Reckoning with the Bluster of Apolitical Jurisprudence

By DONALD E. LIVELY* *and* ELLEN S. PODGOR**

The path of the law, as Justice Holmes observed, is a function of experience.[1] The law develops, more specifically, as an extension of values and priorities that prevail over rival ideals and preferences. Competition to influence legal principles has not always been open or fair. Until the latter part of the nineteenth century, for instance, black persons were denied citizenship and personhood.[2] The path of the Constitution was not a function of their experience for much of the nation's history, even after ratification of the Civil War amendments.[3] Nor was it susceptible to influence by women, who until this century were excluded from the political process.[4]

---

* Professor, College of Law, The University of Toledo. J.D., University of California, Los Angeles; M.S., Northwestern University; A.B., University of California, Berkeley.

** Associate Professor of Law, College of Law, Georgia State University. LL.M., Temple University School of Law, 1989; M.B.A., University of Chicago, 1987; J.D., Indiana University School of Law at Indianapolis, 1976; B.S., Syracuse University, 1973. The authors wish to thank Professor Patrick Wiseman and research assistants Sandra Parker, Edward Pfister, and Susan Rappa.

1. Oliver W. Holmes, Address Before the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457 (1897). While stressing the principles of tradition and history, Holmes does note, "We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present." *Id.* at 474.

2. The Framers accommodated the institution of slavery to effect ratification. *See* WILLIAM W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62 (1977). The original accommodation, by which the federal government would be neutral on slavery and states would determine for themselves whether to allow it, eventually was transformed by the Court into endorsement of slavery. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). In upholding slavery the Court determined that black persons had "no rights which the white man was bound to respect." *Id.* at 407. Slavery was proscribed by the Thirteenth Amendment in 1866. Black personhood and civil rights for constitutional purposes were established by the Fourteenth Amendment in 1868.

3. The Civil War amendments include the Thirteenth Amendment, which prohibits slavery; the Fourteenth Amendment, which guards against state abridgement of privileges and immunities and state denial of due process and equal protection; and the Fifteenth Amendment, which protects the franchise from official discrimination.

4. Women were afforded voting rights by the 1920 passage of the Nineteenth Amendment. U.S. CONST. amend. XIX. They remain, however, an insignificant voice in the political and judicial processes. *See generally* Lynn Hect Schafran, Gender Bias in the Courts: Time Is

The evolution of jurisprudence, like legislative output, is defined in significant part by societal values and allowances. Chief Justice Marshall asserted nearly two centuries ago that it is the "province and duty of the judicial department to say what the law is."[5] Marshall's arrogation of judicial authority on constitutional questions preceded by several decades the Fourteenth Amendment's introduction and its subsequent transformation into a source of exponential jurisprudential growth.[6] In defining "what the law is," the Marshall Court facilitated a nation in the Federalist image.[7] Judicial determination and amplification of overarching law has been a norm of, rather than an exception to, the political process. The exercise has included the Taney Court's identification of slavery as a constitutionally protected concern;[8] the post-Reconstruction Court's cramping of the federal interest in civil rights;[9] the validation of official segregation for half of the Fourteenth Amendment's existence;[10] the *Lochner* Court's diversion of the Fourteenth Amendment from its original concern;[11] the Warren Court's attention to fundamental liberties,[12]

Not the Cure, Address Before Crighton University School of Law (Oct. 20, 1988), *in* 22 CREIGHTON L. REV. 413 (1988-89) (areas of bias in the judicial system). To achieve true equality, it is necessary that there be a diffusion of a "world dominated by the male norm." Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 534 (1990).

5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

6. Toward the end of the nineteenth century, the Court began to infuse the Fourteenth Amendment with substantive meaning. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897). Despite criticism of jurisprudence which has amplified the amendment in substantive terms, most notably renderings on behalf of economic liberty during the first third of this century, it remains a source of judicially discerned fundamental rights. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (sanctity of family); Roe v. Wade, 410 U.S. 113 (1973) (liberty to elect abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy).

7. Marshall's federalist legacy includes opinions that broadly construed the Commerce, Necessary and Proper, and Contracts Clauses. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See also* Burton Caine, *Judicial Review-Democracy Versus Constitutionality*, 56 TEMP. L.Q. 297 (1983) (discussion of theory of judicial review and its effect as espoused by John Marshall in *Marbury v. Madison*).

8. Taney identified slavery as a property right expressly protected by the Constitution. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 426-40 (1857).

9. The Civil Rights Cases, 109 U.S. 3 (1883) (Congress bereft of power under Fourteenth Amendment to reach private discrimination).

10. The Court subscribed to the separate but equal doctrine in Plessy v. Ferguson, 163 U.S. 537 (1896). Official segregation survived, pursuant to deferential standards of review, until invalidated in the area of public education in Brown v. Board of Educ., 347 U.S. 483 (1954).

11. The Court originally had recognized that the central concern of the Fourteenth Amendment was with the civil rights and equality of black persons. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). By the inception of the twentieth century, the amendment had become more significant as a means of accounting for economic liberty. *See, e.g.*,

rights of the accused,[13] and principles of racial equality;[14] and the Rehnquist Court's displacement of race-conscious remedial policies.[15]

Debate over the judiciary's proper function remains animated notwithstanding the well-established nature of an activist judiciary that is capable of displacing the output of the political branches of government. Expressions of concern about the judiciary being anti-democratic continue to draw scholarly and public attention despite their lack of novelty. Robert Bork, for instance, has asserted that activism imperils the "legitimacy of the law itself."[16] Even before *Marbury v. Madison*,[17] however, the role and reach of the judiciary were the subjects of sharp debate within the Court itself.

In *Calder v. Bull*,[18] Justices Iredell and Chase argued respectively for a more and less restrained judicial function. Iredell maintained that reference to natural law held democratic principles captive to subjective ideology and thus undermined the representative process.[19] Chase asserted that jurisprudential accounting for natural or unenumerated rights effectuated rather than impeded popular will.[20] Over the 200 years since Iredell and Chase debated the question, references to natural law, even if not always acknowledged for what they are, have inspired the development of constitutional principles. The legacy includes not only endorsement of slavery and formulation of economic rights but also identification of modern concepts of privacy and personal autonomy as fundamental liberty interests.

Depiction of constitutional law-making as anti-democratic reflects a sense that it generally is wrong for the judiciary to negate the work of a popularly elected legislature. During the middle part of this century,

---

Lochner v. New York, 198 U.S. 45 (1905). Meanwhile, the provision's concern with the status and rights of black persons largely had been discounted by the tolerance of "mere discrimination," The Civil Rights Cases, 109 U.S. at 25, and emergence of the separate but equal doctrine, *Plessy*, 163 U.S. at 550-51.

12. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing right of privacy as emanation of several enumerated guarantees).

13. The Warren Court, for instance, extended the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), and established constitutional standards for custodial interrogation in Miranda v. Arizona, 384 U.S. 436 (1966).

14. The desegregation mandate, premised upon the notion that separate was inherently unequal, was introduced in Brown v. Board of Educ., 347 U.S. 483 (1954).

15. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (race-conscious policies are suspect).

16. ROBERT H. BORK, THE TEMPTING OF AMERICA 349 (1990).

17. 5 U.S. (1 Cranch) 137 (1803).

18. 3 U.S. (3 Dall.) 386 (1798).

19. *Id.* at 398-400.

20. *Id.* at 386-90.

however, some of the Court's most significant jurisprudential contributions responded to the reality that "discrete and insular minorities" systematically had been excluded from, and underrepresented in, the political system.[21] Equal protection theory, premised on process defect, resulted in criteria of "suspect classification" and "rigorous review."[22] "With respect to racial discrimination, judicial review ultimately translated into 'strict in theory,' and fatal in fact."[23] Enhanced attention to gender classifications enabled women to challenge and sometimes defeat assumptions and stereotypes that traditionally had operated against them.[24] Such results may be perceived as anti-democratic to the extent legislative output is superseded. Insofar as the Court has accounted for a dysfunctional representative process and attempted to extrapolate results pursuant to a political model consonant with constitutional aims, its performance might be squared with the consent of all of the governed.

Notwithstanding such interventions, the judiciary cannot be aptly criticized for deviating long or often from popular sentiment or priorities. The Court's derogation of blacks in *Dred Scott v. Sandford*[25] accurately reflected racial attitudes pervading the entire nation.[26] Similarly, the separate but equal doctrine operated for half of the Fourteenth Amendment's existence as a reflection of persistent racial chauvinism.[27] Until relatively recently, deferential review of gender classifications mirrored the paternalistic views of a male-dominated society.[28] Lochnerism denoted prioritization of social Darwinist values at the expense of progres-

21. The methodology of strict scrutiny originated with concern that a historically disadvantaged minority had been excluded from or underrepresented in the legislative process because of prejudice and thus the system was defective. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

22. Korematsu v. United States, 323 U.S. 214 (1944).

23. Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

24. *See* Craig v. Boren, 429 U.S. 190 (1976) (intermediate standard of review used to invalidate state statute that prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18).

