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Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics

Bertrall L. Ross II*

Judicial interpretations of the Equal Protection Clause have undergone a major transformation over the last fifty years. A Supreme Court once suspicious of the democratic losses of discrete and insular minorities, now closely scrutinizes their democratic victories. A Court once active in structuring the democratic process to be inclusive of racial and other minorities, now views minority representation in the political process as essentially irrelevant. A Court once deferential to exercises of congressional power that enhanced the equal protection rights of minorities, now gives Congress much less leeway.

What explains these shifts? An easy explanation is that the Supreme Court has simply become more conservative. But what underlies this conservatism? In this Article, I argue that the Court’s own evolving conception of politics underlies the changes in the meaning of equal protection. In the past, the Court saw politics through the lens of pluralist theory, the crucial defect of which was

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the risk that minorities would be politically marginalized. That understanding has given way to a public choice conception in which the Court presumes these same minorities to be too politically powerful. In essence, one form of judicial distrust of democratic politics has replaced another.

I argue that two primary sources produced this renewed distrust: changing conservative views of the position of minorities in politics and a conservative legal movement that rejected pluralism in favor of public choice theory as the most accurate description of the operation of politics. I conclude by identifying important normative questions that this theory raises for constitutional law scholars and by offering a prescription for civil rights advocates seeking to influence judicial interpretations of the Equal Protection Clause.

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INTRODUCTION

In a dispute over the constitutionality of a state poll tax nearly fifty years ago, Justice Hugo Black, writing in dissent, criticized the Court’s decision to invalidate the voting qualification just thirty years after the Court upheld a similar tax. He accused the majority of consulting “its own notions rather than following the original meaning of the Constitution” and of giving itself the “constant power to renew [the Constitution] and keep it abreast of this Court’s more enlight[ened] theories of what is best for our society.” Justice William Douglas, writing for the liberal majority, famously and controversially responded, “the Equal Protection Clause is not shackled to the political theory of a particular era.” Justice Douglas’s statement suggested that the majority saw its own interpretation of the Clause as transcending contemporaneous theories of politics, “founded not on what . . . government policy should be, but on what the Equal Protection Clause requires.”

3. Id.
4. Id. at 669 (majority opinion). In addition to Justice Douglas, the majority included Chief Justice Warren, Justices Clark, Brennan, White, and Fortas.
5. Id. at 670. The assertion is somewhat ambiguous as it could be interpreted as suggesting that the Court’s equal protection jurisprudence should change as theories of politics change. However, once the quote is contextualized as a response to the dissent, it is clear that the liberal majority was trying to defend its equal protection jurisprudence against Justice Black’s charge of Lochner-era activism—an era in which the Court invalidated, under the Due Process Clause, several democratically enacted laws on the basis of a particular theory of politics. See Barry Friedman, The History of the
Yet judicial interpretations of the Equal Protection Clause have never been transcendental. Instead, in the modern era, the Supreme Court’s equal protection jurisprudence has continuously evolved as new conceptions of the operation of politics have emerged. Ironically, the influence of evolving conceptions of politics is seen most readily in the equal protection jurisprudence of the more conservative members of the Court. Contrary to Justice Black’s call to consult original meaning—a call that has been heeded at times in the jurisprudence, but is more often merely recited in the rhetoric of conservative Justices—the case law evidences a conservative effort to renew the Equal Protection Clause by keeping its interpretation abreast of what conservatives consider “more enlighten[ed] theories of what is best for our society.”

The influence of evolving conceptions of politics is evident in contrasting two jurisprudential extremes: first, the equal protection jurisprudence of the liberal members of the Vinson and Warren Courts, and second, that of the conservative members of the Burger, Rehnquist, and Roberts Courts. During the Vinson and Warren Courts’ era, pluralism was the dominant theoretical conception of the operation of politics. Democratic outcomes were theorized to be the product of intergroup bargaining and compromise. It was thought that those outcomes generally accorded with the public good so long as all groups had a seat at the bargaining table. An important defect in the pluralist model, however, came to light when certain out-groups were excluded from the bargaining and compromise of the pluralist marketplace. In these contexts, political resolutions usually did not reflect the out-groups’ influence or interests. Thus, for pluralists, minorities’ role in politics was usually a healthy one, except that certain minorities were subject to unfair exclusion and thus illegitimately deprived of their share of political power.

Much of the Vinson and Warren Courts’ equal protection jurisprudence can be understood as a response to what I refer to as a “defective pluralism” conception of politics. Racial and other minorities constituted the politically marginalized out-groups. In the language of the Court, these groups were “discrete and insular minorities.” To the extent that laws disproportionately harmed these minorities, the Court subjected them to close judicial scrutiny.

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6. See infra Part I.B.
7. See infra Part I.B.
9. See infra Part I.C.
For example, in the Vinson and Warren Courts’ application of equal protection to minority groups’ claims for special judicial protection, the Court closely scrutinized laws disproportionately harming aliens in *Oyama v. California* and *Graham v. Richardson*, Japanese Americans in *Korematsu v. United States*, and the poor in *Harper v. Virginia Board of Elections*. In its equal protection race doctrine, the Court, in cases such as *Brown v. Board of Education*, *McLaughlin v. Florida*, and *Loving v. Virginia*, subjected laws to close scrutiny that on their face applied equally to African Americans and whites, but in fact disparately harmed African Americans. These doctrinal innovations appeared to be founded on the Court’s presumption that the democratic process could not be trusted to protect marginalized minorities.

The Warren Court also used the Equal Protection Clause as a tool to actively structure the political process to secure minority participation and representation. For example, cases like *Reynolds v. Sims* and *Fortson v. Dorsey* required States to draw electoral districts to ensure the fair and effective representation of minorities in the political process. The Court also made clear that federal statutes like the Voting Rights Act (VRA) were constitutional exercises of congressional power to enforce the Equal Protection Clause, even when the statutes provided greater protection for racial minorities than the Constitution required. For the liberal majority operating under the defective pluralism model described above, judicial deference and trust of state action were appropriate when a dominant majority acted to protect the rights of a marginalized minority.

The same minority groups that were the object of protection in the Vinson and Warren Courts, however, experienced dramatically different results in the equal protection jurisprudence of the Rehnquist and Roberts Courts thirty years later. During this period, the composition of the Court shifted in a conservative direction, but underlying the shift in the equal protection jurisprudence seemed to be something even more fundamental: a radically different view of the operation of politics and minorities’ political power.


13. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding a provision under the Voting Rights Act that prohibited a literacy test requirement as a proper exercise of congressional Fourteenth Amendment power); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding Sections 4 and 5 of the Voting Rights Act as proper exercises of Congressional power under the Fifteenth Amendment, which prohibits denial of the right to vote on account of race, color, or condition of servitude); *see also infra Part I.C.*
By the time of the Rehnquist Court, public choice theory had replaced pluralism as the preeminent theoretical conception of American politics. According to public choice theorists, small groups have a critical organizational advantage in the political process because they can more easily detect and punish those who free ride on the efforts of others and provide selective benefits to members who organize. Because of this organizational advantage, public choice theorists believe that small groups are better positioned to lobby for legislative goods by providing legislators with special benefits in the form of campaign contributions and votes. These legislators, in turn, pass laws favorable to these small groups at the expense of the broader, unorganized public. The jurisprudence of the Rehnquist and Roberts Courts seemed to reflect this more cynical conception of politics, as the discrete and insular minorities that were once entitled to protection under the defective pluralism conception of politics became the object of suspicion. When legislators passed laws protecting or advantaging these groups, the Court described such laws as illegitimate giveaways to special interests.

This cynical conception of minorities’ role in politics is evident in the Rehnquist and Roberts Courts’ treatment of race in their equal protection doctrine. For example, in *Ricci v. DeStefano*, a recent Title VII case with strong equal protection undertones, the three most conservative members of the Roberts Court concurred in the conservative majority’s invalidation of a state action that benefitted minority firefighters at the expense of white firefighters. For these Justices, the state action was the product of “racial politics,” in which organized racial minorities were able to secure democratic advantages at the expense of the disorganized white majority.

The conservative Justices’ recent suspicion about the power of minority racial groups is also seen in the changes the Court made to equal protection doctrine in the area of voting rights. The same year the Court decided *Ricci*, it suggested that the most important provision of the Voting Rights Act, section 5, might be unconstitutional in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*). The Court doubted the Act’s continued constitutionality because it perceived that racial minorities’ right to vote had been secured already. Given the Court’s apparent view of racial minorities’ organizational power, it was unnecessary for the Act to protect anything more than the right to vote. Thus, the Court suggested that there might no longer be

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14. *See infra* Part III.A.
15. *See infra* Part III.A.
17. *Id.* at 596–605 (Alito, J., concurring, joined by Justices Scalia and Thomas) (arguing the city’s real reason for its affirmative action program was “the desire to placate a politically important racial constituency”); *see also infra* Part III.C.
19. In questioning the constitutionality of the Voting Rights Act, the Court in *NAMUDNO* ignored the continued relevance of second-generation barriers on racial minorities’ right to vote,
a basis for allowing the Act to constrain Southern States’ power over elections. Four years later, a conservative majority of the Court in *Shelby County v. Holder* completed the task initiated in *NAMUDNO*, nullifying the operation of section 5. Spending a little more than a page assessing the voluminous 15,000-page record that Congress compiled to support reauthorization of the Voting Rights Act, the Court determined that the current burdens of the Act could no longer be justified by “current needs.” After all, the Court explained “no one can fairly say that [the record] shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965.”

Finally, in doctrinal areas involving the treatment of other minorities and the extent of congressional power to enforce the Equal Protection Clause, the influence of a public choice conception of politics on conservative jurisprudence is even clearer. One example is *Romer v. Evans*, in which the conservative dissenters argued that a state popular initiative that invalidated local ordinances prohibiting discrimination against gays and lesbians was not entitled to special judicial scrutiny. Gays and lesbians, according to the dissenters, were a politically powerful group well positioned to protect their rights through democratic channels. The local ordinances overturned by state initiative provided gays and lesbians with impermissible “special rights” at the expense of the diffuse public. A second example is *United States v. Windsor*. There, the conservative dissenters found faith again in the products of democratic politics that eluded them in the *Shelby County* case decided the day

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21. *Id.* at 2627 (explaining that the Voting Rights Act’s coverage formula fails to meet the test that a “statute’s ‘current burdens’ must be justified by ‘current needs’”).
22. *Id.* at 2629.
24. *Id.* at 645–46 (Scalia, J., dissenting); see also infra Part III.C.
before. The Court in *Windsor* invalidated a Defense of Marriage Act (DOMA) provision that prohibited partners in same-sex marriage from receiving the same federal benefits as partners in opposite-sex marriages.26 According to the dissenters, Congress provided a reasonable basis for such discrimination against same-sex couples.27 A minority’s democratic loss in the adoption of DOMA apparently ameliorated concerns about a captured political process, a concern that seemed to animate their skepticism in *Shelby County* about Congress’s adoption of the minority-protective VRA.

My interpretation, which links the overall shifts in the Court’s equal protection jurisprudence over time to changing conceptions of politics, is a novel approach to understanding equal protection law. Scholars thus far have examined individually the changes to the Court’s equal protection doctrines with much of the emphasis on the Court’s evolving race jurisprudence. The most prominent account suggests that the changes in equal protection doctrine are the product of judicial backlash against the “special rights” claims of racial minority groups that threaten “core American values . . . of individual merit and equality of opportunity” with white Americans as the ultimate victims.28 The range of redress placed into the category of “special rights” includes affirmative action to address historical and societal discrimination, race-conscious remedies for discriminatory actions by a specific state actor, and even antidiscrimination laws to secure equal treatment of minorities.29 This backlash ultimately translates into Supreme Court doctrine that is “hostile to the more ‘radical’ extensions of antidiscrimination law, especially those that seek to protect traditionally unprotected groups, extend antidiscrimination ideas to unusual contexts, or push the law beyond the principle of formal equality.”30

26. The Court struck down section 3 of DOMA, which provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. Justice Kennedy, writing for the majority, explained that the essence of the statute was to interfere “with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power.” *Windsor*, 133 S. Ct. at 2693.

27. *Id.* at 2710 (Scalia, J., dissenting); see also *id.* (Alito, J., dissenting) (suggesting that *Windsor* should seek the right to same-sex marriage from a legislative body elected by the people, not from unelected judges).


29. See Dudas, *supra* note 28, at 730 (suggesting that minority successes are “interpreted as assaults . . . against the interests of those Americans who lack membership in a historically disadvantaged group”).

Judicial racial backlash is in many ways a compelling explanation for current Supreme Court equal protection jurisprudence, but it is nonetheless incomplete. Specifically, the backlash account fails to identify the source of the current Court’s renewed distrust toward democratic institutions. Under a standard, simplified majoritarian account of democracy, the elected institutions of government are ideally situated to be accountable to white racial backlash. If majority whites are resentful, then presumably they will use their dominant numerical position to vote elected officials responsible for passing “special rights” laws out of office and to elect new officials who will repeal the existing “special rights” legislation. The backlash account never explains why the Court distrusts democratic institutions to act.

This gap in the theory of judicial racial backlash can be filled if we understand conservative members of the Court as having adopted evolving conceptions of politics to guide their equal protection jurisprudence. Under this interpretation, it is not resentment that explains the judicial backlash against minorities, but rather judicial perspectives on whether to trust or distrust minorities’ apparent gains won in electoral politics.

My Article contributes to the existing theoretical landscape by pointing to changing conceptions of the operation of democratic politics as a key basis for the Court’s shifts in its equal protection jurisprudence. In many ways, this theory complements judicial backlash and other theories that seek to explain equal protection doctrine. It also improves upon certain, more general theories of the Court’s shifting motivations.

My argument takes on a dual form: it can be read as asserting a strong claim about the actual causes of the shifts in equal protection doctrine or as offering a milder claim that simply provides a principled justification for the shifts, even if the shifts in fact have been driven by other forces. The more assertive and controversial claim is that the conservative Justices’ equal protection jurisprudence can be explained as a response to evolving conceptions of politics. Since it is impossible to get inside of the heads of the Justices that decide cases, I make this claim using the types of evidence that legal scholars ordinarily rely on—language contained in doctrine—and circumstantial evidence that is often overlooked—judicial interactions with

31. Other scholars have developed accounts of Supreme Court equal protection jurisprudence that have focused more narrowly on current doctrine rather than the shifts in doctrine and on a different bloc of Justices than are the focus here. See Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 YALE L.J. 1278, 1300-03 (2011) (identifying an evolving judicial role of moderate Justices in the race cases to enforcing an antibalkanization principle constraining political interventions that promulgate special rights for minority groups “so as to ameliorate resentment they may engender”); Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747, 748–55 (2011) (arguing that anxiety about pluralism has served as a justification for limitations on “constitutional protection of new groups, curtailed it for already covered groups, and limited Congress’s capacity to protect groups through civil rights legislation”).
academic theoretical movements. Ultimately, as with any other attempt to account for the Court’s actions, the claim that evolving conceptions of politics explains equal protection doctrine cannot be definitively proven according to social science standards. Nonetheless, I argue that this explanation improves upon more conventional accounts of the conservative shifts in the Supreme Court’s constitutional jurisprudence, such as greater adherence to judicial restraint, the shift from living constitutionalism to originalism, and an increasing orientation toward protecting the prerogative of States. I show that each of these accounts is a weaker explanation of the actual shifts in the Court’s equal protection jurisprudence than the explanation I offer premised on an evolving judicial conception of politics.

My less assertive claim is simply that evolving conceptions of politics provide a principled justification for the Court’s shifting equal protection doctrine. This latter argument does not rest on what actually motivated the conservative Justices. Rather, it is an interpretive claim concerning how an objectively principled Justice coherently deciding cases would make sense of the shifts in equal protection doctrine. As I show, in each period a Justice adopting the dominant theoretical conception of politics of that period could have logically justified the Court’s equal protection doctrine in terms of that conception. To the extent that this interpretation fits the existing doctrinal landscape, it could provide the basis for future lower court and Supreme Court decisions. For example, a public choice account of minorities’ disproportionate political power provides a potential (though perhaps misguided) justification for the current Court’s decisions overturning democratically enacted laws.

To support both the explanatory and interpretive argument, I use a methodology that Jed Rubenfeld terms “juxtaposition across doctrines,” examining “how decisions from one doctrinal category relate to those from

32. The challenge with proving cause and effect in judicial decision making is that in the absence of a judicial admission, the independent effect of a variable on a judicial decision cannot be observed, given the existence of other variables that could have influenced the judicial decision. See Paul W. Holland, Statistics and Causal Inference, 81 J. AM. STAT. ASS’N 945, 947 (1986) (describing the fundamental problem of causal inference as the impossibility of observing the independent effect of a variable on an outcome). The best that legal scholars can do in seeking to ascertain the cause and effect of judicial decision making is to try to identify the variable that accords with judicial admissions in the language of opinions, circumstantial evidence, and the consistency of doctrine.

33. According to the partisanship account of change, constitutional change over the last fifty years can simply be explained by the Court’s increasing conservatism. Shifts in doctrine merely reflect changes to the partisan orientation of a controlling majority of the Court. See Antonin Scalia, The Disease as Cure: “In Order To Get Beyond Racism, We Must First Take Account of Race.,” 1979 WASH. U.L.Q. 147, 147 (1979) (arguing the decisions of each of the Justices in the affirmative action cases “are tied together by threads of social preferences and predisposition”). Partisanship, however, cannot explain the content of doctrine and its internal logic. To understand why conservatives have molded doctrine in the ways that they have, we must try to understand the principles guiding particular jurisprudential approaches. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled . . . transcending the immediate result that is achieved.”).
others.34 Through juxtaposition, I derive a more robust understanding of how evolving conceptions of politics may be affecting the Court’s jurisprudence than could be derived from a separate examination of each line of doctrine. The four categories of equal protection that I examine are doctrines dealing with: (1) racial minorities, (2) other minorities, (3) congressional power to enforce equal protection, and (4) the structure of the democratic process.

The theory of constitutional change that I offer has both normative and prescriptive implications. From the normative perspective, the theory raises a set of fundamental questions. Should evolving conceptions of politics inform the Court’s equal protection jurisprudence? Assuming that evolving conceptions of politics will inform doctrine, is the current Court’s approach the right one? The Court has rarely, if ever, stated openly that it updates doctrine to reflect new understandings of politics. This silence probably reflects a judicial concern that transparency about such updating would undermine the Court’s legitimacy as an impartial adjudicator of the law.35 However, this lack of transparency increases the potential for error associated with the application of the wrong conception of politics in a particular context. It takes away the opportunity for others to contest the Justices’ assumptions—whether in the courtroom or in broader democratic politics—about how politics actually operate, and perhaps correct mistaken views by the Court. This raises a third normative question: how transparent should the Court be once its legitimacy concerns are balanced against the potential costs of error?

More prescriptively, the theory suggests that opponents of the Court’s current equal protection jurisprudence should consider the Justices’ conception of politics and find ways to counter their logic or suggest alternative paths within a particular conception. For example, civil rights advocates who understand that the Court’s jurisprudence is animated by a particular conception of politics should employ a litigation strategy of presenting evidence as to how politics operates with respect to the state action at issue, in order to counter and potentially correct the Court’s preconceptions.