25. 60 U.S. (19 How.) 393 (1857).

26. The Court's observation that blacks were categorically inferior and "might justly and lawfully be reduced to slavery," *id.* at 407, was described even at the time as an accurate reflection of dominant attitudes. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE 430 (1978) (quoting Susan B. Anthony).

27. The separate but equal doctrine was subscribed to in Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896), and not repudiated until Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

28. As Justice Brewer stated in Muller v. Oregon, 208 U.S. 412 (1908): "That woman's physical structure and the performance of maternal functions place her at a disadvantage, in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her.... Still again, history discloses the fact that woman has always been dependent upon man." *Id.* at 421.

sive economic regulation.[29] The desegregation mandate reflected eventual understanding that official separation implied racial inferiority and denied equal educational opportunity.[30] It soon was curtailed, however, by principles limiting desegregative duties.[31] A determination that education was not a fundamental right[32] resulted in constitutional law that defeated some education that was separate but equal, but accommodated much more that was separate and unequal. Contemporary equal protection criteria now reserve strict scrutiny for instances in which discriminatory intent is established.[33] Although the Court acknowledges "this nation's sorry history of public and private discrimination,"[34] its standards of review are calibrated to defeat overt remedial preferences but are largely unresponsive to minorities or women victimized by subtle, disguised, or unconscious racism or sexism.[35]

Such performance evinces a well-established record of review that, even if not by conscious design or manipulation, has mostly accounted for the established order and dominant priorities. Whether the Court could have or might still fashion a legacy more responsive to discrimination or disadvantage is a question prompted by recent debate within the Supreme Court itself. Dissenting from the Court's allowance of racial preferences in the federal licensing of broadcasters, Justice Kennedy doubted the Court's capacity to distinguish between invidious and less benign racial classifications.[36] The majority's response was an expression of confidence that it can make such distinctions in a sensitive fashion.[37] Kennedy's query whether the Court is capable of distinguishing official segregation or South African apartheid from remedial preferences[38] may be unsettling. Even more unsettling, however, is a historical record that supports his concerns about the Court's ability to make sensitive equal

29. The Court's identification of economic liberty as a fundamental right immediately was objected to on grounds that it held reform captive to a disputable ideology. Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

30. *See Brown*, 347 U.S. 483, 494-95.

31. *See infra* notes 173-76 and accompanying text.

32. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-37 (1973).

33. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (purpose requirement unsatisfied in death penalty); Washington v. Davis, 426 U.S. 229, 240 (1976) (necessity of a "purposeful" act of discrimination).

34. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

35. Remedial preferences are overt in their favoritism and thus easily discernible by motive standards. Because discrimination against minorities is no longer formal and self-evident, it may escape constitutional detection. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319-27 (1987).

36. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3046 (1990) (Kennedy, J., dissenting).

37. *See id.* at 3008 n.12.

38. *See id.* at 3046 (Kennedy, J., dissenting).

protection judgments.[39]

Although some of the Court's most notable constitutional ignominies have now been discredited,[40] modern jurisprudence continues to elicit misgivings over appraisal skills when discrimination, disadvantage, or diversity is implicated. It may be impossible to measure the impact of institutional diversification upon the law's development, but it is difficult to imagine pluralism not benefiting from such diversification. The Court is not a particularly well-diversified entity, at least with respect to the breadth of its collective experience. As such, the Court has been criticized for an "acute ethnocentric myopia" characterized by its inability to comprehend how language considered indecent in some contexts may be normative in others;[41] its failure to discern how a traffic barrier routing residents of a black neighborhood around a white neighborhood might be racially significant, especially given the community's history of official segregation;[42] and its failure to comprehend that pregnancy is a gender-specific condition.[43]

Justice Kennedy's response to the Court's perceptual deficiencies may be to avoid any appraisal of culturally sensitive issues at all. Abstinence, however, may be functionally akin to a decision that assertively endorses a challenged practice and accordingly diminishes the Constitution's significance. If quality of jurisprudential output is the concern, the problem is reducible essentially to a matter of competence. The better alternative, therefore, may not be disabling the institution but enhancing its capability.

As with any entity, effectuation of institutional goals requires capable personnel. Justice Kennedy's warnings against exercising judgment may reflect instead a need for better judgment. Constitutional law is the function of general charter principles animated by standards of review and doctrine crafted by the judiciary. When formulating the criteria that

39. The majority in responding to Justice Kennedy stated: "We fail to understand how Justice Kennedy can pretend that examples of 'benign' race-conscious measures include South African apartheid, the 'separate-but-equal' law at issue in Plessy v. Ferguson, 163 U.S. 537 (1896), and the internment of American citizens of Japanese ancestry upheld in Korematsu v. United States, 323 U.S. 214 (1944) . . . ." *Id.* at 3008 n.12.

40. Decisions upholding slavery and official segregation, for instance, now are described as "derelicts of constitutional law." Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987) (quoting PHILLIP KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 186 (1970)).

41. *See* FCC v. Pacifica Found., 438 U.S. 726, 776 (1978) (Brennan, J., dissenting).

42. *See* City of Memphis v. Greene, 451 U.S. 100, 147 (1981) ("[r]espondents are being sent a clear, though sophisticated, message that because of their race, they are to stay out of the all-white enclave.")

43. *See* Geduldig v. Aiello, 417 U.S. 484, 501 (1974) (failing to take note of gender-linked nature of pregnancy).

translate constitutional text into governing principle, personal experience and understanding become critical to the law's development. The existence of an institution that was all white until 1968[44] and all male until 1981,[45] suggests that breadth of cultural experience and understanding seldom has been a significant influence on selection of jurists and crafting of the law itself.

Constitutional significance reflects the influence of text, history, standards of review, and personal understanding. Terms may be fixed but indeterminate; history may be immutable but debatable; and standards of review may be subject to development, reevaluation, and redefinition. Individual perceptions of and contributions to those various factors are critical determinations of how the law develops. This Article will (1) identify a historical record of jurisprudence persistently favorable to the established order and dominant priorities; (2) suggest that models of restraint or abstinence are deceiving and inimical to constitutional development; and (3) consider how the political process could facilitate a broadening of jurisprudential vision and enhance accountability to a pluralistic society.

I. Disadvantage and Standards of Forbearance

Disadvantage is a relative phenomenon that is both a consequence of and opportunity for constitutional choice.[46] The framing of the Constitution was an exercise in delineating governmental power, enhancing economic efficiency, and sheltering designated rights and freedoms. Like other decisionmaking processes, the chartering of the republic reflected an ordering of priorities. Defining the civil status of a discrete class of persons was subordinated to the overarching imperatives of forming a union and securing ratification.[47] Accommodation of slavery identified a system that in its creation not only countenanced but negotiated and constitutionalized political and economic disadvantages.

Several decades and a civil war passed before slavery was formally rooted out of the nation's system. The Thirteenth, Fourteenth, and Fif-

44. Thurgood Marshall's appointment to the United States Supreme Court represented the first instance of a black Justice.

45. Sandra Day O'Connor's appointment to the United States Supreme Court represented the first instance of a female Justice.

46. Disadvantage, even if a natural condition of humanity, may be constitutionally compounded by principles and decisions that accommodate or uphold slavery, allow official segregation, stress marketplace freedom, or in various ways qualify equality interests.

47. For a description of the Framers' accommodation of slavery, see FEHRENBACHER, *supra* note 26, at 11-27.

teenth Amendments were calculated, respectively, to prohibit slavery,[48] protect basic rights and liberties from state abridgements,[49] and preclude race-based deprivation of voting rights.[50] Unlike its original incarnation, the nation's charter as revised by the Reconstruction amendments enabled Congress and required the judiciary to account for new federal interests in civil and political freedom and equality.

Discrimination has been an especially profound cause of disadvantage. Although the phenomenon was not an original concern, and its comprehensive eradication may not have been contemplated during the charter's revision, the Fourteenth Amendment at least has afforded a departure point for reckoning with it. For the most part, however, the history of the Fourteenth Amendment has been defined by theories and standards of review that either confound or selectively animate the federal interest.