In this Article, I develop my theory that constitutional change derives from evolving conceptions of politics in four parts. In Part I, I describe how the Supreme Court laid a foundation for importing conceptions of politics into its equal protection jurisprudence in United States v. Carolene Products.36 I then

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34. Rubenfeld, supra note 28, at 1144. To a certain extent, this explanatory account will look to the specific language of judicial opinions. But the primary focus will be on making sense of the relationship between different doctrinal threads since “the true grounds of legal decisions are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions.” Richard A. Posner, Economic Analysis of Law 18 (2d ed. 1977).

35. As Justice Frankfurter, a chief proponent of judicial restraint explained, public confidence in the Court “must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.” Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

36. 364 U.S. 144 (1938).
argue that a defective pluralism conception of politics influenced the Vinson and Warren Courts’ equal protection jurisprudence.

In Parts II and III, I argue that equal protection doctrine subsequently shifted in the later, more conservative Courts, and that each of these shifts is best understood as a response to an evolving judicial conception of the operation of politics.\(^{37}\) I identify two major transformations that have roughly coincided with changes to the composition of the Supreme Court. The first transformation involved the evolution from a defective pluralism conception of politics to an optimistic pluralism conception of politics in the Burger Court. The second transformation involved the evolution from the optimistic pluralism conception of politics to a public choice conception of politics in the Rehnquist and Roberts Courts. In these two parts, I also offer circumstantial evidence that accounts for why conservative members of the Court may have adopted these particular conceptions of politics. In Part IV, I argue that understanding constitutional change as a response to the Justices’ evolving conceptions of politics better accounts for the shifts in the Court’s equal protection jurisprudence than the more conventional explanations of judicial restraint, originalism, and federalism. I conclude with a brief discussion of the normative and prescriptive implications of my theory.

I. THE JURISPRUDENTIAL FOUNDATION: EQUAL PROTECTION AND THE DEFECTIVE PLURALISM CONCEPTION OF POLITICS

John Hart Ely’s 1980 book, Democracy and Distrust, provides perhaps the most-cited explanation of Supreme Court doctrine based on a theory of politics.\(^{38}\) Ely focused on the Warren Court. He argued that its constitutional jurisprudence, as first augured in the famous footnote four of United States v.

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\(^{37}\) The Supreme Court’s modern equal protection jurisprudence is quite voluminous, spanning thousands of pages of Supreme Court reporters. Any attempt to bring explanatory coherence to such a wide swath of doctrine is therefore a daunting task. This Article will therefore take an airplane view of doctrine focusing on broader trends rather than specific details. In addition, beyond the discussion of the Warren Court, the focus will be on the jurisprudence of the more conservative members of the Court where the influence of changing theoretical conceptions of politics appear to be clearer. An account of the evolution of the Supreme Court jurisprudence of the more liberal members is for another day.

\(^{38}\) JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (explaining Supreme Court doctrine according to a process defect conception of politics). A debate has brewed for some time over the extent to which changing theories of politics should influence the Supreme Court’s constitutional jurisprudence. See, e.g., Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 720 (1985) (arguing the Court should not interpret the statute in accord with a pluralist theory of politics because “it is by no means clear that our Constitution wholeheartedly endorses the bargaining theory of democracy”); Lewis F. Powell, Jr., Carolene Products Revisited, 82 COLUM. L. REV. 1087, 1091 (1982) (“One reasonably may doubt the capacity of courts … to determine which groups … operate effectively within our politics.”); David A. Strauss, Is Carolene Products Obsolete?, 2010 U. ILL. L. REV. 1251, 1265–66 (questioning the competency of Justices to apply conceptions of politics to its constitutional jurisprudence).
Carolene Products, could be explained as a judicial response to defects in the democratic process. According to Ely, the Warren Court closely scrutinized laws to protect against the entrenchment of incumbents in power and unfair discrimination toward those out of power.\textsuperscript{39} For both liberal jurists and scholars, this process-defect model remains the touchstone for interpretation of the Equal Protection Clause and other parts of the Constitution.\textsuperscript{40} But as I explain in Parts II and III, this conception of politics has not continued to guide the equal protection jurisprudence of the more conservative members of the Court.

In this Part, I explore how Carolene Products set the foundation for the Supreme Court to import its conceptions of politics into its equal protection jurisprudence. I then describe the conception of politics that underlies Ely’s process-defect model, a conception I call defective pluralism. Finally, I show how the Vinson and Warren Courts’ equal protection jurisprudence reflected the influence of the defective pluralism view of politics. I do so by tracing the Courts’ jurisprudence within the four major doctrinal areas that I track throughout this Article: the treatment of marginalized groups, race, congressional power, and the structuring of the political process. My goal in this Part is to establish the theoretical and jurisprudential baseline from which subsequent changes in equal protection law have occurred.

\textit{A. The Doctrinal Foundation for Judicial Importation of Conceptions of Politics into Equal Protection}

The Court’s modern equal protection jurisprudence began to emerge after decades in which the Court, in a period during the early twentieth century that came to be known as the \textit{Lochner} era, closely scrutinized regulations on the

\textsuperscript{39} ELY, supra note 38, at 77–84, 151–53.
\textsuperscript{40} See, e.g., Samuel Issacharoff & Richard H. Pildes, \textit{Politics As Markets: Partisan Lockups of the Democratic Process}, 50 \textit{STAN. L. REV.} 643, 709–10 (1998); Jane S. Schacter, Romer v. Evans and Democracy’s Domain, 50 \textit{VAND. L. REV.} 361, 390–91 (1997) (describing democracy in process defect terms); Rebecca E. Zietlow, The Judicial Restraint of the Warren Court (and Why It Matters), 69 \textit{OHIO ST. L.J.} 255, 258–59 (2008) (continuing to rely on a process defect conception of politics as relevant to review of legislation involving discrete and insular minorities). There are, however, critics of the idea that the Court’s equal protection jurisprudence is influenced by any conception of politics. These critics argue that substantive ideas of equality are what really guide the Court’s jurisprudence. See William N. Eskridge, Jr., Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?, 50 \textit{WASHBURN L.J.} 1, 10–17 (2010) (arguing that substantive concerns about prejudice and stereotypes rather than process-based concerns about the political powerlessness of certain groups has made a difference in the Supreme Court’s equal protection jurisprudence); Bradley R. Hogin, \textit{Equal Protection, Democratic Theory, and the Case of the Poor}, 21 \textit{RUTGERS L.J.} 1, 2–3 (1989) (contrasting the process-oriented theories with the outcome-oriented theories of equal protection); Michel Rosenfeld, Decoding Richmond: \textit{Affirmative Action and the Elusive Meaning of Constitutional Equality}, 87 \textit{MICH. L. REV.} 1729, 1792 (1989) (arguing that the Court’s adjudication of the affirmative action cases can only be understood with reference to a conception of substantive equality and cannot be understood in process-based terms).
basis of a laissez-faire conception of the economic marketplace. In the mid-1930s, this form of judicial activism led to a torrent of criticism from the democratic branches of government and ultimately to a presidential challenge to the Court, and to the institution of judicial review. Facing a legitimacy crisis, a chastened Court backed down, abandoned its imposition of a laissez-faire conception of the market on the Constitution, and inaugurated an era of greater deference to the more democratic branches of government.

The ghost of *Lochner* has hung over the Court ever since. It manifests itself in a resistance to the Court’s reliance on social science theories or political philosophies to decide cases. This resistance, however, did not extend to the civil rights and civil liberties domain. In the years immediately following the *Lochner* era, the Court laid the foundations for developing new rights doctrines, which depended on a particular conception of politics.

In *United States v. Carolene Products*, the Court upheld a milk regulation under rational basis review. The Court’s decision to employ this deferential standard of review to a government regulation after the pro-business decisions of the *Lochner* era made the seemingly ordinary case remarkable. But it was a footnote that marked the occasion for the Court’s establishment of its modern equal protection jurisprudence. In the footnote, a plurality of the Court suggested that it would subject to more exacting scrutiny “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” It also suggested that prejudice toward discrete and insular religious, national, or racial minorities “may be a special condition, which tends seriously to curtail the operation of those

41. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (overturning a maximum hour law because it “necessarily interferes with the [Fourteenth Amendment Due Process] right of contract between the employer and employees [sic], concerning the number of hours in which the latter may labor in the bakery of the employer.”). In several other cases, the Court overturned economic regulations under this theory of the freedom of contract. See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating a state minimum wage law); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926) (invalidating a state consumer protection law); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating a federal minimum wage law for women); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating a state law prohibiting employer from requiring as a condition of employment that employees not join a union); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating a federal law prohibiting employers from forbidding workers to join a union as a condition of employment). *But see Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a maximum hour law for women); see also Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 9–11 (1991) (describing the laissez-faire influences on Justices during the *Lochner* era).


44. See Sunstein, supra note 5, at 873 (“The spectre of *Lochner* has loomed over most important constitutional decisions . . . .”).


46. Id. at 152 n.4.
political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny.\footnote{Id.} \footnote{See J.M. Balkin, \textit{The Constitution of Status}, 106 \textit{Yale L.J.} 2313, 2368 (1997) (finding in this paragraph “a perceived conflict between democracy and prejudicial treatment of certain kinds of social groups” that arises when “social groups are unable to form coalitions with other groups to protect their interests,” which threatens democracy).} 

Although stated merely in a footnote on which only a plurality of the Court agreed, a tentative new theory of judicial review emerged.\footnote{See Lea Brilmayer, \textit{Carolene, Conflicts, and the Fate of the “Inside-Outsider,”} 134 \textit{U. Pa. L. Rev.} 1291, 1292 (1986) (arguing \textit{Carolene Products} footnote four “requires a judge to make controversial assumptions about what the proper process ought to be like”); David M. Bixby, \textit{The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic}, 90 \textit{Yale L.J.} 741, 743–45 (1981) (arguing \textit{Carolene Products} footnote four reflected an emerging consensus about democracy that minorities were particularly vulnerable to the animosities of the majority).} This theory would become the central avenue for the Justices to import their views of politics into their interpretations of the Equal Protection Clause and other rights provisions.\footnote{\textit{Carolene Products}, 304 U.S. at 152 n.4.} \footnote{Louis Lusky, \textit{Footnote Redux: A Carolene Products Reminiscence}, 82 \textit{Colum. L. Rev.} 1093, 1098 (1982).} With footnote four, the \textit{Carolene Products} plurality opened the door to further inquiry regarding the proper conception of politics that should animate the Court’s equal protection jurisprudence. By offering a particular theory of politics as a potential basis for future doctrine, the Justices in the plurality suggested that such theories were in fact appropriate bases for judicial decision making.

Religious and racial minority out-groups were undoubtedly a central point of concern for the plurality. But the plurality also seemed to be aware that as society changed, conceptions of the operation of the political process might change as well. The footnote’s tentative language left open the possibility that different theories of politics might emerge over time, providing different starting points for measuring when the political process is defective. The plurality’s use of the word “ordinarily” to describe the nature of the political process suggested that the Justices realized that the political process might itself be dynamic, changing over time.\footnote{See Buck v. Bell, 274 U.S. 200, 208 (1927).} As later explained by a law clerk to Justice Stone, the principal author of the footnote, “[t]he Footnote was being offered not as a settled theorem of government or Court-approved standard of judicial review, but as a starting point for debate—in the spirit of inquiry, the spirit of the Enlightenment.”

After \textit{Carolene Products}, the Vinson and Warren Courts gradually remade the Equal Protection Clause from the “usual last resort” of litigants bringing constitutional challenges\footnote{See Buck v. Bell, 274 U.S. 200, 208 (1927).} to a constitutional focal point for minorities claiming unfair treatment. Many subsequent decisions came to depend on the Justices’ notions of the nature of the political process and when its defects
required judicial intervention. In the Warren Court era, this consideration came to depend upon the insights of pluralism, the leading academic conception of politics during the years following the decision in Carolene Products.

B. Pluralism and Its Defects

The pluralist theory on which the Warren Court appeared to rely is based on ideas expounded in James Madison’s highly influential essay on factions, tyranny, and democracy, The Federalist No. 10. This essay is the essential starting point for the pluralist theoretical conception of the American political process. For Madison, politics operated along the lines of governing majority factions ruling over minorities. He suggested that the greatest threat to the new republic came in the form of a tyrannical majority faction passing laws that deprived minorities of their natural rights.

More than a hundred years later, at the beginning of the twentieth century, Arthur Bentley revised Madison’s conceptual framework into what became known as pluralism. Instead of a static political process controlled by monolithic majority factions, Bentley envisioned politics as a dynamic process of diverse groups continuously seeking to attain social, economic, and political goals. Pluralism emerged as the leading account of how politics operated for the next half-century in part due to its distinctive emphasis on the role of group activity in government decision-making processes.

David Truman, Robert Dahl, and other political scientists writing in the mid-twentieth century built on Bentley’s work to provide a more complete account of how groups formed and advanced their interests in the pluralist process. For modern pluralists, rule by a monolithic majority is a myth.
Instead, “rule by minorities,” in which interest group activity is the predominant form of political action, is the more accurate description. Well-organized groups bargain and compromise with each other in a competitive pluralist political marketplace to secure favorable legislation. The process of compromise results in the creation of majority coalitions of minorities that lobby to secure particular legislative outcomes.

Importantly, these majority coalitions are transient and dynamic rather than stable and static. They change in response to evolving political contexts and to the changing preferences of the majority coalition partners. As a result, no single stable interest group or set of groups controls the political system because of “the fluctuation in . . . the use of political resources that occur over time.” In addition, according to the stability-disruption-protest model, members of the unorganized public will organize when there is a disturbance to the legislative equilibrium and enter the pluralist marketplace for an outcome on more favorable terms to the group. Ultimately, under this theory, the legislative product of the pluralist marketplace reflects the public interest because it represents a confluence of the preferences of all active and potential groups in society.

Several critics questioned the optimistic presumptions of the pluralist model; in particular, they noted that the political process appeared to be consistently biased against certain groups. Theorists like Theodore Lowi and
Jeffrey Berry identified an important defect in pluralism: the risk that societal and legal marginalization of minority groups in the political process would lead to their exclusion from pluralist bargaining and compromise. This defect seemed to inform the Vinson and Warren Courts’ development of equal protection doctrine during the heyday of pluralism.

C. Defective Pluralism and the Warren Court’s Equal Protection Jurisprudence: Democratic Distrust

In the period immediately following Carolene Products, a liberal majority on the Vinson and Warren Courts seemed to perceive the ordinary political process as operating in accordance with the defective pluralism model. For these Courts, the political exclusion of minorities emerged as the central point of concern. Judicial majorities began to actively supervise the political process, policing harms to politically marginalized minorities who could not vote or otherwise defend their interests through democratic channels. The influence of this defective pluralism conception of politics is seen in the Court’s equal protection jurisprudence concerning marginalized groups, racial minorities, congressional enforcement power, and the structuring of the political process. Below, I show how the Court’s solicitude for minorities played out in each of these doctrinal areas.

1. Marginalized Groups

In the years immediately following the Civil War and the Fourteenth Amendment’s ratification, the Court made clear that the new Amendment’s protections extended beyond African Americans. It explained that the Amendment’s “provisions are universal in their application, to all persons within the territorial jurisdiction.” However, well into the twentieth century, it remained unclear whether the Court would closely scrutinize state enactments that disparately harmed marginalized minority groups.

It was not until the Court’s articulation of the new theory of judicial review in Carolene Products that the Court started to differentiate between groups empowered to influence the majoritarian process and those that were

69. See BERRY, supra note 54, at 12 (explaining how the marginalization of African Americans in the 1960s undermined the assumptions of a functioning and competitive pluralist marketplace); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 57–58 (2d ed. 1979) (criticizing the flawed assumptions of interest group pluralism that fail to account for the imperfect competition in the political marketplace); see also DAHL, PREFACE, supra note 56, at 133 (“[T]he more relevant question is the extent to which various minorities in a society will frustrate the ambitions of one another with the passive acquiescence or indifference of a majority of adults or voters.”).


not. 72 In two cases immediately following Carolene Products, the Court refused to give special protection to opticians and corporations disparately harmed by state ordinances. 73 The Court explained that the Equal Protection Clause only invalidates invidious discrimination and suggested that disparate burdens on most groups would receive only rational basis review. 74

However, the Court subsequently began to rule that other minorities did in fact require additional judicial protection. For example, when an internment law targeted politically disempowered Japanese Americans during World War II, 75 or a California land law subjected certain noncitizens to discrimination in ownership of land, 76 or a Virginia poll tax diminished the opportunity of the poor to vote, 77 the Court took a different position than it did for laws disparately harming opticians and corporations. The Court closely scrutinized these laws to ensure that they were necessary to achieve a compelling state interest. As the Court explained in a challenge to the Virginia state poll tax, “[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored.” 78 In the case involving a challenge to the California land law for discriminating on the basis of ancestry, the Court explained, “only the most exceptional circumstances can excuse discrimination on that basis.” 79

The distinction between the Court’s treatment of laws harming opticians and corporations, on the one hand, and Japanese Americans, aliens, and the poor, on the other, is consistent with the Court’s adoption of a defective pluralism conception of politics. For laws targeting politically marginalized groups, a presumption of constitutionality was inappropriate because the lack of influence these groups had on the political process created a potential for pluralist malfunction. Whereas opticians and corporations could influence the political process to have their voices heard and interests accounted for by actors seeking reelection, Japanese Americans, aliens, and the poor were not similarly situated. Members of these latter groups could not vote or faced societal prejudice that left them on the political sidelines. A conception of the operation of politics as potentially defective with respect to the treatment of marginalized minorities resulted in a doctrine premised on distrust of the state actors that passed laws disparately harming these groups. Concurrently, the Court, in a series of cases beginning with Brown v. Board of Education, extended this

72. See Bixby, supra note 49, at 743 (describing the period from 1935 to 1945 as one in which the Court shifted toward a recognition that racial, religious, and ethnic minorities were entitled to a special degree of judicial protection).
74. See Williamson, 348 U.S. at 489; Ry. Express, 336 U.S. at 110.
78. Id. at 668.
79. Oyama, 332 U.S. at 646.
distrust to state actions disparately harming racial minority groups, particularly African Americans.

2. Racial Minority Groups

From the time the Court ushered in the post-Carolene Products era in Brown v. Board of Education, equal protection race doctrine started to reflect judicial distrust of the ostensibly neutral actions of democratic institutions that harmed racial minorities. In Brown, the Court famously determined that segregation of school children into separate educational facilities violated the Equal Protection Clause. While much emphasis has been placed on the Court’s repudiation of the long-standing separate-but-equal doctrine articulated in Plessy v. Ferguson, Brown also evidences the Court’s adoption of a defective pluralism conception of politics.

The Court in Brown employed a level of scrutiny of state actions that was much less deferential to democratic institutions than that which existed before. Under the prior constitutional legal regime in which segregation was treated as a neutral state action, the Court deferred to state exercises of police powers in the area of race. For example, the Court in Plessy presumed that the law segregating individuals by race in public transportation was enacted “in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.” An intentionally naive conception of the political process seemed to underlie this presumption. The Court simply assumed that the State’s goal was to advance the public interest—including the interests of majorities and minorities, voters and the voteless—in its passage of laws. For the Plessy Court, it was not the laws that instilled a badge of inferiority in African Americans; instead it was the choice of members of the African American race to put that construction on the laws.