The Court first reviewed the Fourteenth Amendment in the *Slaughter-House Cases*,[51] in which the Court disregarded recent history and minimized the amendment's redistribution of power from the state to the federal government.[52] Such jurisprudence reflected resistance toward authority that might redefine and broaden constitutional demands of liberty and equality.[53] Although the cases did not concern racial discrimination, the Court noted that the Fourteenth Amendment was primarily concerned with race-disadvantaging state action.[54] Consistent with that sense, the Court soon thereafter rejected arguments that the amendment supported a woman's right to vote.[55] The result was influenced not only by understanding of the provision's history but perceptions that "[t]he paramount destiny and mission of woman [was to] . . . fulfil the noble and benign offices of wife and mother."[56] In the *Civil Rights Cases*[57] a decade later, the Court trimmed Congress' enforcement power under the

48. U.S. CONST. amend. XIII.

49. U.S. CONST. amend. XIV.

50. U.S. CONST. amend. XV.

51. 83 U.S. (16 Wall.) 36 (1873).

52. By determining that the privileges and immunities of national citizenship were not enhanced or expanded by the Fourteenth Amendment, the Court limited the federal interest in providing for civil rights and equality. *See id.* at 74.

53. As subsequent jurisprudence disclosed, refusal to recognize a redistribution of federal and state interest reflected concern with Congress' power "to establish a code of municipal law." The Civil Rights Cases, 109 U.S. 3, 13 (1883).

54. The Court doubted "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." The Slaughter-House Cases, 83 U.S. at 81.

55. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

56. Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

57. 109 U.S. 3 (1883).

Fourteenth Amendment so it could not reach private discrimination. The Court emphasized that racial disadvantage no longer merited special attention.[58] Its analysis prefaced the separate but equal era, which defined racially significant Fourteenth Amendment jurisprudence until the 1950s.[59]

As the nineteenth century drew to a close, the Court transformed the Fourteenth Amendment from a guarantee originally responsive to a historically disadvantaged group to an asset of the privileged. In consecutive terms, the Court endorsed official segregation[60] and introduced the notion of contractual liberty.[61] The separate but equal doctrine deferred to premises, customs and practices that the Court characterized as harmful only if misunderstood by their victims.[62] Jurisprudential disinterest in racial disadvantage contrasted with the Court's animation of the Fourteenth Amendment in ways that cramped state regulatory powers and defeated initiatives aimed at governing employment conditions.[63] Within a few decades of its creation, the amendment had become a constitutional mutant that compounded rather than challenged established advantage. In Justice Harlan's words, pertinent law had become a device for advancing the interests of "a dominant race—a superior class of citizens" while fastening "a badge of servitude" on a traditionally disadvantaged class.[64]

Despite the Fourteenth Amendment's introduction as an agent for leveling basic rights and opportunity, underdeveloped jurisprudence remained a norm through the first half of the twentieth century. In 1903, the Court refused to protect the constitutionally secured right to vote against racially motivated deprivation.[65] As Justice Holmes put it, any relief the Court ordered would be ignored by state and local officials and thus would be pointless.[66] Holmes later upheld a mandatory sterilization scheme for mentally retarded persons on grounds that "[t]hree generations of imbeciles are enough."[67] In so doing, he described the equal protection guarantee as "the usual last resort of constitutional argu-

58. *Id.* at 25.

59. *See supra* note 27.

60. Plessy v. Ferguson, 163 U.S. 537 (1896).

61. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

62. *Plessy*, 163 U.S. at 551.

63. *E.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (invalidating state minimum wage law for women); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating state law against anti-union contracts); Lochner v. New York, 198 U.S. 45 (1905) (invalidating state law regulating bakers' working hours).

64. *Plessy*, 163 U.S. at 560, 562 (Harlan, J., dissenting).

65. *See* Giles v. Harris, 189 U.S. 475, 488 (1903).

66. *Id.*

67. Buck v. Bell, 274 U.S. 200, 207 (1927).

ments."[68] Contemporaneously, the separate but equal doctrine evidenced its procrustean nature and dedicated service to the dominant culture when a student of Chinese descent was required to attend an all-black rather than an all-white school.[69] As the Court noted in *Gong Lum v. Rice*, it could not "think that the question is any different or that any different result can be reached . . . where the issue is as between white pupils and the pupils of the yellow races."[70]

Fourteenth Amendment jurisprudence during the first third of this century actually fortified economic and social advantage instead of accounting for opportunity and equality. Economic liberty was a constitutional priority complemented on rare occasion by empty gestures toward equalization of separate facilities and by deference to stereotypes. Railroads were obligated to provide separate cars for blacks[71] even though few blacks had an opportunity to use them or the consequent standing to complain if they were unavailable. Legislation limiting the working hours of women also was upheld as consistent with perceptions of "a disadvantage in the struggle for subsistence [that] is obvious."[72]

Emphasis on substantive due process and concepts of economic liberty defined constitutional review until the late 1930s.[73] Official segregation persisted for another two decades,[74] when repudiation of the separate but equal doctrine commenced an interval of attention to equal opportunity and cultural realities that implied group inferiority.[75] By the 1970s, equal protection was circumscribed again by jurisprudential demands for proof of discriminatory purpose[76] and by a reluctance to define interests such as public benefits[77] and education[78] as fundamental

68. *Id.* at 208.

69. *See* Gong Lum v. Rice, 275 U.S. 78, 85-87 (1927).

70. *Id.* at 87.

71. McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-62 (1914).

72. *See* Muller v. Oregon, 208 U.S. 412, 421 (1908).

73. The Court eventually determined that substantive due process review was "a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed." West Coast Hotel v. Parrish, 300 U.S. 379, 397 (1937).

74. *See supra* note 27.

75. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (racial segregation of school children "generates a feeling of inferiority . . . in a way unlikely ever to be undone").

76. *See* McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (purpose requirement unsatisfied in death penalty challenge); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (same standard unmet in housing discrimination claim); Washington v. Davis, 426 U.S. 229, 246 (1976) (same standard unmet in public employment discrimination claim).

77. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (welfare not a fundamental right).

78. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-37 (1973) (education not fundamental right).

rights. From a critical perspective, delimitation of the desegregation process reflected a sense that constitutional reckoning with accumulated racial disadvantage "had gone far enough."[79]

Even as the anti-discrimination principle evolved with respect to race after 1954,[80] constitutional analysis of gender classifications remained bound by a sense of the Fourteenth Amendment's historical limits. *Goesaert v. Cleary*, which upheld a state law prohibiting most women from working as bartenders,[81] typified the Court's attention to women under the Fourteenth Amendment through the 1960s.[82] The ruling may have been consistent with seminal equal protection expectations reflecting doubt "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[83] Even if women had "achieved the virtues that men have long claimed as their prerogatives," the Court determined that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards . . . ."[84] The Court's eventual extension of the equal protection guarantee to women, a group beyond the Fourteenth Amendment's original ken,[85] is similar to the Court's expansion of equal protection coverage to racial

79. Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

80. The Court in 1954 struck down official segregation of public schools on grounds that it caused racially stigmatic harm and impaired educational opportunity. Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954). For approximately a decade and one-half after requiring desegregation "with all deliberate speed," Brown v. Board of Educ., 349 U.S. 294, 301 (1955), th Court consistently invalidated desegregation plans as inadequate. *E.g.*, Green v. County Sch. Bd., 391 U.S. 430 (1968) (invalidating freedom of choice plan); Rogers v. Paul, 382 U.S. 198 (1965) (invalidating one grade per year plan); Cooper v. Aaron, 358 U.S. 1 (1958) (refusing request to delay implementation of plan). As the Court assertively developed the desegregation principle in the public school context, it also expanded the concept to defeat segregation and racial classifications in a broad spectrum of consequences. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating anti-miscegenation law); Gayle v. Browder, 352 U.S. 903 (1956) (invalidating segregation of buses). Desegregation and non-discrimination demands, beginning in the 1970s, were qualified by evidentiary requirements necessitating proof of intentional segregation or discrimination. *See supra* note 76, *infra* notes 92, 107-08, 173-76 and accompanying text.

81. 335 U.S. 464, 467 (1948).

82. Prior to that time, gender classifications were subject to deferential standards of review applied to general economic regulation. The Court provided enhanced attention to sex-based classifications beginning in Reed v. Reed, 404 U.S. 71 (1971) (invalidating preference for males as administrators in intestate proceedings).

83. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

84. Goesaert v. Cleary, 335 U.S. at 466.

85. As noted previously, the status of women was not an initial concern of the Fourteenth Amendment. *See supra* notes 51-56 and accompanying text.

circumstances not contemplated by the provision's architects.[86] Unlike the unanimity that characterized the *Brown* decision,[87] enhanced review of gender classifications prompted significant dissent.[88] As a consequence, standards of review for even overt gender discrimination have been more relaxed, and constitutional results have been mixed and unpredictable.[89]

As the Fourteenth Amendment courses through the final decade of the twentieth century, it seems an ever-less-likely departure point for meaningful attention to racial or any other group disadvantage. Standards requiring proof of discriminatory intent as a prerequisite for close review of alleged race[90] or gender[91] discrimination have greatly diminished the prospect of successful equal protection claims, at least to the extent that official preferences are not overt.[92] The Rehnquist Court, in particular, has foreclosed the possibility that policy may account in a generally race-conscious fashion for the nation's heritage of discrimination.[93] Jurisprudence, which a century ago precluded interference with state discrimination[94] despite the Fourteenth Amendment's establishment of a contrary federal interest, now identifies and asserts national policy to defeat state efforts that would reckon with the consequent legacy.[95] It also has reiterated that desegregation duties are terminal rather

86. The desegregation of public schools was ordered despite a historical record indicating that the Framers did not contemplate such racial mixing and simultaneously had segregated public schools in the District of Columbia.

87. Brown v. Board of Educ., 347 U.S. 483 (1954).

88. Justice Powell, for example, maintained that gender classifications were not a Fourteenth Amendment concern and thus should not be closely reviewed. *See* Frontiero v. Richardson, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring).

89. The Court thus has invalidated a gender-based admissions policy at a nursing school over dissents that the standards were justified. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 736-38 (1982) (Powell, J., dissenting). The holding insisted on "needless conformity," *id.* at 735 (Blackmun, J., dissenting), and the issue itself did not present "a sex discrimination case," *id.* at 745 (Powell & Rehnquist, JJ., dissenting). The Court upheld a statutory rape law that punishes only males who engage in prohibited acts with underage females, Michael M. v. Superior Court, 450 U.S. 464, 476 (1981), despite objections that it was grounded in "sexual stereotypes," *id.* at 496.

90. *See supra* note 76 and accompanying text.

91. *See* Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979) (denying challenge to veterans preference scheme on grounds purpose to discriminate against women not established).

92. Illegal intent is easily hidden, and a collective motive may be nonexistent. As a result, motive-based inquiry is an impediment to constitutionally demanded change. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1112-13 (1989).

93. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-95 (1989) (remedial classifications responding to societal discrimination are suspect).

94. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (deferring to reasonableness of state police power attending to established custom).

95. *See Croson*, 488 U.S. at 493-95.

than permanent, notwithstanding reversion to functional if not formal segregation.[96] Such results may deviate from the immediate post-*Brown* era, but they appear consistent with historical norms characterized by reticence or resistance toward a meaningful constitutional accounting for civil disadvantage.

II. The Illusions and Delusions of Restraint

Limiting the reach of the Fourteenth Amendment so it does not displace democratic output at least facially may seem consistent with imperatives of judicial restraint. Despite increased influence by personnel who publicly expound the virtues of restraint, the modern Court has proved itself as selective in its deference to the political process as its predecessor was a century ago. Whereas the Court in *Plessy v. Ferguson* repudiated the notion of a color-blind Constitution when official segregation was challenged,[97] the Rehnquist Court has invested in racial neutrality as a standard that confounds reckoning with the legacy of race-dependent disadvantage.[98] Modern analysis thus varies from its antecedent, sometimes depicted as a "derelict[] of constitutional law,"[99] insofar as it not merely accommodates accumulated disadvantage but impedes correctional or compensatory initiatives.

As evidenced by diverging opinions even within the modern Court with respect to what equal protection allows and prohibits,[100] the practical meaning of the Fourteenth Amendment is a function not of textual ordination but of competing understanding and ideology. Because experience itself is subject to diverse perceptions and understandings, life exposure and values are crucial factors in the animation of principles housed in the Fourteenth Amendment. That reality is conditioned by the notion that courts should exercise restraint in expounding the Constitution. While concepts of judicial restraint are not reducible to a single theory of review, they have in common the stated goal of limiting the Court's political impact. Such principles are generally styled as analytical methodology that preserves the consent of the governed. Yet they may foreclose an established source of input into the democratic process especially to the extent they are unbending and dogmatic. As the post-

96. *See* Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).

97. *Plessy*, 163 U.S. at 550-51.

98. *See Croson*, 488 U.S. at 493-95.

99. Meese, *supra* note 40, at 989.

100. *See Croson*, 488 U.S. at 493-95 (plurality opinion) (equal protection forbids remediation of societal discrimination); *id.* at 524 (Scalia, J., concurring) (equal protection prohibits all racial classifications); *id.* at 752 (Marshall, J., dissenting) (remediation of societal discrimination consistent with Fourteenth Amendment).

Brown experience demonstrates, practical effectuation of desegregation and anti-discrimination principles was attributable to Congress' eventual determination to secure basic civil and political rights.[101] Although the *Brown* decision itself continues to be second-guessed and rationalized by champions of restraint,[102] it was essentially a morally driven decision that effectively catalyzed a previously unresponsive legislative process.

Foundation principles of restraint include literalism, originalism, and neutrality.[103] The essence of literalism consists of "lay[ing] the article of the Constitution which is invoked beside the statute which is challenged and . . . decid[ing] whether the latter squares with the former."[104] Literalism is notable for its general disutility as an interpretive methodology. For a constitutional case or controversy to arise, it is almost inevitable that pertinent terms are disputable rather than self-defining.[105] Given its patent inadequacy for vitalizing critical constitutional text, it is not surprising that strict constructionists constitute a "highly underpopulated subgroup."[106]

The Constitution seldom speaks for itself when its meaning is controverted, so the imperatives of restraint require an alternative interpretive guide. Originalism is such a reference point. Unlike literalism, identification of original intent requires probing beyond the four corners of the Constitution itself. Like strict constructionism, however, originalism has major inadequacies. Motive-based inquiry is notorious for its

101. Congress authorized the Justice Department to bring desegregation actions and conditioned federal school funding on compliance with the desegregation mandate. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a-d (1988).

102. Robert Bork, for instance, suggests that the *Brown* decision is justifiable only because the Court only had options that themselves were at odds with the Framers' original understanding. He maintains that the Court had to decide between a methodology disfavored by the Framers or devitalization of equal protection altogether. *See* BORK, *supra* note 16, at 82-83. The presentation of an either or choice misses the existence of other alternatives including insistence on maximum equalization as a means of animating the Fourteenth Amendment and remaining faithful to original design or leaving the implementation of desegregation entirely to the political process.

103. The concepts are the subject of comprehensive attention in Mark V. Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781 (1983); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

104. United States v. Butler, 297 U.S. 1, 62 (1936).

105. Typifying the problem is the Constitution's assignment to Congress of power to regulate commerce between the states without defining interstate commerce. *See* U.S. CONST. art. I, § 8, cl. 3. Similar difficulties exist with respect to what constitutes "unreasonable searches," "speedy trial," "impartial jury," "assistance of counsel," "excessive bail," "cruel and unusual punishment," "privileges and immunities," "due process," and "equal protection."

106. GERALD GUNTHER, CONSTITUTIONAL LAW 545 (11th ed. 1985).

lack of productivity.[107] Further, it is susceptible to ideological self-service because collective intent may be the result of merged competing or uncertain purposes.[108]

Neutrality is presented as an interpretive methodology that ensures apoliticism even when text and history are uncertain. Neutrality demands that principle, gleaned from text or original understanding, must be applied consistently to all like problems.[109] Because a principle seldom applies to precisely the same circumstance that begot it,[110] the judiciary must consider levels of generality and degree and must exercise judgment with respect to analogy and fitness. Demand for consistency thus disregards or underestimates invariable debate over what contexts and concerns are truly similar and the multiplicity and relativity of factors that may contribute to a single holding. Determination that official segregation was unconstitutional, for instance, reflected the sense that prescriptive separation implied inferiority and also impaired life opportunity. Consideration of racial classifications establishing preferences for remedial purposes has been inspired not by any singular or fixed premise set by precedent. Consequently, questions about whether affirmative action causes harmful stigma, causes unacceptable harm to individuals, or should be accepted because it has a different purpose, invited debate rather than consensual resolution.

At best, principles of restraint are elusive and impractical. At worst, they may hide subjective inclinations. Critics have noted that "these judicial professions of automatism are most insistent when it is most obvious that they are being honored in the breach rather than in the observance [and that] . . . [t]hey seem to appear less often when statutes are sustained than when they are condemned . . . ."[111] History suggests that demands for apoliticism and consequent methodologies of restraint may be politically inspired. Richard Nixon's 1968 presidential campaign, for instance, was grounded in part on a promise to appoint strict constructionists to the Court.[112] The pledge was less a function of constitutional theory than a calculated assessment of the political landscape.

107. For a detailed exposition of the futility of such review, see Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting).

108. *See id.*

109. *See* BORK, *supra* note 16, at 143-44.

110. The notion that racial classifications are suspect, for instance, emerged in the context of discrimination against minorities but had to be reassessed in determining whether it should govern remedial racial preferences.

111. THOMAS R. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 43 (1956).

112. *See* BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986).

Public sentiment at the time reflected significant anxiety over crime and expanding desegregation remedies. Nixon promised Justices who would support law and order and curb the equal protection guarantee's reach.[113] The subsequent narrowing of *Miranda*[114] and exclusionary[115] rules, endorsement of capital punishment despite gross racial disparities in its operation,[116] and evisceration of the desegregation mandate[117] are legacies of the Nixon presidency. More specifically and pertinently, they are the results of a political agenda rather than some independently grand theory of restraint.

Although ideology, perception, and experience may be critical influences on the law's development, personal conviction does not always or necessarily translate into constitutional result. Despite his profound moral objection to slavery, for instance, Justice Story upheld fugitive slave legislation that accommodated the South and deepened the entire nation's implicit endorsement of the institution.[118] The possibility that specific understanding, values, or priorities may shape the Constitution's meaning is enhanced, however, when they drive the judicial nomination or confirmation process. The considerations influencing judicial appointments over the past decade belie the notion that the Court presently is motivated by a sense of restraint and deference toward representative processes. The Reagan Administration, which along with the Bush Administration, is responsible for approximately two-thirds of the federal judges now sitting,[119] screened prospective nominees not according to whether they subscribed to general principles of restraint but whether they were ideologically fit and dependable.[120] President Bush's selection criteria for the most part mirrors the methodology employed during the Reagan years.[121] Given such a focus, it is not surprising that the Rehn-

113. *See id.* at 24. *See also* BOB WOODWARD & SCOTT WOODWARD, THE BRETHREN 159-61 (1979).

114. *E.g.*, New York v. Quarles, 467 U.S. 649 (1984); Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

115. *See* United States v. Leon, 468 U.S. 897 (1984). *See also* Alfredo Garcia, *The Scope of Police Immunity From Civil Suit Under Title 42 Section 1983 and* Bivens*: A Realistic Appraisal*, 11 WHITTIER L. REV. 511 (1989).

116. McCleskey v. Kemp, 478 U.S. 191 (1987).

117. *See infra* notes 171-80 and accompanying text.

118. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842).

119. Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294 (1991).

120. *See* Ronald Brownstein, *With or Without Supreme Court Changes, Reagan Will Reshape the Federal Bench*, 16 NAT'L J. 2338, 2340 (1984); *see also* Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335 (1983).

121. *See* Goldman, *supra* note 119, at 294-306.

quist Court's sense of restraint has vanished when affirmative action programs,[122] liberty to elect an abortion,[123] or associated considerations[124] have been the object of review.

Such results suggest that jurisprudence is not steered by the political disinterest anticipated by academic visions of restraint. From Chief Justice Marshall's pursuit of the Federalist agenda to Chief Justice Rehnquist's facilitation of contemporary Republican aims, apolitical jurisprudence has established itself as a selectively implemented concept.

The manipulability of interpretive methodologies is well-evidenced by modern establishment clause review. The historical record discloses at least three divergent intents that prompted the Establishment Clause. The guarantee was supported by framers and ratifiers who respectively sought a wall between church and state,[125] wanted to protect state-sanctioned religion from federal interference,[126] and envisioned it as a means of ensuring religious tolerance.[127] Chief Justice Rehnquist has identified the Establishment Clause as a guarantee against an official religion or favoritism for a particular sect.[128] Although consistent with *an* original intent, his discernment does not reflect *the* original intent. Rehnquist has advanced a model of review, however, that invites a heightened religious presence and influence in political and public contexts. Among other things, the Rehnquist formula would allow prayer and Bible readings in school, public funding of parochial education, and any official participation with religion that did not favor or burden a particular sect.

> Equally significant for judicial recruitment was George Bush's decisions to continue the Reagan-initiated President's Committee on Federal Judicial Selections and to entrust its chairmanship to his close friend, White House Counsel C. Boyden Gray. Bush's insistence on naming those who shared a conservative judicial philosophy assures not only a continuation of the Reagan-initiated screening process, including extensive interviewing, but placed a parallel screening process (without the personal interviewing) at the White House level.

Id. at 306.

122. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating preferential contracting program adopted by city council); Wygant v. Board of Educ., 476 U.S. 267 (1986) (invalidating preferential layoff plan overwhelmingly approved by union).

123. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

124. The Court, for instance, has allowed disgruntled employees who were not parties to an earlier litigation to challenge consent decrees imposing racially remedial policies. Martin v. Wilks, 490 U.S. 755, 758-59 (1989). It also has rejected a First Amendment challenge to federal law prohibiting dissemination of abortion information at clinics receiving federal money. Rust v. Sullivan, 111 S. Ct. 1759, 1771-76 (1991).

125. *See* Donald E. Lively, *The Establishment Clause: Lost Soul of the First Amendment*, 50 OHIO ST. L.J. 681, 692-93 (1989).

126. *Id.*

127. *Id.*

128. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

Regardless of motivation, management of the historical record suggests that restraint may be valued not for its apolitical but its political utility. Advocacy of restraint generally accompanies criticism of activism as an unprincipled and anti-democratic function. But circumstances and deference to the political branches are selective rather than consistent, so restraint in practice may translate into activism with a hidden agenda. Lack of candor, especially when compounded by ideologically inspired disrespect for competing values and interests, represents a methodology of review that is especially insidious and unprincipled.

The modern Court discloses an investment in judicial restraint that seems not only selective but a foil for insensitivity that at times verges on meanness. A glimpse of such an institutional spirit was manifested by Justice Scalia's ill-tempered denunciation of a pro-affirmative action decision as "this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."[129] Such rhetoric cut through the usual bromides that at least acknowledge the sad reality of past discrimination[130] and revealed ill-temper and antagonism toward policies seeking to repair accumulated disadvantage.

In re Demos[131] even more strikingly reveals a class-oriented, uncharitable spirit. In *Demos*, the Court foreclosed the filing of "frivolous" pleadings by indigent applicants.[132] Chief Justice Rehnquist, who authored the majority opinion, maintained that such filings waste judicial resources and impede the Court's efficiency.[133] Like any other decision, *Demos* reveals priorities and values. From the dissent's perspective, the majority allowed efficiency to outweigh even the appearance of a Court open to all.[134] The balancing of interests discounted the reality that many pleadings are so obviously deficient that they can be rejected by simple form notices.[135] Because wealthy persons also file frivolous pleadings,[136] the net consequence is that poor applicants have been uniquely excluded from the judicial process. As Justice Marshall noted, the Court by

> closing its doors today to another indigent litigant . . . moves ever closer to the day when it leaves an indigent litigant with a meritorious claim out in the cold. And with each barrier that it places in

129. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

130. *See* City of Richmond v. J.A. Croson Co., 488 U.S. at 498-500.

131. 111 S. Ct. 1569 (1991).

132. *Id.* at 1570.

133. *Id.*

134. *Id.* at 1571 (Marshall, J., dissenting).

135. *See id.*

136. *See id.*

> the way of indigent litigants, and with each instance in which it castigates such litigants for having "abused the system," the Court can only reinforce in the hearts and minds of society's less fortunate members the unsettling message that their pleas are not welcome here.[137]

Modern constitutional jurisprudence, like its antecedents, reflects not a simple philosophy of restraint but the function of priorities, understanding, and ideology. Reminiscent of the *Lochner* Court's performance,[138] contemporary constitutional renderings are hypocritical rather than candid about their activist roots. The results, especially when discrimination or its remediation are at issue, betray not only the norms of restraint but also the premise that "[t]here is no caste here."[139]

Methodologies premised on judicial restraint present significant risks to democratic dynamics and potential. Such methodologies may foster, for instance, a stagnant complacency about the law. Progressive propositions may be dismissed as impermissible, as in *Lochner* itself, when in fact the restraint itself establishes a policy at odds with an honest value structure. Theories of restraint also may deny or cramp the space available for cultural growth and correction of past misconceptions or ameliorating political perils to a society that is democratic in form.[140]

Society's ability to develop and actualize its ideals is imperiled by constitutional review that compounds a legacy of past discrimination, whether by endorsement or by standards that make exposure and ratification of the reality next to impossible. Despite statutory prohibition of race and gender discrimination, and attendant constitutional attention in varying degrees, studies show that bias remains prevalent in areas especially critical to equal protection's core meaning. Inequities define enforcement of the law,[141] the courtroom environment,[142] the legal

137. *Id.* at 1571-72.