Once the Court in Brown transformed segregation from a neutral to a minority-subordinating state action, deference to the State was no longer considered appropriate. Under the new equal protection regime inaugurated in Brown, the Court seemed to reassess the presumption that the State acted in good faith and for the public interest when it enacted segregation laws. This reassessment came in light of the realities of a political process that excluded those harmed by segregation. The Court in Brown stepped in to fill the

81. Id. at 493–95.
82. Id.
84. See id. at 551.
democratic deficit left by the political exclusion and marginalization of racial minorities.  

Brown also opened the door to judicial review of facially neutral laws under the Equal Protection Clause. The state action struck down in Brown differed from those previously invalidated under equal protection. In the late nineteenth century, the Court struck down laws under the Equal Protection Clause that explicitly singled out particular minorities for disadvantage. The Court in Brown not only conceded that the segregation law applied equally to African Americans and whites, but also that school facilities for the two races were tangibly equal. Nonetheless, for the Court segregation meant something different for African Americans prohibited from attending white schools than it did for whites prohibited from attending African American schools. Segregation instilled within black children “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” It seemed to have this effect on black and not white children because it was imposed by the State, a State controlled by whites in which blacks were excluded from any direct influence in its decisions. So while the law was neutral in the sense of its equal application to blacks and whites, its imposition by a white-controlled State transformed the status of segregation from an ostensibly neutral action into one that subordinated a disempowered racial minority.

Building on Brown, the Court in subsequent race cases described the judicial role as extending beyond a law’s equal application. Judges were to


87. See, e.g., Neal v. Delaware, 103 U.S. 370, 397 (1880) (invalidating a law explicitly excluding African Americans from jury service); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (same).

88. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) (accepting the lower court findings that “the [African American] and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors”).

89. Id. at 494.

90. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421, 425 (1960) (arguing “segregation is historically and contemporaneously associated” with the “still largely effective exclusion of [African Americans] from voting”); Wechsler, supra note 33, at 33 (“[Brown] must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.”). But see Daniel A. Farber & Philip P. Frickey, Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation, 79 CALIF. L. REV. 685, 692–94 (1991) (arguing that the Court’s decisions in Brown and Loving did not rely on the logic of Carolene Products footnote four).

91. See, e.g., Hunter v. Erickson, 393 U.S. 385, 389–93 (1969) (closely scrutinizing and invalidating a city charter amendment prohibiting the city council from implementing any housing discrimination ordinances because the amendment had a disparate impact on racial and religious minorities); Green v. Cnty. Sch. Bd., 391 U.S. 430, 438–39 (1968) (closely scrutinizing a school
closely scrutinize laws to assess whether they were animated by “arbitrary or invidious discrimination” toward the affected classes. In subjecting laws to this heightened level of judicial scrutiny, the Court rejected any presumption that the State had acted in good faith and for the public interest. Rather, the Court treated the enactment of these laws with suspicion and gave the State the heavy burden of proving that some “overriding statutory purpose” necessitated the race-based prohibition. While the laws may have been equally applicable as a formal matter, their impact on a group lacking voice in the majoritarian channels necessitated close judicial scrutiny.

3. Congressional Enforcement Power

The influence of defective pluralism on the jurisprudence of liberal members of the Warren Court can also be seen in the Court’s approach to congressional power to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment. Section 5 gives Congress the power to enforce the other articles of the Fourteenth Amendment by “appropriate legislation.” In the period immediately after the ratification of the Amendment, the Court broadly deferred to congressional exercises of Section 5 power, even when such exercises invaded state sovereignty. As the Court explained in response to a State’s challenge to one such exercise of congressional authority, “[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.”

In the middle of the twentieth century, the Warren Court continued to defer to Congress’s exercises of its enforcement powers. It also deferred to congressional intrusion into areas of traditional state sovereignty aimed at providing considerably greater protection to minorities than that mandated under the Constitution. For example, in South Carolina v. Katzenbach and Katzenbach v. Morgan, the Court deferred to Congress’s exercise of its Fourteenth and Fifteenth Amendment enforcement powers to enact the VRA,

board’s “freedom of choice” attendance plan for desegregation); Loving v. Virginia, 388 U.S. 1, 10–11 (1967) (closely scrutinizing and invalidating an anti-miscegenation law); Louisiana v. United States, 380 U.S. 145, 151–53 (1965) (closely scrutinizing and striking down as racially discriminatory a voter registration law requiring that registrants interpret the Constitution); Anderson v. Martin, 375 U.S. 399, 401–04 (1964) (closely scrutinizing and invalidating a law requiring the racial designation of candidates on nomination papers and ballots); McLaughlin v. Florida, 379 U.S. 184, 191–94 (1964) (closely scrutinizing and invalidating a prohibition on interracial cohabitation). But see Swain v. Alabama, 380 U.S. 202, 221–22 (1965) (upholding the prosecutor’s use of peremptory strikes against black jurors under a deferential form of strict scrutiny because “to subject a prosecutor’s challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge”).

92. See McLaughlin, 379 U.S. at 191.
93. See id. at 192.
94. See U.S. CONST. amend. XIV, § 5.
95. See, e.g., Ex parte Virginia, 100 U.S. 339 (1879).
96. Id. at 346. The one limitation the Court placed on this power was that Congress could only apply its statutory prohibition to state actors and action. See Civil Rights Cases, 109 U.S. 3, 11 (1883).
which dramatically intruded into traditional state sovereignty to protect racial minority voting rights. In both cases, a liberal majority applied a constitutional standard granting Congress broad power to pass “[w]hatever legislation is appropriate [and] adapted to carry out the object[ives]” of the Reconstruction Amendments. The message from these cases was that democratic actions were entitled to judicial trust when the actions protected the rights of the marginalized.

Congress, however, remained a majoritarian institution that could not escape the suspicions of the Court when it acted to harm the politically marginalized. As a preemptive matter, the Court, through Justice Brennan, articulated its famous one-way “ratchet theory” of congressional enforcement power. Under this theory, Congress has the authority to add to the constitutional protections granted to minorities under the Equal Protection Clause, as it did with the Voting Rights Act. However, Congress lacks the power “to exercise discretion in the other direction and to enact ‘statutes so as in effect to dilute equal protection and due process decisions of this Court.’” In advancing the ratchet theory, the Court seemed to perceive Congress as a majoritarian institution vulnerable to the defects of pluralism. It therefore could not be trusted when it used its constitutional enforcement powers to harm minorities.

4. Structuring the Political Process

Finally, the Warren Court’s liberal majority not only scrutinized democratic outcomes to protect the politically marginalized from unfair treatment and deferred to legislation that protected these minorities, but also actively structured the representative process. In a line of cases addressing minorities’ voting and political representation rights, the Court established two new doctrines to help redress minority exclusion from the pluralist marketplace.

One new doctrine governing the representative process emerged in response to the political stranglehold that rural, mostly white, voters had over state and federal legislatures in the mid-twentieth century. This stranglehold was secured through judicial acquiescence to the legislative drawing of malapportioned districts that gave sparsely populated rural districts the same level of representation as heavily populated and more racially diverse urban

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98. See Morgan, 384 U.S. at 650 (citing Ex parte Virginia, 100 U.S. at 345–46); South Carolina, 383 U.S. at 327.
99. See Morgan, 384 U.S. at 651–52 n.10.
100. Id.
districts. The Warren Court’s reapportionment revolution changed this dynamic. In a series of cases, the Court required that States provide individuals with fair representation in the political process. This meant that States had to create equal population districts according to a standard of one-person, one-vote.

The one-person, one-vote doctrine responded to a defective pluralism conception of the political process. The liberal majority of the Warren Court removed the ability of white rural residents to maintain structures that gave them disproportionate power and led to inequalities in the representation of the urban majority. After the reapportionment revolution, only democratic majorities could constitutionally rule in state legislatures and in the United States House of Representatives.

Recognizing that majority rule did not resolve the principal pluralist defect—exclusion of minorities from politics—the Court also set out to directly protect the representational interests of politically marginalized groups. The Court interpreted the Equal Protection Clause to prohibit voting schemes that “operate to minimize or cancel out the voting strength of racial or political elements of the voting population.” This doctrine, referred to as a bar on “vote dilution,” put the Court in the role of overseeing the structure of the representative process to secure the effective representation of all groups.

The Court’s constitutional vote dilution doctrine worked in tandem with close judicial scrutiny of voting qualifications that disenfranchised marginalized minorities, such as state poll taxes and property qualifications.

102. See Colegrove v. Green, 328 U.S. 549, 552 (1946) (finding challenges to malapportioned districts to be a non-justiciable political question). The result of such malapportionment was “minority rule in many states,” which “meant that a minority of the population was able to elect a majority of representatives in state and federal legislative bodies.” Bertrall L. Ross II, The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard, 81 FORDHAM L. REV. 175, 205 & n.161 (2012); see also ANSOLABEHERE & SNYDER, supra note 101, at 47 (describing the degree of malapportionment in each state).


104. See Reynolds, 377 U.S. at 578–79.

105. See, e.g., Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 HARV. L. REV. 29, 44 (2004) (“The justification for judicial review in contexts such as malapportionment is to address the structural risk of political self-entrenchment.”).


The presumption of constitutionality and the approval given “rational” classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less
The doctrine also complemented Congress’s Voting Rights Act, which the Court itself further reinforced through a broad interpretation of the Act. As a result of the Court’s broad interpretation of the VRA, places that had historically excluded blacks from the political process experienced not only significant growth in registration but also in black office-holding, an important indicator of increased representation.

As with other equal protection doctrines of this era, the Court’s line of cases involving the structuring of the political process is consistent with a defective pluralism conception of politics. The Court tried to ameliorate the exclusion of politically marginalized minorities from the pluralist bargaining process. By structuring the political process to secure political power for politically marginalized minorities, the liberal majority seemed to think that some of pluralism’s defects would be rectified.

5. Summary

The Warren Court’s equal protection jurisprudence reflects distrust toward democratic institutions—distrust animated by a concern that the political process was not operating properly to protect politically marginalized minorities. Through the development of four separate doctrines, the Court in this era established a presumption of invalidity for laws that harmed such minorities. First, the Court closely scrutinized laws harming groups that it viewed as excluded from pluralist bargaining and majority coalition building, such as noncitizens and the poor. Second, in the race context, the Court closely scrutinized laws that ostensibly applied equally to African Americans and whites to determine whether they subordinated the politically marginalized minority.

Third, when Congress created additional layers of statutory protection for marginalized minorities, the Court deferred to Congress’s exercises of its power to enforce the Equal Protection Clause. The Court, however, did not similarly defer to congressional enactments that diluted the equal protection rights of these minorities. Congress, as a majoritarian institution, could not be trusted when it disadvantaged marginalized minorities. Finally, the Court, through its close scrutiny of state infringements on the right to vote and of

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under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decision just as effectively as if the decisions were made by legislators the minority had no voice in selecting.

Kramer, 395 U.S. at 628.


obstacles to minorities’ fair and effective representation in the political process, actively structured the political process to correct defects in its operation. The Court’s ultimate goal was to structure the political process to empower the marginalized to defend themselves through majoritarian channels so that judicial intervention would become unnecessary.

Each of these doctrines underwent significant change when a more conservative majority took control of the Supreme Court in the early 1970s. Over the next twenty years, the Court’s equal protection jurisprudence was transformed: a doctrine reflecting greater trust of democratic institutions in their treatment of minorities replaced the earlier Courts’ doctrines of distrust. In the next Part, I argue that this jurisprudential transformation was animated by the newly dominant conservative Justices’ adherence to an alternative conception of the operation of politics.

II. FROM A DEFECTIVE PLURALISM TO AN OPTIMISTIC PLURALISM CONCEPTION OF POLITICS

The Supreme Court’s equal protection jurisprudence underwent a major transformation beginning in the early 1970s. The prior Court had closely scrutinized state actions in a way that suggested judicial distrust of democratic majorities’ treatment of minorities—a product of its defective pluralism conception of politics. But when a new conservative majority took control, the Court began to defer to majoritarian institutions in their treatment of minorities. This deference seemed to reflect an emerging optimism that minorities had been elevated from a position of marginalization to equal partners within the pluralist process. These minorities, according to this account, no longer required much in the way of judicial protection from the majoritarian process.

In this Part, I offer an explanation for why and how conservative perceptions of the positions of minorities in the pluralist process changed in the early 1970s. I then show how the equal protection jurisprudence of the more conservative members of the Burger Court is consistent with the evolution toward an optimistic conception of the pluralist process.

A. The Changing Judicial Perception of Minorities’ Position in the Pluralist Marketplace

In the late 1960s and early 1970s, Republican President Richard Nixon appointed four Justices to the Supreme Court. Three of the four Warren Court Justices replaced were part of the liberal coalition that had advanced an
equal protection jurisprudence that accorded with a defective pluralism conception of politics. With this change in the composition of the Court came gradual and important shifts in its equal protection jurisprudence. In doctrines developed from the mid-1970s to the early 1990s, a conservative majority applied a stronger presumption of constitutionality to democratically enacted laws—even those that disparately harmed historically subordinated and politically marginalized minorities.

For the conservative Justices on the Burger Court, much had changed since the prior era. The Voting Rights Act had led to the mass enfranchisement of African Americans. In addition, the Court’s expansive interpretations of the VRA and the Equal Protection Clause facilitated greater representation of racial minorities in the political process with African Americans and Latinos entering political office in record numbers. Racial minorities had used this newfound political power to support policies that advanced their interests. These efforts culminated in the 1975 and 1982 reauthorizations of the VRA, expansion of the federal Civil Rights Act in 1972 and 1991, and the establishment of affirmative action programs and other antidiscrimination provisions at both the state and federal level.

Conservative members of the Burger Court not only seemed to perceive racial minorities as better positioned to advance their interests through democratic channels, but they also seemed to feel this way about other groups as well. The passage of legislation advancing the interests of the poor, the aged, and the disabled indicated to the conservative Justices that the political marginalization of these groups had been ameliorated. The War on Poverty had been fought on behalf of the poor in the 1960s, and the Court seemed to presume that the Democratic Party continued to serve as the political sponsor of the poor in the 1970s and 1980s. For example, when poor, black residents of Marion and Lake Counties, Indiana asserted that a districting scheme denied them effective representation in the political process, the Court wrote “it seems reasonable to infer that had the Democrats won [elections], the ghetto [residents] would have had no justifiable complaints about representation.” For the conservative majority, optimistic about the prospects of all groups in

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111. Chief Justice Warren and Justices Fortas and Black were the three members of the Warren Court who were historically sympathetic to individual rights and were replaced by more conservative Justices.


113. See id. at 329–37.


the pluralist marketplace, “[t]he mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies.”116

In addition, between the 1960s and 1980s, Congress passed a host of legislation that protected the aged and the disabled.117 As the Court explained in a case addressing discrimination against the developmentally disabled, “the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates . . . that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.”118 The Court conceded that these groups did not necessarily get everything that they wanted, but for the conservative Justices, the fact that there were winners and losers in politics did not entitle the losers to special judicial protection.119

B. Optimistic Pluralism and the Burger Court’s Equal Protection Jurisprudence: Democratic Trust

Gradually, the conservative Justices’ more optimistic view of the pluralist process came to be reflected in the period’s equal protection doctrine. This era extended from the mid-1970s to the early 1990s—an era that for ease of reference, I refer to as the Burger Court era, although the Burger Court technically ended in 1986. During this time, the Justices’ concern about the tyranny of majority coalitions was replaced by optimism that political struggle in the pluralist marketplace led to outcomes that accorded with the public good. The pluralist struggle inevitably produced winners and losers, but for the new conservative majority, the presumed openness and inclusiveness of majoritarian politics meant that few groups were actually entitled to special judicial protection to compensate for their losses. “[T]he United States had become a Nation of minorities,” as Justice Powell famously asserted in the affirmative action case of Regents of the University of California v. Bakke.120

Equal protection doctrines consistent with optimistic pluralism shifted from reflecting distrust of democratic institutions in their treatment of minorities to generally reflecting trust of these institutions. The new optimistic

116. See id. at 154–55.
118. Cleburne, 473 U.S. at 443.
119. See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 496 (1982) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O’Connor) (“In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.”).
pluralism conception of politics sometimes resulted in explicit changes to doctrine. But often, the desire to maintain the pretense of doctrinal consistency for purposes of institutional legitimacy proved too strong. The evolution toward the Court’s conception of the operation of politics was therefore usually reflected less in changes to the doctrinal tests than in how they were applied.

There was, however, one important exception to the conservatives’ doctrinal expression of trust of democratic institutions in their treatment of minorities: in certain affirmative action cases, the conservative members proved less willing to defer to decision-making institutions controlled by minorities who passed laws benefiting other members of the same minority group. The Court, as will be discussed further below, seemed to perceive this as a form of self-dealing.

1. Marginalized Groups

The first notable shift in the Court’s equal protection jurisprudence was a movement away from providing marginalized groups with special protection from the majoritarian process. Presuming that the political process operated defectively, the Warren Court was willing to heed calls from aliens and the poor for greater judicial scrutiny of state actions. In contrast, the Burger Court proved much less willing to provide such protection. For example, in rejecting a request to closely scrutinize an unequal school financing system, a conservative majority in San Antonio Independent School District v. Rodriguez explained that the poor were not “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” The Court used similar language in declining to extend exacting scrutiny to the elderly in Massachusetts Board of Retirement v. Murgia and the mentally disabled in Cleburne v. Cleburne Living Center.

Rather than being considered minorities at the mercy of the majority, the conservative majority of Justices seemed to see the poor, the aged, and the disabled as equals among many other participants in the pluralist


Instead of being entitled to judicial protection, these groups were required to struggle and compromise to achieve their preferred outcome. Working from a baseline of progress in the political inclusion of marginalized minorities, the Court generally presumed the constitutional legitimacy of laws imposing a disparate harm on nonracial minority groups.

The singular exception to this trend was the Court’s treatment of gender classifications. Prior to the more conservative Court’s ascendance in the 1970s, gender classifications had been consistently reviewed under a rational basis standard that was highly deferential to the state. Even the most liberal Justices on the Warren Court considered reasonable the justifications for discriminatory laws founded on presumptions about the biological differences between men and women and on woman’s role in the home and society. This, however, began to change during the early years of the Burger Court. The Warren Court’s liberal holdovers relied on a defective pluralism conception of politics to advocate for close scrutiny of classifications that discriminated against women. They were, however, unable to secure majority support for that position. In rejecting it, the conservative Justices pointed to the concurrent political struggle for a constitutional amendment that would secure the equal rights of women. To the conservatives, the struggle indicated that women had political power and that application of a much more deferential standard to the bargains and compromises of the democratic process was appropriate.

Eventually, however, the more liberal Justices were able to secure the support of the moderate conservative Justices on the Burger Court for intermediate scrutiny of gender classifications: a standard more rigorous than the highly deferential rational basis review but less rigorous than strict

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125. *Cleburne*, 473 U.S. at 446 (“[B]ecause both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.”); *Murgia*, 427 U.S. at 313 (“[E]ven old age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process.’”); see also *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (relying on *Murgia* and finding the elderly not to be a suspect class for purposes of evaluating the constitutionality of a congressional retirement statute).


129. See *Frontiero*, 411 U.S. at 691–92 (Powell, J., concurring).

scrutiny.\textsuperscript{131} The justification for applying this greater level of scrutiny had nothing to do with providing a politically powerless group with special judicial protection from majoritarian processes; that battle had already been fought and lost.\textsuperscript{132} Instead, the intermediate level of scrutiny was a mechanism through which the Court could differentiate between laws based on “real” gender differences and those based on stereotypes.\textsuperscript{133} The Court’s decision to apply a heightened level of scrutiny to gender classifications was therefore not informed by a conception of politics. However, an evolving conception of politics did very much animate the Court’s shifting equal protection race jurisprudence.

2. Racial Groups

a. Laws Disadvantaging Racial Minorities: The Discriminatory Purpose Standard

The conservative Justices’ new treatment of racial discrimination claims marked a second important shift in the Court’s equal protection jurisprudence. With the exception of one important set of vote dilution cases discussed below,\textsuperscript{134} the Court declined to categorically subject to strict scrutiny facially neutral laws that disparately harmed historically subordinated racial minorities. Under the new conservative regime, in order to bring a successful equal protection claim against such a law, a challenger had the difficult task of proving that the state was motivated by a discriminatory purpose in its adoption of the law.\textsuperscript{135} At its core, the discriminatory purpose standard presumed state actions that disparately harmed a racial minority were the product of a fairly operating pluralist process animated by the objective of serving the public good, and not by some other nefarious goal such as prejudice. The burden was on the challenger to prove otherwise.

\textit{Washington v. Davis} exemplifies the presumption of a properly operating pluralist marketplace. In that case, the Court rejected the idea of applying strict scrutiny to all laws that disproportionately harmed minorities, stating that such an approach would potentially invalidate “a whole range of tax, welfare, public

\begin{footnotesize}
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\item In fact, many of the gender classifications struck down under this intermediate scrutiny standard disparately harmed males. See, e.g., Craig, 429 U.S. at 192; Califano v. Goldfarb, 430 U.S. 199, 201 (1977).
\item See infra Part II.B.
\end{enumerate}
\end{footnotesize}
service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”

Implicit in the Court’s stance was a view that the democratic adoption of such disparately harmful policies is entitled to deference—apparently because the outcomes of democratic institutions should be presumed the product of fair bargaining and compromise.

The presumption of constitutionality for facially neutral laws that disproportionately harmed racial minorities marked a fundamental shift from the prior regime. Whereas the Warren Court subjected to close scrutiny explicitly race-based laws that applied equally to the different races to assess whether they subordinated racial minorities, a conservative majority of the Burger Court refused to extend such scrutiny to facially neutral laws. Much attention has been directed to the contrast between laws that expressly classify by race and those that do not. But ultimately, this is a distinction without real difference. States consider race in many activities that have not raised suspicion, such as when they collect census data, identify criminal suspects, structure adoption placements, and draw legislative districts. What made particular uses of race invidious in the Warren Court’s eyes was the harm of the race-based policy to racially subordinated minorities. States’ racial segregation of children into different schools and prohibition of interracial marriage were subject to close scrutiny because these official acts had a stigmatizing effect on politically marginalized racial minorities.

Like laws that explicitly mention race, race-neutral laws can disparately harm and stigmatize racial minorities. For example, challengers in one case pointed to the fact that the use of a facially neutral promotion test limited African American employment promotion opportunities relative to whites. In another case, challengers demonstrated that a housing ordinance disproportionately denied relatively poorer African Americans affordable housing opportunities. Such laws may stigmatize as much as an explicit racial classification insofar as they leave racial minorities disproportionately segregated into the lower rungs of employment and the ghettos of inner cities—in positions that are separate and unequal. Nonetheless, unlike the Warren Court, the conservative members of the Burger Court deferred to democratic

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136. Davis, 426 U.S. at 248.
138. See Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. MIAMI L. REV. 9, 28 (2003) (arguing these differences suggest that the “application of the anticlassification principle often depends on judgments concerning the presence, absence, or degree of status-harm”).
139. See supra Part I.C.
140. Davis, 426 U.S. at 235–36.
institutions’ enactment of laws that disproportionately harmed minorities. This new conservative race doctrine reflected a greater faith in the ability of the pluralist marketplace to include racial minorities.

b. Laws Advantaging Racial Minorities: The Affirmative Action Cases

The evolution in judicial treatment of democratic actions that harmed racial and other marginalized groups is indicative of the Court’s changing view of the ordinary operation of politics. However, the shift toward a more optimistic view of pluralist politics is perhaps most clear in cases involving challenges to state actions advantaging racial minorities. For many equal protection scholars, the Burger Court’s affirmative action jurisprudence reflected a shift from antisubordination to anticlassification. Rather than focusing on the protection of racial minority groups from subordination, the Court sought to protect all individuals, white or minority, from government use of race.142

But a closer look at judicial doctrine during this era reveals a continued focus on harms arising from the position of groups in the political process. Conservatives on the Burger Court continued to protect against a form of group subordination, but the Court’s attention shifted to a different source of subordination. Group-based domination and subordination, according to the new conservative construction of the Equal Protection Clause, were no longer shaped by a long history of racial oppression, but instead determined by the current political context. Specifically, the conservative Justices’ categorization of racial groups shifted from historically dominant and historically subordinate to politically dominant and politically subordinate.143 The conservatives seemed to measure political dominance and subordination according to which group possessed majority control over the decision-making apparatus. For these categories of political dominance and subordination, it did not matter that the group currently in power had been historically subordinated, or that the groups out of power had been historically dominant.

In the affirmative action cases, conservatives on the Burger Court viewed whites as simply another group. These Justices determined when it was presumptively permissible to benefit racial groups and when it was not based on whether they perceived the group as potentially engaging in self-dealing.

142. See, e.g., Siegel, supra note 31, at 1292 (arguing Justice Powell’s opinion in Bakke represented a rejection of an antisubordination reading of the Equal Protection Clause); Balkin & Siegel, supra note 138, at 10 (describing the Court’s rejection of the antisubordination approach in the 1970s in favor of the anticlassification approach); Bybee, supra note 70, at 283 (attributing an anticlassification approach to Justice Powell’s opinion in Bakke); but see Rubenfeld, supra note 28, at 1168 (identifying the Rehnquist Court’s affirmative action decision in Adarand as the point at which the Court shifted to an anticlassification approach).

143. See Gotanda, supra note 85, at 37 (describing this period’s shift away from recognition of “the diverging historical experiences of Black and white Americans” to “a vision of race as unconnected to the historical reality of Black oppression”).
When the group in control of the state decision-making apparatus adopted laws that benefitted members of other, politically subordinate groups, the Court applied an extraordinarily deferential form of strict scrutiny and validated the laws. This seemed to reflect a conservative optimism that the ordinary pluralist process was at work, making a presumption of constitutionality appropriate. However, when a politically dominant group adopted laws to the express benefit of other members of their own group, the ordinary rigorous strict scrutiny applied and it proved fatal to the laws challenged. These democratic outcomes were not presumed to be the product of ordinary pluralist processes, but rather malfunctions resulting from self-dealing by the politically dominant racial minority group.

For example, in Bakke, the Court addressed a challenge to UC Davis School of Medicine’s special admission program, which was designed to increase admissions of historically disadvantaged groups. In his opinion, Justice Powell explained that the context of African American enslavement and subordination to a monolithic white majority had been displaced. In its place, a nation of minorities had arisen in which each group “had to struggle . . . and to some extent struggle still . . . to overcome the prejudices . . . of a ‘majority’ composed of various minority groups [whose] shared characteristic was a willingness to disadvantage other groups.” According to Justice Powell, it was not just African Americans who could be subordinated, but any minority group, including members of white minority groups. The “two-class theory” of equal protection, in which the clause applied differently to different groups based on their history of subordination, no longer had a place.

The special admissions program designed to benefit historically disadvantaged groups would therefore be subject to the same close judicial scrutiny that the Court had ordinarily reserved for actions that disadvantaged these same groups. This application of strict scrutiny to state actions benefitting historically subordinated minorities seemed inconsistent with the

145. Id. at 292; see also Bybee, supra note 70, at 278 (finding a link between Justice Powell’s view of group politics and the writings of two interest group pluralists, Robert Dahl and Richard Posner).
146. Bakke, 438 U.S. at 292 (in the words of Justice Powell, as “the Nation [has] filled with the stock of many lands, the reach of the [Equal Protection] Clause [has] gradually extended to all ethnic groups seeking protection from official discrimination”); see also Haney López, supra note 28, at 1034–37 (historicizing the rise of race as ethnicity in Justice Powell’s opinion in Bakke and arguing that it “laid the framework for the subsequent adoption of reactionary colorblindness”); Bybee, supra note 70, at 279 (arguing that Justice Powell in Bakke “carves out a judicial role . . . converting the Court into a guarantor of interest-group process . . . sav[ing] interest-group politics from its own excesses”).
147. Bakke, 438 U.S. at 295; see Haney López, supra note 28, at 1038–39 (“Powell’s analysis indicated that since all contemporary racial dynamics involved merely interest group politics, no government action would merit heightened review simply because it disadvantaged groups on the basis of racial or ethnic classifications.”).
very justifications for applying this form of scrutiny in the first place. The *Carolene Products* footnote suggested that exacting judicial scrutiny should be reserved for the review of laws enacted through a procedural defect, either due to a process that excluded discrete and insular minorities from decision making or one that ignored their interests out of prejudice. The special admissions program, however, benefited the very minorities that had up to then been considered the object of exclusion. But in Justice Powell’s nation of minorities, the history of the subordination of groups was much less relevant to the determination of a group’s entitlement to special protection from majoritarian processes. What mattered was the current position of groups vis-à-vis each other in a particular decision-making context.

Thus, despite its irrelevance in prior equal protection jurisprudence, the issue that Justice Powell focused on in *Bakke* was the fact that a majority of the UC Davis special admissions committee were members of historically subordinated racial minority groups. The perception that these groups controlled a special admissions process that benefitted members of their own groups seemed to underlie Justice Powell’s determination that the affirmative action program was a presumptively unconstitutional racial classification. For Justice Powell, an active role for the Court in supervising the special admissions program arose from a need to police the special admission committee’s self-dealing. The Justice seemed to perceive members of the committee as doling out special benefits in the form of medical school admissions to their racial allies at the expense of politically “subordinated” whites.

Once Justice Powell determined that strict scrutiny was applicable, he applied it rigorously and without any optimistic pluralism presumption that the special admissions committee acted in good faith. The committee, according to Justice Powell, had essentially imposed a racial quota. This admissions process, Justice Powell asserted, “tells applicants who are not [African American], Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class.” Justice Powell gave little weight to the medical school’s argument that the program was necessary to remedy discrimination against historically subordinated groups in education and in

149. *See supra* Part I.A. *But see* Ackerman, *supra* note 38, at 723–24 (“Other things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.”).

150. *Bakke*, 438 U.S. at 274; see William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 800–02 (1979) (criticizing Justice Powell’s consideration of the demographic composition of the special admissions committee as “the worst sort of racism”).

151. *See Bakke*, 438 U.S. at 274.

152. Justice Powell initially refused to label it a quota, see *id.* at 289, but in a later case, he reframed the UC Davis medical school admissions policy as being just that, see *Fullilove v. Klutznick*, 448 U.S. 448, 498 (1980) (Powell, J., concurring).

prior medical school admissions. The desire to remedy broader societal
discrimination was simply not a compelling state interest. And although
Justice Powell considered racial diversity to be compelling, he determined that
the use of such a “quota” was not narrowly tailored to achieve that interest.

Two years after Bakke, in Fullilove v. Klutznick, the Court addressed a
challenge to a congressional affirmative action law that explicitly classified on
the basis of race. The decision revealed that when a politically dominant
group benefitted members of politically subordinate groups, the conservative
Justices were willing to apply their usual optimistic pluralism conception of
politics. The Court did not seem concerned with self-dealing and, despite using
the language of strict scrutiny, applied something closer to a presumption of
constitutionality to the affirmative action program.

The law challenged in Fullilove required, subject to a waiver, that States
and localities use at least ten percent of the federal funds granted for local
public works projects to procure services or supplies from minority-owned
business enterprises. As in Bakke, the Court was sharply divided with the
majority of the Justices voting to uphold the program, but disagreeing on the
applicable standard of scrutiny. For the more conservative plurality, strict
scrutiny continued to be the appropriate standard of review. However, the
form of strict scrutiny applied was unlike any the Court had ever employed.
Under the Court’s ordinary application of strict scrutiny, state actors had an
extremely heavy burden to show a compelling interest and an even heavier one
to show that the program was necessary to achieve this interest. If the
standard were properly applied, Congress would not have met this burden of

154. Id. at 307–10.
155. Id. at 310.
156. Id. at 315–18.
158. Id. at 454. A comparison of the medical school special admissions program challenged in
Bakke to the minority set-aside program in Fullilove shows the latter program to be much more explicit
in its use of race. The business enterprises eligible for the set-aside in Fullilove included those owned by “[African-Americans], Spanish-speaking, [Asian-Americans], Indians, Eskimos, and Aleuts.” Id.
159. A moderate conservative plurality comprised of Justices Burger, White, and Powell voted
to uphold the affirmative action program applying strict scrutiny. Liberal Justices Marshall, Brennan
and Blackmun voted to uphold the affirmative action program applying intermediate scrutiny. Justices
Stewart, Rehnquist, and Stevens dissented arguing that the affirmative action program should be
invalidated under strict scrutiny.
160. Fullilove, 448 U.S. at 480.
161. The plurality’s decision to uphold the program under this standard was notable because if
their opinion controlled, it would have been the first state action to survive strict scrutiny in over thirty
years. Prior to Fullilove, the Court had not upheld a state action under the strict scrutiny standard since
162. Fullilove, 448 U.S. at 480.
justification for its minority set-aside program. But the conservative plurality in Fullilove applied a different standard, levying a rather light burden on Congress to prove that it was remedying discrimination that it had caused. The plurality essentially ignored Congress’s failure to produce any direct evidence that it contributed to these past discriminatory practices that Congress sought to remedy with the set-aside program. In addition, as to the question of whether the minority set-aside program was necessary to achieve the compelling interest, the plurality conceded that the program was both over- and under-inclusive. It also never interrogated whether Congress had pursued or considered alternative means to remedy its past discrimination, a requirement consistently applied in the Court’s prior cases applying strict scrutiny. The conservative plurality in Fullilove justified this unusual deferential form of strict scrutiny because Congress, as a coequal branch of government with the power to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment, had enacted the affirmative action program.

The contrast between Bakke and Fullilove was sharp—what was different about the special admissions committee in Bakke that deprived it of a similar entitlement to deferential scrutiny? It is difficult to accept at face value the plurality’s explanation that separation of powers considerations of respect due to the coordinate branches of government supported the Court’s application of deferential strict scrutiny to Congress and ordinary strict scrutiny to the States. Prior to Fullilove, the Court had never applied a more deferential level of review to congressional race and gender classifications than it did to analogous state classifications. In fact, in prior cases the Court never mentioned

163. Only in the context of military necessity during wartime had a state action been held to survive this form of scrutiny. See Korematsu, 323 U.S. at 218; Hirabayashi v. United States, 320 U.S. 81, 112 (1943). For other state actions lacking such a justification, strict scrutiny was “‘strict’ in theory, but fatal in fact.” See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972).

164. The evidence that Congress produced included prior statistical disparity in procurement from minority-owned business enterprises; an assertion by the sponsor of the bill of a need to ensure fair opportunities for minority business in federal government funds; and assertions by subcommittees reviewing other bills that “low participation by minorities in the economy was the result of ‘past discriminatory practices.’” Fullilove, 448 U.S. at 505 (Powell, J., concurring).

165. Id. at 485–86.

166. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–16 (1978) (Powell, J. concurring) (invalidating the UC Davis School of Medicine affirmative action plan in part because it failed to consider as an alternative the Harvard plan of using race as a factor in admissions).

167. Fullilove, 448 U.S. at 472.

Congress’s institutional status or Section 5 authority as a relevant consideration to the level of scrutiny.

The difference between *Bakke* and *Fullilove* seemed instead to rest on the composition of the political body that adopted the affirmative action program in each case (Congress was majority white while the admissions committee was majority minority) and the Court’s concern that one context implicated intragroup self-dealing and the other did not. This theory would receive further confirmation from the Court ten years later. In *Richmond v. Croson*, a conservative majority again applied strict scrutiny to a minority set-aside program adopted by the Richmond City Council.\(^{169}\) The Richmond set-aside program was virtually identical to the congressional program upheld in *Fullilove*, with similar evidence provided in the legislative record to support its constitutionality.\(^{170}\) Despite the similarities between the federal and city set-aside program, the Court invalidated the city program, employing a rigorous level of scrutiny that bore virtually no resemblance to the scrutiny applied by the conservative plurality in *Fullilove*. The conservative majority gave much less deference to the city council’s representation that the design of the set-aside program served the interest of remedying discrimination, dismissing evidence very similar to the congressional evidence that sufficed in *Fullilove*.\(^{171}\)

Tellingly, the *Croson* Court dismissed as self-serving the testimony of government officials who described in broad terms the function of the set-aside program as remedying past discrimination in contracting. The Court had, of course, accepted similar testimony in *Fullilove*. The *Croson* Court explained, “the mere recitation of a ‘benign’ or legitimate purpose for a racial

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170. Both programs set aside a certain percentage of government contracting dollars for minority business enterprises. Both programs also included clauses ending the program after a certain number of years and a waiver to be applied when there were not enough qualified enterprises for the dollars reserved. *Croon*, 488 U.S. at 529 (Marshall, J., dissenting).

171. To justify enactment of the program, the Richmond City Council had, like Congress, provided evidence of the statistical disparity in the number of minority business enterprises that had received local construction contracts. These statistics revealed that only 0.67 percent of the city’s prime construction contracts went to minority business enterprises even though the city of Richmond was approximately 50 percent black—a much more extreme racial disparity than existed at the national level. *Id.* at 479. In addition, the city council relied on the same federal studies that Congress had in *Fullilove* showing the nationwide barriers that minority business enterprises faced in securing construction contracts. *Id.* at 529–33 (Marshall, J., dissenting). Moreover, like Congress, Richmond also produced testimony from current and former city elected officials attesting to the widespread nature of racial discrimination in contracting and to their belief that the program would eradicate the effects of this discrimination. *Id.* at 534 (Marshall, J., dissenting). Although far from dispositive, this testimony was arguably stronger than that produced by Congress linking state action to past discrimination in *Fullilove*.
classification is entitled to little or no weight.”

Given the suspect nature of racial classifications, “simple legislative assurances of good intention cannot suffice.” In a shift from *Fullilove*, the conservative majority in *Croson* considered these testimonial statements to be “of little probative value in establishing identified discrimination.” Finally, the conservative majority subjected to close scrutiny the council’s chosen means of remediying past discrimination. The use of a particular set quota, which the conservative plurality in *Fullilove* had considered narrowly tailored despite its under- and over-inclusivity, did not receive a similar pass in *Croson*.

In *Croson*, Justice O’Connor tried to justify the difference in the level of scrutiny as arising from separation of powers concerns and the role of Congress as a coequal branch in enforcing the Equal Protection Clause under Section 5 of the Fourteenth Amendment. But of the conservatives, only Chief Justice Rehnquist joined this part of the opinion. Moreover, as Justice Powell had in *Bakke*, Justice O’Connor in *Croson* took the unusual step of describing the racial composition of the decision-making body. She rejected the argument that because the racial classification did not arise from whites disadvantaging historically subordinate racial minorities, the Court should apply something less than strict scrutiny. She pointed to the fact that African Americans held five of the nine seats on the city council. According to Justice O’Connor, that a political body composed in such a way had established a program primarily beneficial to other African Americans “militate[d] for, not against, the application of heightened judicial scrutiny.”