138. While invalidating a state law regulating hours of employment, the *Lochner* Court observed that it would be inappropriate to "substitut[e] the judgment of the Court for that of the legislature." Lochner v. New York, 198 U.S. 45, 56-57 (1905). The transparency of the premise was revealed, however, by the Court's announcement that "[w]e do not believe in the soundness of the views which uphold this law." *Id.* at 61. Justice Holmes characterized the decision as an extension of "Mr. Herbert Spencer's Social Statics." *Id.* at 75 (Holmes, J., dissenting).

139. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

140. The *Brown* decision is an especially prominent example of constitutional law evolving contrary to original assumptions but nonetheless reflecting the development of moral understanding.

141. *See, e.g.*, FINAL REPORT OF THE RHODE ISLAND COMMISSION ON WOMEN AND THE COURTS 31-35 (1987) (prevalence of gender bias in court decisions, *i.e.*, sentencing, damage awards); GENDER AND JUSTICE IN THE COLORADO COURTS 13-72 (1990) (including discussion of advantages provided as a result of gender in areas of divorce, custody and visitation).

education process,[143] and the law itself.[144] Such disparities nonetheless remain constitutionally insignificant insofar as the Court adheres to criteria that impose the confounding task of reading minds rather than encourage reasonable inferences from circumstances.[145] Even though a recent execution represented the first instance in nearly half a century that a white defendant was put to death for a crime against a black person,[146] analysis profoundly reducing any Fourteenth Amendment interest in capital punishment created legal reality dissociated from reality itself. Contrary to imagery of restraint, such review defines the law pursuant to a disputable vision.

Institutional misgivings about the Court's ability to review culturally sensitive claims, when viewed in the context of politically activist results clothed in the rhetoric of restraint, merit suspicion. Self-declared reservations and suggestions of analytical restraint deviate from functional norms that obligate the Court to draw difficult constitutional lines.[147] Some critics of the Court's performance argue for a legislative branch as the exclusive policy source and for a consequently diminished

142. *See, e.g.*, UTAH TASK FORCE ON GENDER AND JUSTICE 93-107 (1990) (noting distinctions in perceptions within the courtroom as well as lack of acceptance and credibility offered to women); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, *reprinted in* 15 WM. MITCHELL L. REV. 825, 923-46 (1989) (noting courtroom environment for female litigants, witnesses, and attorneys as well as existence of sexual harassment in the judicial system). The recent revisions to the ABA Code of Judicial Conduct provide redress when there is sexual harassment by a judge. *See generally* Marina Angel, *Sexual Harassment by Judges*, 45 MIAMI L. REV. 817 (1991) (how new ABA prohibitions will prevent solicitation of sexual favors by members of the judiciary).

143. *See, e.g.*, REPORT OF THE FLORIDA SUPREME COURT—GENDER BIAS STUDY COMMISSION (1990) (discussion of bias in law schools); *see also* Marina Angel, *Women In Legal Education: What It's Like to be Part of a Perpetual First Wave, or the Case of the Disappearing Women*, 61 TEMP. L.Q. 799 (1988) (study of women in legal education).

144. *See, e.g.*, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, *reprinted in* 15 FORDHAM URB. L.J. 11, 28-64 (1986-87).

145. *See supra* notes 76, 107-08 and accompanying text.

146. David Margolick, *Rarity for U.S. Executions: White Dies for Killing Black*, N.Y. TIMES, Sept. 7, 1991, at A1.

147. In the First Amendment area, for instance, the Court routinely classifies speech despite acknowledging that the lines are not "easy to draw." *In re* Primus, 436 U.S. 412, 438 n.32 (1978). Even exponents of judicial restraint are ardent line-drawers in outcome-determinative ways. Justice Scalia, in determining what is rooted in the nation's traditions for purposes of fundamental rights analysis urges a definition of the interest at its "most specific level." Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989). The demand alters questions of privacy rights to whether a fundamental right to engage in homosexual sodomy exists and to whether the father of a child born of an adulterous affair has parental rights traditionally respected by society. *See id.*

and apolitical role for the Court.[148] These critics underestimate how abstinence from the process of differentiation and distinction diminishes the possibility of judicial or legislative reckoning with Fourteenth Amendment interests. Despite the present Court's hypocrisies and record of defeating democratic output and reforms at the beginning and end of this century, maintenance of an interventionist model is essential to the interests of constitutional self-government and societal development. Compared to a more active legislature, an interventionist Court can provide protection to minority interests against the tyranny of the majority. A judicial function capable of animating the nation's highest law enhances the quality of attention to society's development. Such a process risks regression, as a history that includes endorsement of slavery and segregation demonstrates. Instead of a judicial function premised on an easily subverted ideal, processes of governance and interests in societal development may be facilitated better by attention to the values, priorities, and sensitivities of those who might exercise judicial responsibilities.

III. Sharpening Jurisprudential Vision

Jurisprudential quality in significant part is a reflection of the caliber of judicial personnel. In the federal system, responsibility for judicial appointments and at least indirectly, the quality of their output, is a function of the executive and legislative branches. The President has the constitutionally assigned duty of nominating "Judges of the Supreme Court."[149] Confirmation, however, is subject to the "Advice and Consent of the Senate."[150] Over the course of history, considerations influencing nominations have varied. Senate input, moreover, has ranged from deferential to rigorous examination of nominees. Notwithstanding the variances, judicial performance in large part has been an extension of the values that influenced appointment.

The Marshall Court, for instance, reflected the priorities of early Federalist administrations. Presidents Washington and Adams packed the Court with exponents of a nationalist ideology.[151] Consistent with their expectations, the Marshall Court defined federal powers broadly and assertively. Expansive definitions of the Contracts Clause,[152] the

148. *See* Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (maintaining that attention should be directed toward creating a progressive Congress and citizenry).

149. U.S. CONST. art. II, § 2, cl. 2.

150. *Id.*

151. *See* HENRY ABRAHAM, JUSTICES AND PRESIDENTS 69-76 (1974).

152. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (state may not modify corporate charter without abridging Contracts Clause).

Commerce Clause,[153] and the Necessary and Proper Clause[154] pitched constitutional law toward the imperatives of national economic development and strong central governance.

Commitment to a broad definition of federal powers was so profound that half a century elapsed after *Marbury v. Madison*[155] before the Court invalidated another act of Congress. In *Dred Scott v. Sandford*,[156] identification of a constitutional right in slavery reflected an investment in ideology that superseded a national policy designed to accommodate but not affirmatively support slavery.[157] The decision incited outrage and resistance in the North, primarily due to the extent it denied Congress power to determine the governance of territories and conditions for admission as states.[158] Insofar as it denied citizenship not just to slaves but to all black persons, however, the ruling was a fair reflection of a society that denied basic rights and equality in a race-dependent fashion without regional qualification.[159] It was Chief Justice Taney who observed that blacks

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit.[160]

Just as Marshall had spoken for Presidents Washington and Adams, Taney's observations fairly reflected the cultural attitudes of Jacksonian Democrats and of an antebellum society that invested heavily in racist ideology.[161]

The *Dred Scott* decision was not unique in its insensitivity to racial oppression or disadvantage, although retrospectively characterized as a constitutional "derelict[]."[162] In striking down the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations, the Court precluded Congress from regulating rigidly defined private ac-

153. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (congressional power over commerce extends to wherever commerce is).

154. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Necessary and Proper Clause vests Congress with broad authority to effectuate its enumerated powers).

155. 5 U.S. (2 Cranch) 137 (1803).

156. 60 U.S. (19 How.) 393, 452 (1857).

157. *See* FEHRENBACHER, *supra* note 26, at 380-84.

158. *See id.* at 428-48.

159. *See id.* at 428-31.

160. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409 (1857).

161. *See* FEHRENBACHER, *supra* note 26, at 226-28.

162. Meese, *supra* note 40, at 989.

tion pursuant to the Fourteenth Amendment.[163] In so doing, it characterized racially based exclusions from public venues as "[m]ere discriminations" and thus constitutionally insignificant.[164] Two decades later, in *Plessy v. Ferguson*,[165] the Court upheld official segregation. In subscribing to the separate but equal doctrine, it emphasized that any sense of the law as stigmatizing or otherwise harmful was a function not of government action but of the victim's misperception.[166]

The *Plessy* ruling, which Justice Harlan found as "pernicious" as *Dred Scott*,[167] is understandable too as the reflection not only of specific decisions and attitudes defining specific decisions but of the judicial appointment process. During the latter decades of the nineteenth century and early part of the twentieth century, justices were selected for their commitment to principles of economic freedom. Presidents Harrison, Cleveland, and Taft in particular were scrupulous in nominating persons who shared their commitment to unqualified marketplace liberty.[168] Not surprisingly, as the country became fatigued with the problems of reconstruction and focused on economic development, jurisprudence reflected those values and priorities. One year after *Plessy*, the Court announced that the Fourteenth Amendment guaranteed a person's freedom to use "all his faculties; to be free to use them in all lawful ways."[169] The Court thus effected the amendment's transformation from original concern with civil rights and equality of the nation's new citizens[170] to a predicate for general economic liberty.