In the eyes of the conservative plurality in *Croson*, the majority-black political body’s adoption of an affirmative action program was more likely the product of “racial politics” than of healthy pluralist bargaining and compromise. Justice O’Connor explained that failing to scrutinize these

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172. *Id.* at 500.

173. *Id.*

174. *Id.*

175. *Id.* at 506.

176. *Id.* at 490 (arguing “Section 1 of the Fourteenth Amendment is an explicit constraint on state power” while Section 5 is “a positive grant of legislative power” (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966))).

177. *Id.* at 490–92.

178. *Id.* at 495.

179. *Id.*

180. *Id.* at 496. *But see* Rosenfeld, supra note 40, at 1774–77 (criticizing the analogy the Court draws between the actions of the Richmond City Council and a case where a white majority enacts a law to disadvantage a black minority).

types of actions would open the floodgate for “legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate ‘a piece of the action’ for its members.”\textsuperscript{182} In other words, it would open the floodgate to further racial minority group self-dealing.

Justice Scalia, writing in concurrence, was even more explicit in describing the source of concern: a majority black political body had adopted an affirmative action program that primarily benefited other African Americans. Justice Scalia explained that “[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States.”\textsuperscript{183} Racial discrimination against minorities is more likely to manifest itself in the smaller political units of states and localities where a particular political faction is more likely to dominate.\textsuperscript{184} For Justice Scalia, the Madisonian concern with majority tyranny “came to fruition” in Richmond where the “dominant political group” enacted a law beneficial to members of its own group and at the expense of the politically subordinate white minority.\textsuperscript{185}

In \textit{Metro Broadcasting v. FCC}, a case decided a year after \textit{Croson}, a liberal majority relied on the logic that the racial composition of the political body implementing the affirmative action program mattered. The Court applied an intermediate form of scrutiny and upheld two minority preference policies administered by the Federal Communications Commission (FCC).\textsuperscript{186} As support for its application of intermediate as opposed to strict scrutiny, the majority cited to the deferential strict scrutiny standard the conservative plurality used to uphold the congressionally enacted set-aside program in \textit{Fullilove}.\textsuperscript{187} It determined that the more deferential form of scrutiny was appropriate because the case did not raise the type of concerns about racial minority self-dealing that animated the more rigorous form of strict scrutiny in \textit{Croson}.\textsuperscript{188} Unlike the majority black city council, the liberal majority explained, “the Federal Government is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination.”\textsuperscript{189} Justice Scalia’s concern about “the heightened danger of oppression from political factions in small, rather than large, political units” was ameliorated when a

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\item 182. \textit{Croson}, 488 U.S. at 511.
\item 183. \textit{Id.} at 522 (Scalia, J., concurring).
\item 184. \textit{See id.} at 523–24 (Scalia, J., concurring); \textit{see also} Haney López, \textit{ supra} note 28, at 1048, 1051 (imagining Justice Scalia’s thought process: “What is this so-called affirmative action . . . but racial rent-seeking by a new dominant race” making whites “the new minority”).
\item 185. \textit{Croson}, 488 U.S. at 524.
\item 187. \textit{Id.} at 563.
\item 188. \textit{See supra} text accompanying notes 171–75.
\item 189. \textit{Metro Broad.}, 497 U.S. at 566.
\end{enumerate}
\end{footnotesize}
federal agency acted because it not only governed a large political unit, but perhaps more importantly, was majority white. 190

The conservative Justices nonetheless dissented. Deference to agency administration of an affirmative action program was not appropriate. 191 Signaling a shift to a more cynical conception of politics, the conservative Justices suggested agencies could not be trusted to adopt policies that reflect the public good. 192 Instead, like the majority-black Richmond City Council, federal administrative agencies emerged as potential objects of racial group capture. 193

In sum, the seminal affirmative action cases of the 1970s through the 1980s are best understood as representing a shift by the Court away from a race-conscious antisubordination model that protected historically subordinated racial groups to a jurisprudential model that protected whichever groups happened to be subordinate in a particular political context. This shift appeared to reflect the Justices’ changing conception of politics. The conservative Justices’ jurisprudence reflected a move from a defective pluralism model, with accompanying concern about the political marginalization of minority groups, to a more optimistic account of pluralism that presumed all groups to be equal partners in the bargaining, compromise, and coalition building of the pluralist marketplace. The conservative members of the Burger Court, however, abandoned this optimism when a racial minority controlled a decision-making body that adopted laws benefiting members of their own group. Rather than presuming the constitutionality of these laws and programs, the Court directed suspicion toward them—a suspicion that reflected a conservative concern that racial minorities were engaging in a form of self-dealing that was unaccountable to the pluralist marketplace.

3. Structuring the Political Process

In a final shift, the Court went from actively structuring state and federal representative institutions in the Warren Court era to adopting a much more passive posture during the Burger Court era. However, in one area the Court

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190. See id. (quoting Croson, 488 U.S. at 523 (Scalia, J., concurring)).
191. Id. at 632 (Kennedy, J., dissenting) (criticizing the Court’s deferential form of review of the agency’s race-conscious decision).
192. This distrust is reflected in the rigorous form of strict scrutiny that the conservative dissenters applied to the FCC’s race-conscious decision. See id. at 612–30.
193. The dissenters explained that a rigorous form of strict scrutiny should apply to the FCC’s affirmative action policy because a federal agency adopted and administered the affirmative action policy, not Congress. Id. at 605 (O’Connor, J., dissenting). This was relevant, according to the dissenters, because there was an important distinction between the review of Congress’s unique remedial powers under Section 5 of the Fourteenth Amendment, which were entitled to “considerable latitude,” and the decisions of agencies that presumably were not. Id. The considerable latitude to congressional exercises of Section 5 power in Metro Broadcasting seemed to follow from a judicial optimism that Congress could be trusted to enact laws that represent the public good but agencies could not be similarly trusted.
did affirm the use of judicial power to police the representative process. The conservatives on the Court continued to oversee this process to ensure the proper operation of pluralist politics. They did so first through the protection of the representational rights of racial minorities and second through the policing of electoral structures that could undermine pluralist bargaining and compromise between groups.

After initially suggesting that States were required, through their electoral schemes, to provide racial minorities an opportunity to elect representatives of their choice, conservatives vacillated between a requirement of proof of discriminatory motivation in the adoption of electoral schemes and a requirement of proof that the scheme operated in a discriminatory manner. Ultimately, conservatives joined with liberal members of the Court in Rogers v. Lodge to subject state electoral schemes that operated to exclude minorities from the pluralist marketplace to close scrutiny, without the need to show the traditional indicia of discriminatory intent.194

The Court’s willingness to retain a vote dilution standard with real teeth suggests that the Justices may have realized that they needed to continue to supervise the pluralist marketplace if they planned to maintain an optimistic pluralism conception of politics in other contexts. From their perspective, it was therefore not the motivation underlying the electoral laws that mattered.195 Instead, the relevant focus of scrutiny was the operation of the electoral scheme, since it its operation that determined whether the pluralist marketplace was functioning.196

The Court also continued to defer to congressional efforts to ensure an inclusive pluralist marketplace. Reflecting the trust of democratic institutions prevalent in other equal protection doctrines of this era, the Court deferred to aggressive exercises of congressional authority under Section 5 of the Fourteenth Amendment to advance the representational rights of racial minorities.197 Through expansive interpretations of the Voting Rights Act, the Court also reinforced congressional efforts to secure racial minority


195. See id. at 627; see also Ross, supra note 102, at 191–97 (arguing that the evidentiary standard developed in Rogers was less deferential to the State than that developed in Washington v. Davis and its progeny). But see City of Mobile v. Bolden, 446 U.S. 55, 66–69 (1980) (a conservative plurality of the Court ostensibly applying the Washington v. Davis discriminatory purpose standard to a vote dilution claim).

196. This optimistic pluralism conception of politics was at play in a pair of cases challenging state initiatives addressing school segregation. See Crawford v. Bd. of Educ., 458 U.S. 527, 539–42 (1982) (a conservative majority rejecting a challenge to a proposition that repealed a desegregation order explaining that it did not distort the political process); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 496 (1982) (Powell J., dissenting joined by Chief Justice Burger and Justices Rehnquist and O’Connor) (dissenting from the invalidation of an initiative process that placed greater burdens on racial minorities to achieve the integration of schools, arguing that the initiative “is simply a reflection of the State’s political process at work”).

These cases suggested a concession that groups cannot necessarily be trusted to maintain a fair bargaining process, but that the Court with the support of the national legislature is up to the task of policing any manipulation of the pluralist marketplace.

However, in cases decided during the latter stages of this era, a new form of review of political structures emerged that appeared to be influenced by a faltering optimism about the operation of the pluralist marketplace in certain contexts. In an innovation that undercut the goal of ensuring a more inclusive pluralist marketplace, a conservative majority in Shaw v. Reno established a novel doctrine responsive to concerns about racial minority group self-dealing.

As background to Shaw, African Americans in North Carolina had suffered through a history of discriminatory exclusion from the political process. Judicial invalidation of voting qualifications and active voter registration efforts under the VRA remedied denials in the opportunity of African Americans to vote. But in terms of the opportunity to effectively influence elections, African Americans continued to be marginalized. A principal reason for this marginalization was racially polarized voting. In many jurisdictions in the South in particular, white voters refused to vote for black preferred candidates. Courts interpreted and the executive enforced the VRA to require States and local jurisdictions to guarantee opportunities for meaningful minority representation in the political process. Specifically, when voting was racially polarized, States were required to draw majority minority districts when African Americans comprised a residentially compact, politically cohesive group in order to provide black voters with the opportunity to elect their preferred candidate.

In Shaw, however, a conservative majority determined that North Carolina had gone too far in its efforts to comply with the VRA to provide meaningful representation to African Americans. In response to a challenge brought by four white voters, the Court held that the State relied too much on race when it drew unusually shaped districts to capture enough black voters to comprise electoral

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majorities in two congressional districts. This decision raised the ire of the more liberal dissenters as it implicitly overruled precedent, which limited constitutional harms to cases of vote dilution, and it introduced an entirely novel cause of action limiting government use of race in districting.

What animated this novel concern? While the majority referred to the odiousness of the use of race in government decision making and concerns about racial stereotyping, the conservatives’ overriding concern appeared to be that these unusually shaped districts might create the structural preconditions for intragroup self-dealing. For the conservatives, such bizarrely shaped majority-minority districts diminished incentives for the politically dominant racial group to engage in coalition building with other racial groups and for elected officials to respond to intergroup bargaining and compromise. The districts resembled political apartheid by “signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.” Thus, the majority felt that these districts would create the perception among minority elected officials that they owed their political allegiance to particular constituents rather than all groups in the pluralist marketplace—contributing to its breakdown.

4. Summary

In the Burger Court era, the Equal Protection Clause underwent a significant transformation. Important shifts in the Supreme Court’s equal protection jurisprudence reflected an evolution from a defective pluralism to an optimistic pluralism conception of politics. The Court generally felt much less inclined to intervene in democratic processes to protect historically subordinated minorities in this new era. Conservatives retreated from the Vinson and Warren Courts’ special judicial protection of other minority groups first by withdrawing it from the poor and, to a certain extent, noncitizens while rejecting claims for such protections by other groups like the elderly. In the race domain, conservatives relaxed the standard of scrutiny for equally applicable laws that had a disparate impact on historically subordinated minorities by requiring proof that these laws were motivated by a discriminatory purpose. At the same time, in elaborating a race-neutral
antisubordination doctrine in affirmative action cases, the conservative Justices made clear that the Equal Protection Clause did not merely protect historically subordinated racial minority groups, but instead protected all racial groups equally, including whites. Finally, the conservatives on the Court policed the political process to ensure the proper operation of the pluralist marketplace. They did so first through the protection of the representational rights of racial minorities and second through the policing of electoral structures that could undermine pluralist bargaining and compromise between groups.

These doctrinal shifts accorded with a conception of politics in which minorities, racial and otherwise, largely were able to fend for themselves in the political process. Conservatives appeared to perceive these minorities as able to engage in the bargaining and compromise of the pluralist marketplace to influence political outcomes. Special judicial scrutiny of democratic actions became much less necessary under this optimistic conception of politics.

There were, however, exceptions where the Court’s optimism did not hold. In contexts in which racial minorities controlled the decision-making apparatus and adopted and implemented laws to benefit members of their own group, the Court more rigorously scrutinized the state action. This rigorous scrutiny evidenced conservative suspicion that in these contexts the pluralist process may have broken down in the midst of racial minority self-dealing.

III.
FROM AN OPTIMISTIC PLURALISM TO A PUBLIC CHOICE CONCEPTION OF POLITICS

Beginning in the mid-1990s, the Supreme Court’s equal protection jurisprudence underwent a second major transformation. The prior Court had deferred to state actions in a way that suggested judicial trust of democratic majorities’ treatment of minorities—a product of its optimistic pluralism. In a significant shift from this position, the Court began to closely scrutinize laws enacted by majoritarian institutions that benefited minorities. Motivated by an entirely new view of minorities’ role in politics, the Court had come to see such laws as giveaways to politically powerful minority interest groups.

Below, I first show how a new theory of politics came to inform academics’ understanding of minorities’ roles in politics, and suggest mechanisms by which this academic theory reached the Court. I then show how this theory of politics—generally referred to as “public choice”—maps onto the doctrinal shifts that the Court engineered in equal protection doctrine in this period.
A. The Ascendance of Public Choice Theory

After decades in which pluralism reigned as the dominant theoretical conception of politics, the influence of pluralism in the social sciences began to fade in the mid-1960s. Critics pointed out that in reality the pluralist marketplace did not seem all that competitive. Certain groups dominated over others and were able to achieve their preferred political outcome without bargaining or compromise. Given this lack of mutual compromise, the same critics questioned whether outcomes from pluralist bargaining and compromise necessarily represented the public good. Much of political scientists’ criticism of pluralism’s premises was directed at the upper-class bias of the pluralist system. However, at this time, economists began to advance their theory of broader biases in the political process arising from collective action problems that gave small, organized special interest groups political advantages over the broader disorganized public.

In a seminal work, The Logic of Collective Action, Mancur Olson explained that smaller groups are likely to have an advantage in organizing over larger groups because they can better police free riding. Free riding is a problem because to the extent that public goods obtained from the legislature are distributed to everyone in the group, regardless of the amount of effort an individual puts in to secure that good, it is only rational for that individual to expend the least effort, to pay the least cost, to obtain the public good. A classic example of the free riding problem occurs in the context of labor unions when an employee pays no union dues and yet receives the benefits from union representation in its negotiations with the employer for a new employment contract. The non-dues-paying employee has engaged in free riding on the efforts of others in the union.

If it is rational for individual members of a group to free ride on the efforts of others, then the group as a whole will fail to organize to lobby the government for public goods. The key to political group organization is therefore the capacity of the group to police the free riding activity of its members to ensure their contribution to the group effort. Smaller and more cohesive groups are better positioned to fulfill these requirements of political

210. Scholars differ about the peak and decline of pluralist theory in the social sciences, but it is generally agreed to have occurred between the 1950s and 1970s. See, e.g., BAUMGARTNER & LEECH, supra note 57, at 50 (suggesting that pluralist theory was in crisis by the late 1960s); BERRY, supra note 54, at 9 (equating the peak of pluralism with the publication of Robert Dahl’s book Who Governs? in 1961); Eskridge, supra note 121, at 283 (“Since the 1950’s . . . optimistic pluralism has been substantially discredited, in large part through the descriptive contributions of public choice theory.”).

211. See supra note 68.

212. Id.


214. See id. at 12–16.

215. See id. at 43–48.
organization than larger and more diffuse groups. It is much less costly for a smaller group to monitor the efforts of individual members than larger groups and to provide carrots and sticks to ensure their participation. These smaller groups are therefore more likely to organize politically.

What did social scientists conclude that this small group organization advantage meant in terms of the operation of politics? Working from the logic of collective action, conservative public choice theorists such as Gordon Tullock and Robert Tollison developed a rather cynical account of the legislative process. Starting from a framework of supply and demand of public goods, Tullock and Tollison described small politically organized groups as being on the demand side while legislative actors occupy the supply side in the political marketplace. These politically organized groups provide legislators with rents in the form of election-related benefits such as money and votes, as well as opportunities for subsequent employment. The organized groups’ goal is to exchange those benefits for public goods to be distributed to the group through legislative enactments that are ultimately paid for by the broader public. Members of the broader diffuse public are unlikely to organize in response to disturbances in the legislative equilibrium from the rent-seeking activity of smaller groups because they do not have the capacity to police free riding. The result is a political process that is biased in favor of smaller groups that are better positioned to organize politically.

Contrary to the pluralist conception of politics, the principal defect under the public choice account is not the marginalization of minorities. Instead, it is that special interest groups—minorities—engage in rent-seeking behavior to secure advantages for themselves at the expense of the larger public. Such behavior circumvents the majoritarian processes.

216. Id. at 22–36.
217. See id. at 33–36.
218. MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 18 (1982) (describing the political advantages of smaller groups and “[t]he paradox . . . that . . . large groups, at least if they are composed of rational individuals, will not act in their group interest”).
220. See POSNER, supra note 34, at 405. Public choice theorists assume that legislators are “rational, self-interested, and reelection minded.” HAYES, supra note 219, at 5.
221. OLSON, supra note 213, at 48.
This public choice conception of the operation of politics emerged as the chief competitor to the pluralist account in the 1970s; in terms of scholarly attention, it had supplanted pluralism by the 1980s. As I discuss below, its emergence also seemed to have influenced the newly appointed conservative members of the Supreme Court, beginning with President Ronald Reagan’s appointees.

B. The Conservative Judicial Adoption of a Public Choice Conception of Politics

When President Reagan elevated Justice William Rehnquist to Chief Justice after Warren Burger’s retirement, the political rhetoric of conservatism suggested the new Court would be more restrained in its review of democratically enacted laws. With the additions of Justices Antonin Scalia and Anthony Kennedy shortly thereafter, many expected a conservative Court less willing to impose its own substantive value choices on the interpretation of the Constitution and more willing to interpret the Constitution in accord with its original meaning. Scholars suggested that adjudicating cases based on the original meaning of the Constitution would lead to greater respect for the prerogatives of the States in the federal system through more deference to exercises of state authority and more limits on exercises of federal authority.

Empirical metrics indicate that the Rehnquist Court was more conservative than the Burger Court. They also indicate that the Roberts Court


224. See THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 157 (2004) (describing the scholarly assumption upon the elevation of Justice Rehnquist to Chief Justice “that the conservative Court would abandon liberal activism and replace it with restraint”).

225. Id. at 159–60.

226. Id. at 159.

227. See, e.g., Andrew D. Martin et al., The Median Justice on the United States Supreme Court, 83 N.C. L. REV. 1275, 1300–04 (2005) (describing the increasing conservatism of the Court from the Warren to the Rehnquist Court as measured by the partisan orientation of the median Justice).
is more conservative than the Rehnquist Court.\textsuperscript{228} This increasing conservatism has manifested itself in major shifts in equal protection doctrine involving race, other minority groups, congressional enforcement power, and the structuring of the political process. Conservative shifts in other jurisprudential areas are consistent with the Court’s increasing reliance on judicial restraint, originalism, and federalism. But these influences only partially accord with the shifts in the Court’s equal protection jurisprudence. The shifts are instead better understood as being responsive to the conservative Justices’ adoption of an alternative conception of how politics operate. Specifically, the major shifts in equal protection doctrine evidence a change from a view that presumed democratically enacted laws represented the public good to a more cynical public choice conception that is much more suspicious of the products of the democratic process.

This shift cannot be explained by changes in the distribution of political power. Unlike the prior judicial evolution from a defective pluralism to an optimistic pluralism model, the evolution from optimistic pluralism to a public choice conception of politics does not seem to represent a judicial reaction to a changed political situation for formerly disempowered minorities.\textsuperscript{229} From the perspective of legislative activity on behalf of minorities, by the mid-1990s not much had changed. Congress and state legislatures in the 1980s and 1990s continued to pass nondiscrimination and other laws to protect and benefit minorities.\textsuperscript{230} But the level of civil rights activity did not come close to matching that of the 1960s.\textsuperscript{231} For those laws that were passed, an optimistic pluralism story could have still been told. The Court could have understood nondiscrimination and other laws that protect and provide affirmative benefits to racial minorities as the product of fair intergroup bargaining and compromise. Deference to state enactments of minority-favorable legislation would therefore have been uncontroversial. Yet, conservative Justices during the Rehnquist and Roberts Court era directed a renewed distrust toward these laws that conservative Justices during the Burger Court era had determined to be the object of trust.

What appeared to animate this renewed distrust of the democratic process was a judicial evolution to a new conception of the operation of politics.

\textsuperscript{228} Nate Silver, \textit{Supreme Court May Be Most Conservative in Modern History}, N.Y. TIMES (Mar. 29, 2012, 8:06 PM), http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/ (using Martin-Quinn scores to find that the Roberts Court is the most conservative in U.S. history as measured by the partisan orientation of the median Justice).

\textsuperscript{229} See supra Part II.A.


\textsuperscript{231} See supra Part II.A.
Despite the growing influence of public choice in the social sciences in the late 1960s and 1970s, it did not have an immediate impact on legal thinking or judicial doctrine. It was not until the field of law and economics (of which public choice theory is a derivative) evolved from a fringe perspective of a handful of law professors limited in its influence to antitrust doctrine in the 1970s to a mainstream discipline guiding the development of torts, contracts, and statutory interpretation theory in the 1980s and 1990s that public choice entered the legal theory lexicon with a force.232 The conservative legal movement served as the principal vehicle for the mainstreaming of law and economics. This movement included judges, lawyers, and academics, and it altered what was being taught in law school classrooms, what was being written in legal scholarship, and ultimately, what was being decided in cases before the Court.233

One measure of public choice theory’s emerging impact on the law is the number of law review citations of three seminal books generally seen as the progenitors of public choice theory: James Buchanan, *The Calculus of Consent* (1965); Mancur Olson, *The Logic of Collective Action* (1967); and Gordon Tullock, *Rent Seeking* (1970). From 1965 to 1979, legal scholars cited these seminal works 78 times. This number increased to 205 citations in the 1980s, 907 citations in the 1990s, and 1,493 citations in the period from 2000–2012.234 This latter period represented a nearly twenty-fold increase from the fifteen-year period immediately following the publication of Buchanan’s book.235

Beginning in the 1980s, prominent legal scholars, such as Bruce Ackerman, Jonathan Macey, and William Eskridge,236 as well as influential
judges/scholars Richard Posner and Frank Easterbrook, brought public choice theory into their study of the public law subjects of statutory interpretation, administrative law, and constitutional law.\(^{237}\) Undoubtedly, this theoretical perspective entered the classroom as well, influencing the thinking of future lawyers, academics, and law clerks who served as potential vehicles for transmitting the theory to Supreme Court Justices and lower courts.\(^{238}\)

In addition to these indirect channels of influence, by 1990, 40 percent of federal judges, including Justices Clarence Thomas and Ruth Bader Ginsburg, had received training in law and economics through the Economics Institute for Federal Judges, an institute organized by one of the conservative leaders of the law and economics movement.\(^{239}\) The focus of these institutes was training judges in microeconomic principles. However, the opportunity for broader interactions with the academic leaders in law and economics, including experts in public choice theory, likely influenced the thinking of judges when they returned to the bench to adjudicate cases and develop doctrine.\(^{240}\)

Finally, from the mid-1980s forward, the conservative Federalist Society had a say in nearly every federal judge and Justice nominated by a Republican President.\(^{241}\) Notable members of the Federalist Society included Justice Scalia, who served as the original faculty advisor to the organization, as well as Chief Justice Roberts and Justice Alito.\(^{242}\) While the Federalist Society has not taken an explicit ideological stance or disciplinary view, conservatives have dominated the organization since its founding, and many of its academic members have been trained in law and economics.\(^{243}\) As a result, judges and

judicial review under the Due Process and Equal Protection Clauses and arguing that the Equal Protection Clause should serve as a check on special interest group rent seeking). But see Farber & Frickey, supra note 223, at 896–99, 908 (criticizing public choice theory and expressing “grave doubts about solving the problem [of special interest influence] through heightened judicial review”).


238. See Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 10 (1984) (“Economic thought is taught at law schools and is in the air at the bar today much more than thirty years ago.”).

239. See Teles, supra note 232, at 112–14.

240. Id. at 113.

241. Id. at 142, 158 (discussing the important function that membership in the Federalist Society served for conservative administrations in judicial appointments as early as the Reagan administration).


Justices nominated with the Federalist Society’s imprimatur have been uniformly conservative. These judges and Justices were also likely aware of, and perhaps even had rigorous schooling in, the broad prescriptions of law and economics, and particularly public choice theory.244

The pathways of influence are suggestive of the ways that public choice theory may have come to influence judicial thinking, but the evidence is merely circumstantial. It is ultimately not feasible to get inside the minds of the conservative Justices to prove that these were the actual sources of influence. But as I explain in the next Section, what seems clear is that in the conservative equal protection jurisprudence of the Rehnquist and Roberts Courts era, a renewed distrust of democracy emerged that seemed to be linked to a concern about powerful minorities, special rights, and the need to protect individuals from the democratic process. These concerns directly mirrored academic public choice conceptions of organized minorities, rent-seeking behavior, and the vulnerable members of a disorganized public.

C. Public Choice and the Rehnquist and Roberts Courts’ Equal Protection Jurisprudence: Renewed Democratic Distrust

The shifts in the Supreme Court’s equal protection jurisprudence toward a public choice conception of politics did not begin with a grand pronouncement akin to Justice Powell’s opinion in Bakke that this is a “Nation of minorities.”245 Instead, it involved more subtle changes in reasoning, as the opinions of the conservatives on the Court placed greater emphasis on the function of the Equal Protection Clause as protecting individuals from impermissible government classifications. A renewed distrust of democracy emerged to replace the trust reflected in the Burger Court’s equal protection jurisprudence. Although this renewed distrust seemed premised on a form of process malfunction, it differed from the process malfunction that the Warren Court seemed to be concerned about. In particular, the Warren Court’s image of historically subordinated minority groups unable to protect themselves because of their exclusion from the bargaining and compromise of the pluralist marketplace gave way to the Rehnquist and Roberts Courts’ image of vulnerable individuals unable to defend their interests through collective action against these same minority groups, now seen as being too politically powerful.

Discreteness and insularity, which in the Warren Court’s jurisprudence had been perceived as a source of weakness for minority groups entitling them to special judicial protection from majoritarian outcomes, emerged in the jurisprudence of the conservative members of the Rehnquist Court as a source of strength that subjected the groups’ democratic victories to particular

244. TELES, supra note 232, at 158.
245. See supra Part II.B.
suspicion. In the following, I juxtapose equal protection doctrines to demonstrate the suggested influence of a public choice conception of politics on the jurisprudence of the Rehnquist and Roberts Courts.

1. Racial Groups

In the Rehnquist and Roberts Court eras, the Supreme Court’s equal protection race doctrine continued to shift in a direction away from protecting historically marginalized racial minorities. The changes were clearest in cases addressing the constitutionality of affirmative action programs. Soon after articulating the unique concern with minority group self-dealing, the conservative members of the Rehnquist Court quickly abandoned the application of deferential strict scrutiny to any affirmative action program. In the process, the conservatives also rejected the optimistic pluralism conception of politics that seemed to underlie their earlier deference to federally enacted affirmative action programs.

In _Adarand v. Pena_, a conservative majority of the Court held that same rigorous form of strict scrutiny it had applied to the state-enacted set-aside program for racial minorities in _Croson_ also applied to a congressionally enacted set-aside program. The majority did not address Congress’s unique remedial authority under Section 5, which had previously served as the justification for applying a more deferential form of strict scrutiny to congressional affirmative action programs. The conservative majority simply reasoned that “‘[a]bsent searching judicial inquiry . . . there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’”

The conservatives on the Court during the Burger Court era seemed to distinguish invidious classifications from benign classifications on the basis of the racial composition of the decision-making body. Under the optimistic pluralism conception, the simple racial politics of racial minority group self-dealing was only presumed to occur when the decision-making body that adopted or administered the affirmative program was majority-black. Otherwise, such programs were presumed benign or remedial. But in _Adarand_, the conservative majority presumed an affirmative action program adopted by Congress—a democratic, majority-white political body—to be the product of simple racial politics. The conservative majority failed to provide any direct justification for this doctrinal shift other than its disingenuous suggestions that its application of rigorous strict scrutiny in _Adarand_ was consistent with the

247. _Id._ at 230; see also supra Part II.B.
249. See supra Part II.B.
Court’s prior approach to affirmative action cases. However, an examination of the conservative majority’s reasoning suggests that invidious and benign discrimination had become indistinguishable because the conservatives conceptualized the operation of politics differently. The conservatives implicitly repudiated an optimistic pluralism conception of politics in which Congress could be trusted to benefit racial minorities. In its place, they adopted a more cynical public choice conception that subjected Congress and all other majority-white institutions advantaging racial minorities to distrust.

The evolution in the conservative Justices’ conception of politics can be seen in their changing vision of the Equal Protection Clause. The Court had historically conceptualized the Equal Protection Clause as protecting individuals as members of subordinated groups. In determining the level of scrutiny in equal protection cases, the Court asked whether the group that the individual belonged to was subordinated, either historically under the Vinson and Warren Courts’ defective pluralism model or in a particular political context under the Burger Court’s optimistic pluralism model. Under the Rehnquist Court’s public choice model, the conservative majority interpreted the Equal Protection Clause to protect individuals as unaffiliated members of the broader society. Writing for the conservative dissenters in *Metro Broadcasting*, Justice O’Connor explained, “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens ‘as individuals, not as simply components of a racial, religious, sexual or national class.”

Five years later, writing for a conservative majority in *Adarand*, Justice O’Connor reemphasized the point that the Equal Protection Clause protects individuals as individuals and not as members of a group. She explained, “it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group.” As such, “any individual suffers an injury when he or she

250. *Adarand*, 515 U.S. at 236.
251. See David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 3 (1995) (“[W]hat the Court has done is to revive, in the area of affirmative action, one of the noble dreams of American public law—that courts should try to ensure that legislation does not just benefit narrow interest groups but instead serves a public interest.”).
252. See supra Parts I.C, I.I.B.
253. See supra Parts I.C, I.I.B.
254. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting). The focus on the individual as opposed to the group was part of a shift from a race-neutral antesubordination approach to equal protection to an anticlassification or antidifferentiation approach to equal protection. See Colker, supra note 85, at 1005.
is disadvantaged by the government because of his or her race, whatever that race may be.  

According to this renewed emphasis on the individual, it no longer mattered, as it did under the pluralist account of politics, that the whites who challenged race-conscious affirmative action programs were members of the dominant political class that enacted the policy. Instead, what mattered was that particular whites as individuals were harmed by the government’s racial classification. A public choice account would suggest that these whites, as disorganized elements of society, were vulnerable because they were unable to act collectively to defend their interests in the majoritarian process. The conservative Justices seemed to share this vision in determining that whites were entitled to special judicial protection from the outcomes of the democratic process.

This special judicial protection came in the form of rigorous strict scrutiny applied to all affirmative action programs, including those involving university and law school admissions. While the conservative Justices did not always get their way, they established the doctrinal framework for affirmative action laws as one that protected unorganized individuals. Specifically, the conservatives shifted the equal protection doctrinal framework from a group-based antisubordination model to an individual-based anticlassification model.

Why couldn’t the government be trusted in its treatment of individuals as unaffiliated members of society? Initially, the conservatives did not explain in express terms. Their standard justification was that the treatment of individuals on the basis of race is odious, but underlying this rhetoric stood the view that the Court could not distinguish between a state actor’s invidious and benign uses of race. Rather than apply a presumption of constitutionality to government uses of race, the conservative Justices chose to subject these race-based actions to rigorous strict scrutiny. In justifying this rigorous strict scrutiny, the conservatives never went beyond the contention that such scrutiny

“Nation of minorities.” Id. at 292. Ultimately, in the Burger Court era, conservatives reconciled the tension in favor of a group-based conception of the individual. See supra Part II.B.

256. Adarand, 515 U.S. at 230.


258. A majority of the Court comprised of the four more liberal Justices and Justice O’Connor returned to a deferential strict scrutiny model when addressing a challenge to affirmative action in law school admissions. See Grutter, 539 U.S. at 28; see also Akhil Reed Amar & Neal Kumar Katyal, Bakke’s Fate, 43 UCLA L. Rev. 1745, 1745–46 (1996) (offering a basis for distinguishing the scrutiny of affirmative action programs in the public contracting context and in education and arguing that colorblindness should not be constitutionally required in the education context).

was necessary to assess whether the classifications were "‘motivated by . . . simple racial politics.’" 260

As articulated by the conservative majority in *Croson*, the concern about simple racial politics focused on a majority-black political body engaging in a form of self-dealing. 261 Understood in these terms, simple racial politics did not describe the political context surrounding the congressional adoption of the minority set-aside program invalidated in *Adarand*. Rather, given the majority-white composition of Congress, it represented the opposite of the classic case of a majority faction tyrannizing a minority. Something other than a concern about self-dealing must therefore explain the *Adarand* Court’s concern about simple racial politics.

More recent cases addressing race-conscious actions by state actors, along with developments in other areas of the conservative Justices’ equal protection jurisprudence, suggest that the concern about simple racial politics has been transformed. It has morphed from a concern about minority self-dealing into a public choice concern about minority capture of majority-white political bodies.

In the recent Roberts Court cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Ricci v. DeStefano*, the conservative Justices’ rhetoric provided express support for this theorized shift toward a public choice understanding of “simple racial politics.” In *Parents Involved*, a conservative majority of the Court invalidated two school districts’ student assignment plans because the plans relied on a student’s race in an effort to achieve racially integrated schools. 262 Focusing on the actions of the Seattle school district, the conservative Justices viewed the stated justifications for the assignment programs skeptically. 263

At the center of this skepticism was the Seattle school district’s website. According to a conservative plurality of the Court, the website “‘emphasiz[ed] individualism as opposed to a more collective ideology’ as a form of ‘cultural

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260. *Adarand*, 515 U.S. at 226 (quoting Richmond v. *Croson*, 488 U.S. 469, 493 (1989) (plurality opinion of O’Connor, J.)). The conservative majority also expressed a concern that classifications advantaging racial minorities might be motivated by illegitimate notions of racial inferiority premised on racial stereotypes. *Id.* However, looking to other areas of equal protection doctrine, a concern about stereotypes would not seem to justify rigorous strict scrutiny. For example, in the gender context, the Court had deemed intermediate scrutiny sufficient to root out laws motivated by stereotypes. See *supra* Part II.B; see also United States v. *Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to a gender classification to root out “overbroad generalizations about the different talents, capacities, or preferences of males and females”). There is no clear reason why a higher level of scrutiny was necessary to determine whether affirmative action laws were based on stereotypes directed against the advantaged racial class. In addition, since the ostensible objects of racial stereotypes were never parties to the challenges to affirmative action programs that reached the Court, it was not particularly clear why rooting out stereotypes should be the subject of review given the unavailability of evidence.

261. *See supra* Part II.B.


racism,’ and... that the district has no intention ‘to hold onto unsuccessful
concepts such as [a]... colorblind mentality.’” 264 For the plurality, these
statements supported its distrust of the district’s asserted benign justifications
for the school assignment plan, and its ultimate determination that illegitimate
racial balancing was the real reason for the plan. The website and other actions
by the school board, such as sending its students to a white privilege
conference, seemed to indicate to the conservatives the dominance of an
ideology of racial subordination. 265 It also evidenced racial minority power
over the decisions of the school board, including those with respect to student
assignments.

Two years later, the Court suggested even more explicitly that racial
minority groups’ capture was behind state race-based decision making. In Ricci
v. DeStefano, the Court addressed a challenge to the City of New Haven’s
decision not to certify exam results that would have resulted in the
disproportionate promotion of white firefighters over black and Latino
firefighters. 266 Although the opinions focused on the question of whether the
city in its decision to discard the exam had violated the Title VII prohibition on
disparate treatment, the reasoning had strong equal protection undertones and
implications. The implication most relevant here is the explicit conception of
politics that is reflected in the concurring opinion of the three more
conservative members of the Court.

Title VII of the Civil Rights Act prohibits employment practices that are
either intentionally discriminatory or have a disproportionate impact on
minorities. 267 Under the statute, an employer can avoid liability for an
employment practice that has a disparate impact by showing that it is “job
related for the position in question and consistent with business necessity.” 268
Recognizing the limits and costs of litigation, an overriding congressional goal
underlying the Act was to secure voluntary compliance with Title VII.
Employer changes to practices that had a disparate impact on minorities were
encouraged even if the changes harmed whites or men. 269 When employers
acted to preemptively comply with the disparate impact prohibitions of Title
VII, some whites and men brought intentional discrimination claims under Title
VII or the Equal Protection Clause, but those claims were usually rejected. 270
Consistent with the optimistic pluralism account of the prior era, the Court

264. Id. at 730 n.14.
265. Id. at 781 n.30 (Thomas, J., dissenting).
267. Id. at 577.
269. Ricci, 557 U.S. at 581.
conscious affirmative action program to be consistent with Title VII); United Steelworkers of Am. v.
Weber, 443 U.S. 193, 208 (1979) (“Title VII’s prohibition... against racial discrimination does not
condemn all private, voluntary, race-conscious affirmative action plans.”).
immunized white employers from liability, presuming that they acted in good faith in their efforts to comply with the Title VII disparate impact prohibition.\textsuperscript{271} This all seemed to change in Ricci.

A conservative majority of the Court in Ricci abandoned the presumption that the state employer acted in good faith in its effort to voluntarily comply with Title VII. The Court instead subjected the city of New Haven to a burden of demonstrating there was “a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”\textsuperscript{272} As part of this assessment, the conservative majority closely scrutinized and ultimately rejected the city’s findings that the exams were not job-related and consistent with business necessity as well as the city’s determination that an equally valid, less discriminatory testing alternative was unavailable.\textsuperscript{273} The level of scrutiny applied to New Haven’s action bore a strong resemblance to the rigorous strict scrutiny that the Court had applied to equal protection challenges to the government’s use of race to benefit minorities. It is therefore instructive to see how the Court justified this new standard of scrutiny.