Brown v. Board of Education[171] evidenced a departure from the norms of inattention and unresponsiveness to discrimination and disadvantage. The *Brown* Court abandoned the *Plessy* premise that segregation was misunderstood by its victims, and determined that the law itself

163. The Civil Rights Cases, 109 U.S. 325 (1883).

164. *Id.*

165. 163 U.S. 537 (1896).

166. *Id.* at 551 (perception that segregation imposed stamp of inferiority was "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

167. *Id.* at 559 (Harlan, J., dissenting).

168. *See* ABRAHAM, *supra* note 151, at 131-37.

169. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (Fourteenth Amendment guarantees freedom to contract "which the state legislature had no right to prevent." *Id.* at 591).

170. "[T]he one pervading purpose" of the Fourteenth Amendment was to effect "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

171. 347 U.S. 483 (1954).

connoted racial inferiority.[172] The ultimate devolution of the desegregation mandate suggests that *Brown*, rather than *Dred Scott*, is the real constitutional "derelict." During the 1970s, the *Brown* principle was qualified by the concept of de facto segregation,[173] curtailment of interdistrict remedies,[174] and a determination that constitutional duties were terminal.[175] Such doctrinal conditioning countenanced education, especially in major urban areas, that was neither racially mixed nor equal.[176]

The demise of the desegregation mandate is especially instructive with respect to how jurisprudence may be politically ordained. As noted previously,[177] President Nixon promised to reshape the Court and the direction of constitutional law. His appointments included Chief Justice Burger and Justice Blackmun, who joined a majority decision in *Keyes v. School District No. 1*,[178] formulating the de facto concept.[179] Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist—all Nixon appointees—introduced the limitation on interdistrict remedies in *Milliken v. Bradley*, which like *Keyes* was a five-to-four decision.[180] Personnel decisions, especially nominating influences, thus were critical to the Fourteenth Amendment's redefinition.

President Reagan established the most comprehensive judicial screening process in the republic's history and committed his administration to restoring philosophic balance to the Court.[181] Such balance consisted, however, of appointees who almost invariably were white, male, wealthy, and/or ideologically supportive of the Reagan agenda.[182] Justices Scalia, O'Connor, and Kennedy ascended from the process, which

172. *Id.* at 494-95.

173. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (conditioning duty to desegregate on proof of segregative intent).

174. *See* Milliken v. Bradley, 418 U.S. 717 (1974) (invalidating metropolitan desegregation plan on grounds of no proof of segregative intent by suburban school districts).

175. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (no constitutional duty to desegregate, absent showing of official discriminatory intent, if community resegregates).

176. *See* Milliken v. Bradley, 418 U.S. at 782 (Marshall, J., dissenting) (curbing of desegregation principles ensures urban children "will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.")

177. *See supra* notes 112-17 and accompanying text.

178. 413 U.S. 189 (1973).

179. *Id.* at 208.

180. 418 U.S. at 737-52.

181. Sheldon Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 315 (1985).

182. Goldman, *supra* note 120, at 338.

also elevated Justice Rehnquist to Chief Justice,[183] and their influence largely has consolidated and broadened the original Nixon agenda. President Bush has mostly continued the Reagan policy.[184] Given the ideological screening responsible for the selection of a majority of the present Court, it is not surprising that constitutional jurisprudence reflects hostility toward the rights of the accused[185] and race-conscious remediation.[186] The *Brown* principle has been eroded further insofar as the Court has found no constitutional interest in maintenance of its achievements.[187]

What two centuries of judicial appointments disclose is that ideologically inspired appointments are normative rather than exceptional, lip-service to restraint notwithstanding.[188] The process suggests that if attitude is relevant with respect to slavery, discrimination, and its remedies, or to economic liberty, it is appropriate also to take into account understanding of competing cultural interests. Over the course of the nation's history, only one presidential administration has evidenced a commitment to diversify the judiciary with respect to the race, ethnicity, and gender of its personnel. President Carter's goal of appointing more minorities and women to the bench was compromised,[189] however, to the extent that no vacancies existed on the Supreme Court during his term in office.[190] The Court that President Reagan sought to balance was an institution already incapable of apprehending the racial significance of a traffic barrier diverting black traffic around a white neighborhood[191] or

183. Justice Kennedy was appointed to the Court in 1988. Chief Justice Rehnquist was elevated to his present post in 1986, the same year Justice Scalia was appointed to the Court. Justice O'Connor was appointed to the Court in 1981.

184. *See generally* Goldman, *supra* note 121.

185. Decisions in the past decade have eviscerated or narrowed the exclusionary rule, *Miranda* warnings, and the right to counsel. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (exclusionary rule subject to good faith exception); New York v. Quarles, 467 U.S. 649 (1984) (*Miranda* warnings unnecessary under exigent circumstances, which are liberally considered); Strickland v. Washington, 466 U.S. 668 (1984) (adopting strict standards for determining if criminal defendant effectively represented by counsel).

186. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494-95 (1989) (racial classification, even if remedial, subject to strict scrutiny).

187. *See* Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).

188. *See infra* notes 151-87 and accompanying text.

189. President Carter's goal to increase pluralism on the Court was effectuated in his appointment of judges. In a period of four years, he appointed forty women and fifty-five blacks to federal judgeships. Studies of male and female judges support a finding that women have "different experiences, attitudes and perspectives than men. Such differences can affect decisional, courtroom, and administrative behavior." *See* Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204 (1990); *see also* Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 177-78 (1990).

190. *See* Brownstein, *supra* note 120, at 2340.

191. *See* Memphis v. Greene, 451 U.S. 100, 112-16 (1981) (barrier dividing black and white community in historically segregated city depicted as racially neutral safety device).

of understanding the varying usage of language among the nation's subcultures.[192]

Although common to the nomination process,[193] ideological considerations are less frequently an acknowledged factor in confirmation decisions. The Senate's function often has been cramped by deference pursuant to a sense that it should consider only a nominee's "training, experience, and judicial temperament."[194] Such a standard has proven manipulable enough to obscure ideological opposition to liberals like Justice Marshall[195] and conservatives like Judge Bork.[196] Because the Senate reflects a more representative cross-section of the electorate, real deference enables the Chief Executive to dominate the appointment process, at the expense of broad spectrum input and influence that might enhance responsiveness to cultural diversity.

The case for an assertive Senate role that enhances the judiciary's sensitivity to pluralism is fortified by the occasional instance when the Senate has closely examined a nominee's range of social vision. In 1930, the nomination of Judge John J. Parker was rejected in part due to perceptions that he was unsympathetic to the interests of blacks and labor. With respect to concerns that Parker's racial attitudes were a function of prejudice, critics adverted to his race-baiting campaign tactics as a candidate for governor of North Carolina.[197] Parker had described "[t]he participation of the Negro in politics [a]s a source of evil and danger to both races [that] is not desired by the wise men in either race or by the Republican Party of North Carolina."[198] Although the statement was rationalized during hearings as a necessary concession to southern political reality, reservations proved well-placed a few decades later when Parker attempted to preclude and then roll back the process of desegregation.[199]

192. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding regulation of indecent broadcasting).

193. Although the American Bar Association policy on screening candidates states that "[t]he committee does not consider a prospective nominee's philosophy or idealogy." Stephen Wermiel, *Controversy Brews Behind High Marks Given to Bush Nominees for Judgeships*, WALL ST. J., May 13, 1991, at A9.

194. Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 559.

195. *See* Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986).

196. *See* BORK, *supra* note 16, at 268-349.

197. *See* Rona Hirsch Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 HOW. L.J. 105, 122 (1968).

198. *Id.* at 122.

199. As the swing vote in Briggs v. Elliott, Parker diverted the test of segregation's constitutionality to whether schools were or would be equally funded. *See* Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951), *rev'd sub nom.* Brown v. Board of Educ., 347 U.S. 483 (1954).