The conservative majority never clearly explained the basis for adopting the new standard. However, Justice Alito, in a concurring opinion joined by Justices Scalia and Thomas, was much more transparent about the reason for the conservatives’ skeptical review of the city’s actions. For Justice Alito, the city’s action could not be trusted as an evenhanded enforcement of the law because racial minorities had essentially captured the political process.\textsuperscript{274} Justice Alito cited meetings between the mayor and the reverend of an African American church—a person the Justice described as a key organizer in New Haven—and the reverend’s participation at civil service board meetings. Relying on this evidence, Justice Alito concluded “the City administration was lobbied by an influential community leader to scrap the test results . . . before making any real assessment of the possibility of a disparate-impact violation.”\textsuperscript{275} It was therefore reasonable, according to Justice Alito, for a jury to find that “the City’s real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.”\textsuperscript{276}

This judicial skepticism of voluntary state actions to comply with Title VII marked an important shift from the prior judicial presumption of good faith. This doctrinal shift is consistent with a change in the judicial conception of the operation of politics. Formerly, conservative Justices, seeing the world as optimistic pluralists, presumed that government decisions were animated by the

\begin{itemize}
  \item \textsuperscript{271} See Johnson, 480 U.S. at 640; Weber, 443 U.S. at 208–09.
  \item \textsuperscript{272} Ricci, 557 U.S. at 563.
  \item \textsuperscript{273} Id. at 589–92.
  \item \textsuperscript{274} Id. at 596–604 (Alito, J., concurring).
  \item \textsuperscript{275} Id. at 604.
  \item \textsuperscript{276} Id. at 605.
\end{itemize}
desire to serve the public good. Now, the conservative Justices, seeing through the lens of public choice theory, presumed that similar government decisions were the product of a political process that racial minorities had captured.

The conservative jurisprudence in the race cases of the Rehnquist and Roberts Courts reflected a public choice concern that racial minorities had become powerful political groups. African Americans emerged as an example of the smaller groups that public choice theory suggested as better positioned to organize and act collectively to demand legislative goods. Whites, on the other hand, were part of the larger group of individuals who remained disorganized and unable to act collectively in the political process. Contrary to the optimistic pluralism account, the democratic process did not function as an inclusive clearinghouse for group-based bargaining and compromise between racial groups. Instead, it functioned more as an exclusive and hidden market in which smaller interest groups demanded and lawmakers supplied legislative benefits at the expense of the broader public. According to the jurisprudence of the conservative members of the Rehnquist and Roberts Courts, the lawmaking process is therefore to be distrusted when it enacts laws beneficial to the smaller organized racial groups of society. Affirmative action programs or others beneficial to racial minorities, whether enacted by a majority-black political body or one that is majority-white, are objects of suspicion.

Other developments in the conservative Justices’ equal protection jurisprudence regarding race provide further support for this public choice account. As conservatives directed greater scrutiny toward state actions that disproportionately benefitted racial minorities and disadvantaged whites, they continued to defer to state actions that disproportionately disadvantaged racial minorities. The conservative Justices’ conception of politics is the most viable principled account for the difference in the level of scrutiny applied to these two types of policies—a difference that has puzzled scholars.277 The distinction in levels of scrutiny makes sense when seen through the lens of public choice theory. A concern about racial politics, or minority capture, is simply not as relevant when a political body controlled by a white racial majority enacts a law that has a harmful disparate impact on racial minorities. The white racial majority is presumed to be acting for the public good and entitled to judicial trust because it does not have the characteristics of the small, well-organized, and cohesive interest group that is the object of concern under the public choice

277. If the reason for applying strict scrutiny to race-conscious laws that benefit minorities arises from the concern that they produce the disadvantages of racial stereotypes, it is not clear why other laws that have a disparate impact on minorities should not also be subject to the same rigorous scrutiny. After all, it would be equally challenging in both contexts to differentiate between benign and invidious purposes. Yet, the Court has continued to subject state actions that have a disparate non-stereotyping impact on racial minorities to highly deferential rational basis review. Ultimately, the stated concern about the disadvantages from racial stereotypes is a distraction from the real concern of a racially captured political process.
conception of politics. At the same time, racial minorities, because of their organizational advantages, are presumed capable of defending their interests in the majoritarian process and thus not entitled to special judicial protection from laws that disproportionately disadvantage them unless there is evidence of explicit invidious discrimination in the adoption of the law. The political process that produces laws and practices that disproportionately disadvantage minorities therefore continue to warrant trust.

2. Other Minority Groups

A second doctrinal development that evidences the evolution toward a public choice conception of politics is the shift in the conservative Justices’ equal protection jurisprudence involving other minorities. Minorities considered politically marginalized in the Vinson and Warren Courts era and equal partners in the political process in the Burger Court era came to be perceived as having too much political power in the Rehnquist and Roberts Courts era. The Court, as it had with respect to race-conscious actions benefitting historically marginalized racial minorities, directed a new form of scrutiny toward state actions benefitting other historically marginalized minorities.

The conservative Justices’ changing view of other minority groups emerged in a case involving the rights of gays and lesbians. In Romer v. Evans, the Court invalidated a statewide initiative that both repealed local ordinances enacted in Boulder and Denver, Colorado, prohibiting discrimination on the basis of sexual orientation and barred localities from passing any future non-discrimination ordinances. The Court, employing a rigorous form of rational basis review, determined that the initiative was not rationally related to any legitimate interest, but instead was animated by animus toward gays and lesbians.

The reaction of Justices Scalia, Rehnquist, and Thomas evidenced the conservative evolution toward a public choice conception of politics. The conservative dissenters argued that animus toward homosexuals did not animate the law. Rather, the initiative represented “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws.” For the dissenters, gays and lesbians were not just the ordinary minorities of the optimistic pluralism account that bargained and compromised with others. Instead, they were the politically powerful minority of the public

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278. The group of whites is presumed to be large, disorganized, and ordinarily unable to collectively lobby legislatures to obtain benefits at the expense of others. See supra Part II.A.
280. Id. at 631–35.
281. Id. at 636 (Scalia, J., dissenting).
282. Id.
choice conception with organizational and collective lobbying advantages over the diffuse public. Justice Scalia explained, "because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide."283 As a consequence of the political power of gays and lesbians, it was not appropriate to characterize the statewide initiative as simply repealing local ordinances that prohibited discrimination against homosexuals. The initiative was instead understood as repealing local ordinances that granted “special rights” in the form of preferential treatment for this politically powerful minority at the expense of the diffuse public’s moral values.284 Gays and lesbians were thus re-characterized as the special interest group of public choice that engaged in a form of rent-seeking behavior to obtain goods in the form of “special rights” at the expense of the mores of the broader public.

When it came to evaluating the constitutionality of section 3 of DOMA, which denied equal benefits to same-sex married couples, in United States v. Windsor, Justices Scalia, Alito, and Thomas dissented from the majority’s decision to invalidate the statute. Based on Justice Kennedy’s argument for the majority that the statute interfered with the equal dignity of same-sex marriages, the dissenters presumed that the next step would be the constitutional recognition of a fundamental right to same-sex marriage.285 According to the dissenters, the right of individuals to engage in same-sex marriage was for “the People” to decide.286 It is with the People that “ultimate sovereignty rests,” and it is they who “have the right to control their own destiny.”287 For the conservatives, when it came to disadvantaging same-sex couples, it was proper to let the People decide. Same-sex couples could, as a

283. Id. at 645–46; see also Schacter, supra note 40, at 386 (“Far from perceiving any political disadvantage or malfunction that might justify robust review, the dissent painted a picture of elite affluence, influence, and power.”).

284. Romer, 517 U.S. at 626, 644; see also Dudas, supra note 28, at 730 (describing the judicial interpretation of rights claims by the politically marginalized as claims for special rights and linking it to a politics of resentment); Schacter, supra note 40 at 381 (criticizing the special rights language in the dissent as “representative of a contemporary species of political argument that invokes ‘special’ as a term of opprobrium and appeals to a thin, but apparently beguiling, idea of egalitarianism”).

285. See United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (Kennedy, J.) (“The history of DOMA’s enactment and its own text demonstrates that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”); id. at 2709–10 (Scalia, J. dissenting) (arguing that the next step will be the constitutional invalidation of state laws banning same-sex marriage).

286. Id. at 2711 (Scalia, J. dissenting); see also id. at 2711 (Alito, J., dissenting) (explaining that the Constitution does not dictate a particular understanding of marriage and that such choice should be left to the people acting through their elected representatives).

287. Id. at 2716 (Alito, J., dissenting).
presumptively politically powerful group, protect themselves through ordinary democratic politics. But when it came to providing special protection or accommodations to similarly situated minorities, these same conservatives appeared to agree that protecting the sovereignty of the people required close judicial scrutiny of these legislative choices. This is seen in the cases addressing the extent of congressional enforcement authority under the Fourteenth Amendment.

3. Congressional Enforcement Authority

The view of minority groups as politically powerful interest groups seemed to animate the shift in the Court’s interpretation of Section 5 of the Fourteenth Amendment during the Rehnquist and Roberts Courts era. In the Warren Court era, liberals on the Court broadly deferred to congressional authority to enact legislation that enhanced the equal protection rights of racial minorities, but the Court restricted Congress from diluting these rights. The presumption appeared to be that congressional enactments that advanced the interests of minorities were the product of a properly operating political process since minorities lacked the power to corrupt the process. Laws that diluted the rights of minorities, in contrast, were presumed to be the product of a process defect resulting from the political exclusion of these groups from pluralist bargaining. Conservative Justices in the Burger Court era continued to broadly defer to congressional authority to enhance the equal protection rights of minorities. In the optimistic pluralist’s “Nation of minorities,” the Court appeared to presume that each minority group was capable of defending its interests in the pluralist marketplace.

The Supreme Court’s Section 5 jurisprudence shifted once again during the Rehnquist and Roberts Courts. The Court began to give much less deference to congressional authority to enhance the equal protection rights of minority groups. The conservative jurisprudence of this era was consistent with a view of a democratic process comprised of politically powerful minorities and a disempowered and diffuse public. The rights of minorities that Congress statutorily protected through its Section 5 power fell into a category of special rights subject to rigorous judicial scrutiny. This rigorous form of scrutiny found further justification in federal statutes providing minorities the right to sue state actors for violations of their statutory rights, making public coffers vulnerable to the supposed rent seeking of minority groups.

City of Boerne v. Flores marked the starting point for this shift toward a more restrictive view of congressional efforts to protect members of minority

288. See supra Part I.C.
289. See supra Part II.B.
290. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978); see also supra notes 144–56 and accompanying text.
groups. In *Boerne*, the Court explained that Congress’s Section 5 authority was broad, but limited to remedying violations of the Constitution. This remedial power to enforce the Constitution did not include the power to change the substantive meaning of the Constitution, as determined by the Court. Any exercise of congressional power must instead be congruent and proportional to the injury to be prevented or remedied and to the means adapted to that end. Broken down to its core, this congruence and proportionality test asks whether the congressional statutory standard would invalidate too much conduct that the Court considers constitutional. This determination examines the degree of difference between the statutory and constitutional standard for liability, and whether Congress has included in the legislative history evidence of a pattern of unconstitutional conduct that justifies a more aggressive statutory standard.

After *Boerne*, the Court, led by its more conservative members, rigorously scrutinized, and often struck down parts of, congressional antidiscrimination statutes like the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family Medical Leave Act under the congruence and proportionality test. In scrutinizing the legislative record for evidence of a pattern of unconstitutional conduct to justify the statutes, the Court treated Congress as a litigant with a heavy burden of proof. Conservatives discounted statements from members of Congress describing the extent of discrimination against the aged, disabled, and women. They also dismissed as irrelevant state reports of a pattern of unconstitutional discrimination against

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292. *Id.* at 519.
293. *Id.* at 520.
294. When the statutory standard invalidated too much constitutional conduct, the Court considered Congress to be exercising substantive as opposed to remedial powers. See Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1154 (2001). The Court explained that if Congress were given substantive power under the Fourteenth Amendment, then “[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.” *Boerne*, 521 U.S. at 529. Congress could “define its own powers by altering the Fourteenth Amendment’s meaning” undermining the Constitution as “superior paramount law, unchangeable by ordinary means.” *Id.*


296. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368–74 (2001) (scrutinizing Title I of the Americans with Disabilities Act under the congruence and proportionality test); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–91 (2000) (scrutinizing the Age Discrimination in Employment Act under the congruence and proportionality test). In contrast to the Religious Freedom Restoration Act invalidated in *Boerne*, the legislative record for each of the statutes invalidated after *Boerne* included evidence of unconstitutional conduct remedied by the statute. Scholars have suggested that the evidentiary requirement applied to the antidiscrimination statutes “represent[ed] a remarkable repudiation of the Court’s position in *Boerne*.” Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND. L.J. 1, 11 (2003).

297. See Garrett, 531 U.S. at 379–80 (Breyer, J., dissenting); see also Post & Siegel, supra note 296, at 7–11.

298. See Kimel, 528 U.S. at 89.
these groups by local government and the private sector.\textsuperscript{299} For the conservatives, such evidence did not prove that the States had engaged in discrimination. When the record did contain evidence of state-level discrimination against the aged, disabled, and women, the conservatives treated the examples of discrimination in the record as isolated incidences rather than evidence of a broader pattern.\textsuperscript{300} Alternatively, the Court determined that the congressional evidence of state discrimination did not demonstrate irrational discrimination as would be required for a constitutional claim brought by members of these groups.\textsuperscript{301} Because of the failure to meet the Court’s requirement of a showing of a specific pattern of state discrimination, Congress was found to have exceeded its authority under Section 5 of the Fourteenth Amendment in six of the eight cases decided after \textit{Boerne}.\textsuperscript{302}

The conservative majority’s rigorous scrutiny of congressional exercises of its authority under Section 5 stood in dramatic contrast to the Court’s laissez-faire approach in place for over a century prior to \textit{Boerne}.\textsuperscript{303} The conservative Justices defended the new approach as necessary to protect federalism values.\textsuperscript{304} According to this account, rigorous scrutiny was designed to establish greater protections for state prerogatives against congressional exercises of power beyond constitutional limits. Yet with respect to almost every one of the statutes that the Court invalidated under Section 5, the Court conceded that they were valid exercises of Congress’s Commerce Clause power.\textsuperscript{305} If the Court aimed to protect state prerogatives, the congruence and proportionality standard articulated in \textit{Boerne} required a specific pattern of state discrimination, which Congress failed to establish in six of the eight cases. The Court’s decision in this context was consistent with its approach in earlier cases decided under Section 5.


\textsuperscript{300} \textit{Coleman v. Ct. of Appeals}, 132 S. Ct. 1327 (2012); \textit{Lane}, 541 U.S. at 543 (Rehnquist, J., dissenting); \textit{Hibbs}, 538 U.S. at 749 (Kennedy, J., dissenting); \textit{Garrett}, 531 U.S. at 370; \textit{Kimel}, 528 U.S. at 90–91.

\textsuperscript{301} \textit{Garrett}, 531 U.S. at 370–72; \textit{Kimel}, 528 U.S. at 91.


\textsuperscript{303} See, e.g., \textit{Caminker, supra} note 294, at 1131–32 (describing the congruence and proportionality standard as stricter than the deferential necessary and proper standard established in \textit{McCulloch v. Maryland} and applied to congressional exercises of Section 5 power prior to \textit{Boerne}).

\textsuperscript{304} See, e.g., \textit{Tracy A. Thomas, Proportionality and the Supreme Court’s Jurisprudence of Remedies}, 59 HASTINGS L.J. 73, 111 (2007) (describing the Court’s structural concern with federalism). Scholars have also argued that separation of powers concerns about maintaining judicial supremacy over the interpretation of the Constitution explain the congruence and proportionality standard articulated in \textit{Boerne}. See, e.g., \textit{Post & Siegel, supra} note 296, at 2; see also \textit{Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores}, 111 HARV. L. REV. 153, 163 (1997) (describing the interrelated federalism and separation of powers concerns). This separation of powers concerns seems to be much more muted in the Court’s application of the standard to antidiscrimination statutes in the cases decided after \textit{Boerne}.

\textsuperscript{305} See \textit{Hibbs}, 538 U.S. at 744 (Kennedy, J., dissenting) (arguing the Family and Medical Leave Act is an unconstitutional exercise of congressional Section 5 authority but conceding the
proportionality test thus seemed to be a relatively ineffectual way of doing so. As the liberal dissenters lamented, it is not clear how a decision invalidating a statute as an improper exercise of congressional authority under Section 5 of the Fourteenth Amendment but as a valid authority under the Commerce Clause “serves any constitutionally based federalism interest.”

The conservative shift toward a more rigorous form of scrutiny applied to congressional Section 5 power can be understood by assessing why the source of congressional power mattered in these cases. In particular, why did it matter that a statute was invalid as legislation enforcing Section 5 of the Fourteenth Amendment if it was valid under the Commerce Clause? It mattered because the Court had previously determined that Congress, when it properly exercised its Fourteenth Amendment enforcement authority, could abrogate state sovereign immunity under the Eleventh Amendment and give individuals the right to sue States for injunctive relief and damages. But Congress could not give individuals this right to sue States for damages under statutes that were proper exercises of its Commerce Clause authority. Instead, only the federal executive branch has the authority to sue for monetary damages under these statutes. This difference best explains why the Court directed so much scrutiny to congressional exercises of Section 5 power. The public choice conception of politics demonstrates why this is important.

The jurisprudence in these cases reflects a view that the aged, the disabled, and to a lesser extent women were like the gays and lesbians in the Romer dissent. They were politically powerful minority groups seeking to obtain “special rights” at the expense of the public. In particular, the jurisprudence of the conservative Justices in the post-Boerne cases accords with a concern that laws providing enhanced protection for the aged, disabled, and women were the product of a collective lobbying effort of cohesive, organized interest groups. Insofar as these statutes provided these groups with the ability to sue for damages, they codified an opportunity for group rent seeking through lawsuits. These suits were particularly troubling because they would be paid

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306. See Garrett, 531 U.S. at 388.
307. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); see also Eistreicher & Lemos, supra note 305, at 114 (describing the rigorous scrutiny as a response to congressional power to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment, but arguing “concern over the states’ immunity from suit should not drive the Section 5 inquiry”).
309. See Garrett, 531 U.S. at 374 n.9.
out of the state taxpayers’ coffers—coffers which the diffuse, disorganized public could not collectively defend in the political process because of the free-rider problem. By limiting the right to sue for damages to the executive branch of the federal government, the conservative majority fashioned itself as providing a political safeguard for the interests of the disorganized public. Insofar as the executive branch could still sue the State for violations of a statute enacted through the Commerce Clause, political safeguards existed to defend the public against minority group rent seeking. Unlike individual members of minority groups, the executive branch can be held to account for their suits by other interested members of the public, including members of other powerful minority groups that seek to make claims on the States’ coffers.

In a sense, the conservative Rehnquist and Roberts Courts’ jurisprudence involving historically marginalized groups contained a similar degree of cynicism about the democratic process as the liberal Vinson and Warren Courts’ jurisprudence in this area. The cynicism of the two eras was, however, directed at different sources. The cynicism of the Warren Court era was directed toward a political process that the liberal Justices presumed excluded groups like the poor and noncitizens. The cynicism of the later Rehnquist and Roberts Courts era was directed toward a political process that was deemed captured by minority groups like gays, the disabled, and the aged. In the conservatives’ vision of the modern era, not only do minority groups lack the entitlement to special protection from the majoritarian process, but any state action that benefits these groups is the subject of rigorous judicial scrutiny.