The Senate inquiry into the Parker nomination is a seldom-used but effective model for investigating the breadth and depth of a nominee's cultural awareness. The failed nomination of Judge Bork, selected for the Supreme Court by President Reagan, reflected in significant part concern with the nominee's social values and sensitivities.[200]

In 1991, the Senate Judiciary Committee rejected the nomination of Judge Ryskamp to the Eleventh Circuit and did not even report it to the floor for a full vote.[201] Critical to the committee's action was the perception of racial and ethnic insensitivities.[202] Presiding over a civil rights action by four black plaintiffs who had been mauled by police dogs, and even though two of the parties had never been charged with a crime, Ryskamp observed that "it might not be inappropriate to carry around a few scars to remind you of your wrongdoing."[203] The nominee also had maintained his membership in a country club with a reputation for excluding blacks and Jews[204] and had reportedly complained about the consequences of cultural change and diversity in the community where he resides.[205]

The repudiation of Ryskamp's nomination reveals both the weakness and potential vitality of the confirmation process. As generally exercised, the Senate function is calibrated to discern only the most egregious insensitivity to pluralistic imperatives. The Judiciary Committee's chair himself noted that Ryskamp's candidacy failed because of his "dumbfounding remarks" to "softball questioning."[206] Even unexacting inquiry may trip up extremely and obviously narrow-minded or inexperienced candidates, but it allows well-coached and rehearsed nominees with similar deficiencies to pass. Senate inquiry, for instance, did not discern Justice Kennedy's lack of exposure to religious pluralism[207] or Justice Scalia's sense that it is clamoring majorities rather than disadvantaged

---

Upon remand, however, Parker worked to blunt the desegregation mandate's operation. Maintaining that the Constitution "forbids discrimination" but "does not require integration," Parker enunciated a principle that defined southern resistance to *Brown*. Briggs v. Elliott, 132 F.Supp. 776, 777 (E.D.S.C. 1955). A decade later, an appeals court observed that it was "not surprising that school officials—the *Briggs* dictum dinned into their ears for a decade—have not faced up to faculty integration." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966).

200. *See* Meg Greenfield, *Privacy and the Undressed*, NEWSWEEK, Oct. 19, 1987, at 100.

201. *See There Goes the Judge*, NEWSWEEK, Apr. 22, 1991, at 31.

202. *Id.*

203. *Id.*

204. *Id.*

205. *See id.*

206. *Id.*

207. In considering a religious display on public property, Justice Kennedy related that "[b]efore studying this case, I had not known the full history of the menorah, and I suspect the

minorities who deserve close attention pursuant to the equal protection guarantee.[208]

Although not eliciting information predictive of actual performance, the hearings preceding Justice Thomas's confirmation at least identified experience with, and acquaintance with, race-related discrimination and disadvantage.[209] Such information is relevant to a confirmation decision even pursuant to the narrowest criteria of "training, *experience*, and judicial temperament."[210] Legislative attention and responsiveness to a nominee's cultural exposure and awareness could help correct the judiciary's lack of representative accountability to a pluralistic society. Selection criteria should be factored to ensure that standards of review do not defeat democratic reckoning with diversity or disadvantage, as was the case in the post-Reconstruction, *Lochner*, and post-*Brown* eras.

Implicit in achieving a culturally aware bench is a legislature that exemplifies these traits. In the Justice Clarence Thomas confirmation process, the Senate Judiciary Committee attempted to rectify a cursory review process that exploded when leaked to the press.[211] Sexual harassment emerged as a new consideration. The Senate's lack of understanding of a significant gender-related issue was evident, as was its inability to probe a candidate on the matter. A neutral panel, perhaps similar to the Senate's delegation of the sentencing process to the Federal Sentencing Commission, might offer expertise in investigating a candidate's cultural awareness and veracity, to achieve a bench that will remain accountable to pluralistic thought. A neutral body questioning the candidate would offer a more depoliticized process and expertise in questioning, a deficiency apparent in the Senate Judiciary Committee that examined Thomas.[212]

The Court itself has recognized that review should be enhanced

same was true of my colleagues." County of Allegheny v. ACLU, 488 U.S. 816, 991 (1989) (Kennedy, J., dissenting).

208. *See* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 677 (1987) (describing white "victims" of affirmative action as outcasts of the legislative process and "politically impotent").

209. Judge Thomas's use of race ("high-tech lynching") and disadvantage were arguably for the purpose of exploitation, in response to allegations made by Professor Anita Hill who had alleged sexual harassment by him. Richard Berke, *Court Nominee Rejects Charges Laid out in Frank, Vivid Detail Against Him Before Committee*, N.Y. TIMES, Oct. 12, 1991, at A1.

210. *See* Grossman & Wasby, *supra* note 194, at 559 (emphasis added).

211. Neil A. Lewis, *Law Professor Accuses Thomas of Sexual Harassment in 1980s*, N.Y. TIMES, Oct. 7, 1991, at A1.

212. Senator Joseph Biden, Chair of the Senate Judiciary Committee recognized the deficiencies in the existing process: "Maybe we need new ground rules." Neil A. Lewis, *Thomas Panel Frustrated, Ends Hearings with Talk of Overhaul*, N.Y. TIMES, Sept. 7, 1991, at A7.

when government action is classified on the basis of race or gender.[213] Examination of the breadth and depth of a nominee's cultural awareness should be no less rigorous. To allow jurists who themselves must strictly scrutinize racial and gender classifications and determine whether they stigmatize or stereotype,[214] to escape close examination of their own credentials for making such decisions is fundamentally incongruous. Failure to understand the variations of stigma, depending on who is burdened or benefited by a classification, or uncertainty about the differences between official segregation and remedial preferences, reflects shortcomings that undermine the Court's credibility and prestige. Such failure and uncertainty are the products too of an institutional failure to ask the hard and probing questions that must be pursued if jurisprudence is to reflect society's diversity.

Conclusion

Senate inquiry in the judicial confirmation process should be directed not toward whether a nominee is politically correct but whether he or she is culturally aware. Political correctness, as history has disclosed, is a concern that largely has commanded presidential attention and defined the nomination process. It is evidenced by Presidents Washington and Adams's selection of jurists committed to Federalist ideology;[215] President Grant's nomination of Justices friendly to his economic policies;[216] Presidents Harrison, Cleveland, and Taft's choice of judges who would advance the tenets of social Darwinism;[217] President Roosevelt's nomination of Justices who would defeat Lochnerism;[218] President Reagan's emphasis on fidelity to the Republican platform;[219] and President Bush's desire for "judges who will interpret the constitution as it is written."[220]

An enhanced Senate function calculated to discern a nominee's range of cultural experience and perception can be performed within the bounds of the narrowest definition of its responsibility. Even minimalist characterizations of the Senate role in the appointment process acknowl-

213. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973).

214. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

215. *See* ABRAHAM, *supra* note 151, at 69-76.

216. *See* LEO PFEFFER, THIS HONORABLE COURT 182-85 (1965).

217. *See* ABRAHAM, *supra* note 151, at 138-51.

218. *Id.* at 210.

219. *See* Brownstein, *supra* note 120, at 2340 (emphasis on "judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life").

220. Vice President George Bush, Second Presidential Debate, Oct. 13, 1988.

edge the propriety of assessing experience and judicial temperament.[221] An individual with limited cultural exposure or understanding may be fair-minded, but that quality does not ensure sensitivity or acuity in assessing litigants or issues rooted in unfamiliar backgrounds and circumstances. Nor is it likely that such a qualification is established by resignation from exclusive clubs simultaneous with nomination to a federal judgeship.[222]

Given the nature of the process, the appointment of a Justice or judge will reflect the more favored and circumscribed agenda of the Chief Executive. By virtue of its more broadly representative nature, the Senate is the logical forum in which to account for diversity. Such a reckoning cannot be effected, however, without serious and detailed inquiry into cultural experience and understanding. It may be a compromise of separation of powers to ascertain how a nominee actually might resolve a particular issue.[223] Inquiry into a nominee's perception of a barrier between black and white neighborhoods, understanding of how language is used in various cultural contexts, or appreciation of the significance of a particular religious symbol or practice affords useful insight into a jurist's capacity to wrestle with the constitutional problem of a culturally diverse society or consider disadvantage in a sensitive and perceptive way. A nominee who cannot or will not answer questions probative of cultural experience or knowledge should be rejected. The influence of personal education, ideology, and experience on the law may be incapable of precise measurement. So long as it is reasonable to assume a significant connection between such factors and jurisprudential output, we must examine carefully the perceptual breadth and depth concerning the pluralism that the Constitution must reckon with and by which it must be defined.

221. *See* Grossman & Wasby, *supra* note 194 and accompanying text.

222. The ability to express views on broad areas of concern does not cross the boundaries of prejudging a specific case or controversy. As recently stated by United States District Judge Clarence C. Newcomer, in ruling that a Pennsylvania statute was broad and vague in restricting judicial candidates in voicing their view on issues, "[t]here are an array of less restrictive means to preserve the fact and appearance of judicial impartiality which do not impose an unconstitutional restriction upon a judicial candidate's First Amendment rights." *See* WALL ST. J., Apr. 25, 1991, B12.

223. *See* Lively, *supra* note 195, at 573.