4. Structuring the Political Process

In a final shift, the Court’s role in the structuring of the political process changed significantly in the Rehnquist and Roberts Courts era. Reflecting the influence of the public choice conception of politics, conservatives on these Courts directed distrust toward democratic efforts to secure the representational rights of minorities. This distrust contrasted starkly with the prior Courts’ promotion of these same rights.

In the constitutional domain, the Court did not address any claims under the Equal Protection Clause concerning the deprivation of the representational rights of minorities. Many of these claims were litigated under the Voting Rights Act rather than the Constitution. But in supervising the executive’s exercise of its authority to enforce the VRA, the Court, led by its more conservative members, proved to be much less deferential than the conservatives of the prior era. For example, in *Miller v. Johnson*, the Rehnquist Court addressed a challenge to the constitutionality of Georgia’s redistricting plan.310 Under the plan, racial minorities were given greater opportunities for

representation in the political process than they had in the decade before.\footnote{Id. at 907–08 (describing how the proposed plans would have increased the number of majority-minority districts from one out of ten to two out of eleven).} The primary impetus for the Georgia plan was the Department of Justice’s implementation of section 5 of the VRA, a critical provision enforcing the Equal Protection Clause that is designed to redress the history of voting discrimination in specified jurisdictions located mostly in the South.\footnote{See 42 U.S.C. § 1973c (2006).} The Department determined that the use of race to draw district lines was necessary for the State to comply with the Act because it was the only means to assure racial minorities opportunities to elect candidates of their choice.\footnote{Miller, 515 U.S. at 906–08.}

As the conservative majority acknowledged, the Court’s previous deference to similar Department of Justice enforcements of the Act was being replaced by the Court’s new, close scrutiny of enforcement actions. What changed? The Court explained that the Georgia plan was different because it raised constitutional questions for which deference to the elected branches was not appropriate.\footnote{Id. at 923.} But insofar as the Department’s use of race was the source of the constitutional concern, the Court could not realistically distinguish its prior cases that upheld similar uses of race.\footnote{See, e.g., United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).} In addition, the Court conceded that the Georgia plan did not include bizarrely drawn districts that had been the basis for the constitutional concern about racial minority group self-dealing in Shaw.\footnote{See supra text accompanying notes 199–204.}

What instead appeared to be the source of the constitutional concern in Miller was an evolving conception of politics. In the prior era of optimistic pluralism, the executive’s use of race to secure minority representation did not raise serious constitutional questions because such actions were presumed the product of a properly operating pluralist marketplace.\footnote{See supra Part II.B.} But by the time of Miller, the presumption had shifted. Miller was decided the same year as Adarand, the case in which a conservative majority of the Court closely scrutinized and struck down a congressional affirmative action program as a product of “simple racial politics.”\footnote{See supra Part II.B.} The judicial presumption in Adarand was that Congress could not be trusted in its actions benefitting minority groups because such actions were likely the product of racial minority group capture.\footnote{See supra text accompanying notes 246–56.} The same logic seemed to apply in Miller. The executive could not be trusted in its use of race to secure the representational rights of racial minorities because the decision to use race was presumably the product of a decision-making process captured by racial minorities.
In addition to rigorously scrutinizing the executive branch’s reliance on race in supervising redistricting, the Court also declined to defer to other long-standing Department of Justice interpretations of section 5 of the VRA designed to protect the representational rights of minorities. Most ominously, in the recent Roberts Court case, *North Austin Municipal Utility District No. 1 v. Holder* (*NAMUDNO*), the Court seemed to suggest that the protection of representational rights of minorities was no longer under the purview of section 5 of the VRA. For the Court, gains in racial minority registration and voting suggested that this provision of the Act might no longer be necessary. No mention was made of whether the Act continued to be necessary to protect the representational opportunities of racial minorities.

This troubling omission came after decades in which the primary application of the Act was to voting procedures that had the purpose or would have the effect of depriving racial minorities of opportunities to be represented in the political process. Once the conservative Justices made voter registration and turnout the exclusive focal points of section 5 of the VRA, the path was paved for the crippling of the provision in *Shelby County v. Holder*, the next VRA case to reach the Court. Based on African American attainment of registration and turnout parity in the Southern States covered by section 5, the conservative majority determined, with scant attention paid to the record supporting the law, that it was no longer appropriate to target these States for the preclearance requirement.

The novel and narrow understanding of the function of the VRA in *NAMUDNO* and *Shelby County* as merely protecting the right to vote only makes sense when one accounts for the shift to a public choice conception of politics. Public choice theory suggests that so long as members of racial minority groups can vote, their organizational advantage guarantees their


321. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (implying, by its reliance upon the constitutional avoidance canon to avoid deciding whether section 5 of the VRA was a constitutional exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments, that protection of the representational rights of minorities no longer came within the purview of section 5).

322. *Id.* at 201.

323. This was the result of early judicial interpretations of section 5 extending the reach of the provision to claims of vote dilution. See, e.g., *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).


325. *Id.* at 2625–27 (arguing that the section 4 coverage formula that served as the basis for subjecting certain States with a history of discrimination to the preclearance requirement of section 5 was no longer relevant in light of the elimination of the voter registration and turnout gap in the covered States).
representation in the political process. The Act, insofar as it protects the representational rights of minority groups, therefore merely heightens advantages that members of these groups already have in the political process.

5. Summary

The conservative jurisprudence of the Rehnquist and Roberts Courts reflects the influence of a public choice conception of politics. The democratic victories of minority groups are the object of distrust while the presumably vulnerable individuals of the diffuse public require judicial protection.

In race doctrine, the conservative Justices in these two Courts articulated an anticlassification doctrine that subjected to suspicion governmental race classifications that harmed white individuals in order to benefit members of smaller minority groups. The conservative Justices also continued the Burger Court’s retreat from the provision of special judicial protection to other minority groups, rejecting the claims of gays and lesbians. In the process, the perception of these groups evolved from equally influential participants in the pluralist marketplace to politically powerful groups positioned to secure special rights at the expense of the public. Concerned about the political power of these groups, the conservatives rigorously scrutinized congressional exercises of power to enhance the equal protection rights of members of minority groups, which included providing minorities like the aged and disabled with the power to sue States for discrimination. This new level of scrutiny can best be explained by a conservative concern with politically powerful groups engaging in a form of rent-seeking behavior. Finally, conservatives, now perceiving racial groups as sufficiently, if not disproportionately, politically powerful, gave much less deference to congressional efforts to enhance the representational rights of racial minorities in the political process.

IV. RECONSIDERING ALTERNATIVE EXPLANATIONS

I have thus far argued that an evolving conception of politics explains the shifting conservative equal protection jurisprudence over the last fifty years. But to be clear, not every conservative opinion fits the pattern that I have described here. Doctrinal inconsistencies exist in the conservative Justices’ treatment of race and other group discrimination claims, their review of congressional authority to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment, and their structuring of the political process.326 The challenge, however, is not finding what theory perfectly explains the

Supreme Court’s jurisprudence, but what theory best explains it. Following the famous maxim, “it takes a theory to beat a theory,” 327 in this Part I argue that the theory premised on an evolving conception of politics, inconsistencies and all, better explains the Supreme Court’s equal protection jurisprudence than any other theory available.

The three most prominent alternative theories that might potentially account for shifts in the Court’s equal protection jurisprudence are increased judicial restraint, changes in constitutional interpretive methodologies, and revolutions in federalism. 328 However, none of these three overarching explanations accurately captures the shifts in equal protection doctrine over time. In particular, equal protection doctrine has not consistently shifted toward greater restraint, a more originalist methodology, or increased deference toward States.

A. Judicial Activism–Judicial Restraint

A popular canard regarding constitutional change over the last fifty years is that the judicial activism of the liberal Warren Court has been replaced by conservative judicial restraint. What is meant by the terms activism and restraint is the subject of constant dispute, 329 but the dominant account of activism emphasizes the frequency with which courts invalidate the actions of democratic institutions. 330

At the broadest level, the conventional account of liberal Warren Court activism and subsequent conservative judicial restraint has not been borne out empirically. Studies have shown that the more conservative Burger and Rehnquist Courts were equally or even more activist than the Warren Court as measured by judicial invalidation of democratically enacted laws. 331 However, theoretically, it could still be the case that there is a difference in the level of

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328. In addition to these more macro-level explanations of the shifts in the Court’s constitutional jurisprudence, scholars have developed micro-level accounts of shifts to particular equal protection doctrines. See supra note 31.


331. See, e.g., KECK, supra note 224, at 2 (describing the Rehnquist Court as “the least deferential of any in the history of the U.S. Supreme Court” in terms of the number of federal laws it invalidated); Lori A. Ringhand, The Rehnquist Court: A “By the Numbers” Retrospective, 9 U. PA. J. CONST. L. 1033, 1034 (2007) (describing the Rehnquist Court as plainly more activist than its predecessor in its invalidation of federal statutes).
activism in the Court’s equal protection jurisprudence. Perhaps the Warren Court was particularly activist in its equal protection jurisprudence—that is, more inclined to override the decisions of the more democratic institutions—than the Burger, Rehnquist, and Roberts Courts.

The fundamental shifts in the Supreme Court’s equal protection jurisprudence, however, do not reflect a pattern of increasing judicial restraint. For example, the Rehnquist and Roberts Courts’ refusal to defer to congressional attempts to enforce the Equal Protection Clause led it to strike down parts of a number of democratically enacted laws, such as the Age Discrimination in Employment Act, the American with Disabilities Act, and the Family Medical Leave Act. If the Rehnquist and Roberts Courts had applied the Warren Court’s deferential standard to congressional laws enforcing the Fourteenth and Fifteenth Amendments, the invalidated parts of these statutes would likely have been upheld. In the area of political representation, the Rehnquist Court invalidated state districting schemes that sought to secure the proportional representation of racial minorities through unusually shaped legislative districts in cases like *Shaw v. Reno.* The Roberts Court followed suit by initially reading out of section 5 of the VRA a purpose to protect the representational rights of racial minorities in *NAMUDNO v. Holder* and then relying on this reading to cripple the Act in *Shelby County v. Holder.* This level of activism is similar to that of the Warren Court, which used its authority to invalidate state apportionment schemes that failed to provide fair and effective representation for minorities.

Thus, for every area that suggests liberal judicial activism in the Warren Court, one can suggest another that shows parallel conservative judicial activism in the Burger, Rehnquist, and Roberts Courts. The activist-restraintist paradigm ultimately does not get us very far, and it fails to answer the question of why Justices decide to be activist in one equal protection case and restraintist in the next.

### B. Constitutional Interpretive Theory

Changes in constitutional interpretive methodology provide a second potential explanation for the broader shifts in the Supreme Court’s equal protection jurisprudence. According to a simplified version of this account, the Warren Court employed a living constitutionalist methodology in which it interpreted the Constitution flexibly and dynamically in response to societally

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332. *See supra* Part III.C.
333. If anything, the fundamental shifts in the Court’s equal protection jurisprudence are more consistent with an activism-restraint-activism chronology than the simple activism-restraint chronology. Warren Court liberal activism was replaced by Burger Court restraint and Burger Court restraint was ultimately replaced by Rehnquist Court conservative activism.
335. *See Lamb,* supra note 329, at 8 (noting the activism of conservatives and the restraint of liberals in certain historical eras).
held beliefs and principles.\textsuperscript{336} In contrast, the later, more conservative Courts increasingly employed an originalist methodology, interpreting the Constitution according to the Framers’ intent or the public meaning given to constitutional terms at the time of adoption.\textsuperscript{337}

Equal protection doctrine, however, does not reflect the increasing use of originalism for the simple reason that originalism has never been an accepted or available methodology for interpreting the Equal Protection Clause.\textsuperscript{338} Since the finding by the unanimous Court in \textit{Brown v. Board of Education} that the intent of the Framers of the Fourteenth Amendment was too ambivalent to provide any guidance on the constitutionality of school segregation, the Court has rarely turned to originalist sources for evidence of meaning in equal protection cases.\textsuperscript{339} It is therefore not only Warren Court doctrinal innovations such as the extension of special judicial protection to nonracial minorities and the active policing of the effective representation of racial minorities in the political process that arguably derive from a living constitutionalist methodology. It is also the doctrinal innovations of the Rehnquist and Roberts Courts that are similarly grounded. For example, colorblindness, a principle currently employed to support an anticlassification approach to equal protection, has not, and could not, be derived from originalist sources.\textsuperscript{340} Instead, the principle is derived from a conservative interpretation of prior Supreme Court cases like \textit{Brown v. Board Education} and Justice Harlan’s famous dissent in \textit{Plessy v. Ferguson}.\textsuperscript{341}

The fact is that even for originalists, a vague phrase like “Equal Protection of the Laws” does not lend itself to specific answers though an originalist interpretive methodology. Successive Courts have engaged in an ongoing process of construction in which vague phrases like equal protection are given


\textsuperscript{338.} See Jamal Greene, \textit{Fourteenth Amendment Originalism}, 71 Md. L. REV. 978, 982–94 (2012) (explaining the lack of reliance on originalism in judicial interpretations and scholarly accounts of the Fourteenth Amendment).


\textsuperscript{340.} See RONALD DWORKIN, \textit{TAKING RIGHTS SERIOUSLY} 226 (1977) (“Those who wrote the Clause intended to attack certain consequences of slavery and racial prejudice, but it is unlikely that they intended to outlaw all racial classifications . . . .”); KECK, supra note 224, at 191 (“Not in Bakke or Fullilove or Wygant or Croson or Shaw I did [the conservatives] provide any evidence that the Reconstruction Republicans who drafted and adopted the Fourteenth Amendment thought they were outlawing all racial classifications in the law.”); Jed Rubenfeld, \textit{Affirmative Action}, 107 YALE L.J. 427, 427–28 (1997) (explaining the originalist support for affirmative action).

meaning through the formulation of authoritative constitutional requirements that are then followed and re-interpreted by subsequent Courts. 342 The Court has always employed some variation of living constitutionalism in its equal protection jurisprudence, an approach in which meaning evolves on the basis of principles disconnected from constitutional text, Framers’ intent, or original meaning.

**C. Federalism**

A third potential explanation for the shift in the Court’s equal protection jurisprudence is its changing orientation toward federalism. Federalism doctrine, which defines the relationship between federal and state power in our dual constitutional structure, has constantly evolved as a result of changes to the composition of the Court. Since the 1950s, the conventional account is that the Warren Court devalued the importance of state prerogatives and that the later Burger, Rehnquist, and Roberts Courts were much more protective of these prerogatives.

Ultimately, the conventional account of this broader constitutional evolution toward federalism is oversimplified and incomplete as an explanation of the shifts in the Court’s equal protection jurisprudence. It is oversimplified because the Court’s federalism jurisprudence did not evolve in a consistent and coherent manner. Both qualitative and quantitative studies of the three Courts’ jurisprudence point to important inconsistencies in the application of federalism doctrine that suggest something other than a concern about the limits of federal power animated judicial decisions. 343

It is also incomplete because many aspects of the Court’s evolving equal protection jurisprudence simply do not map onto the conventional account of its evolving federalism jurisprudence. For example, the Rehnquist Court directed greater scrutiny toward actions by the States that benefitted racial minorities than the Warren Court. 344 In between, the Burger Court proved much less deferential to state-enacted affirmative action programs than to federally enacted affirmative action programs. 345 Missing from the analyses in the affirmative cases of the more conservative Courts was any assessment of the

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344. See supra Parts I.C and III.C.

345. See supra Part II.B.
federalism harms of the decisions or any efforts to reconcile the cases with the Court’s other federalism jurisprudence.

A second example is the Rehnquist Court’s treatment of federal legislation protecting other groups, such as the disabled and the aged. While the Court, consistent with the conventional account of its federalism jurisprudence, placed limits on congressional Section 5 authority, it did not limit congressional authority to enact these statutes through the Commerce Clause. As a result, individuals could not sue the State for damages for violations of civil rights statutes, but the federal government still could. The distinction between who has the authority to sue the States cannot be explained on purely federalism grounds, as both sources of suit would infringe state sovereignty.

In sum, the alternative explanations of increased judicial restraint, changes in constitutional interpretive methodologies, and a revolution in federalism explain some, but not all, of the changes in the Court’s equal protection jurisprudence. As compared to the theory of constitutional change premised on evolving conceptions of politics, each of the alternative theories comes up short in explaining the Court’s shifting equal protection jurisprudence.

CONCLUSION

When the liberal members of the Warren Court announced, “the Equal Protection Clause is not shackled to the political theory of a particular era,” they thought they were cementing into law a transcendent understanding of equal protection. According to this understanding, the democratic process could not be trusted to protect the interest of discrete and insular minorities. Close scrutiny was required for democratic actions that disparately harmed these minorities. A strong judicial role in structuring the political process was necessary to ensure the inclusion of these groups into democratic decision making. And when these groups were able to secure democratic victories, courts owed deference to congressional actions advancing out-group interests.

But soon after the Warren Court offered what it saw as a transcendent understanding of equal protection, judicial interpretations of the Clause underwent two major transformations. First, the Warren Court’s jurisprudence of distrust of democratic institutions in their treatment of minorities evolved into the Burger Court’s jurisprudence of trust. The Court gave a greater presumption of constitutionality to democratic state actions, whether those benefitted or disadvantaged racial and other minorities. In the second transformation, the Burger Court’s jurisprudence of trust evolved into the Rehnquist and Roberts Courts’ jurisprudence of renewed distrust. The Court once again closely scrutinized democratic state actions affecting minorities, but

346. See supra text accompanying notes 304–06.
347. See supra text accompanying note 308.
this time directed the scrutiny toward state actions that benefited racial and other minorities.

The Equal Protection Clause has therefore never been transcendent. Instead, the clause’s meaning has shifted along with the Court’s changing view of how politics operates. As I have argued, the Warren Court’s jurisprudence of distrust can be explained by the influence of a defective pluralism conception of politics in which politically marginalized minorities were presumed excluded from the political marketplace. But as an increasingly conservative Court witnessed the democratic passage of laws advancing the interests of the politically marginalized, a more optimistic pluralism conception of politics emerged and shaped the Burger’s Court’s jurisprudence of trust. Finally, following the rise of conservative legal movement in the 1980s with law and economics as its central disciplinary focus, the Rehnquist and Roberts Courts’ jurisprudence of renewed distrust emerged, marked by a cynical public choice conception of politics.

The theory of doctrinal change established by this Article raises important normative questions about whether the Court should interpret the Equal Protection Clause to accord with its own evolving conceptions of politics. While there is not sufficient space to develop a full normative account here, as a preliminary matter, I tend to believe that the Court should interpret the Equal Protection Clause in this way. Such a living constitutionalist interpretation is necessary to sustain the relevance of the Court’s equal protection jurisprudence to changing understandings of democratic process and equality. But in doing so, the Court should be more transparent about the conception of politics that animates its jurisprudence. Such transparency allows for democratic engagement between the Court and the people regarding appropriate understandings of politics. Such engagement with the people reduces the possibility of error in the Court’s adoption of a particular conception of politics. Ultimately, it is the only way to legitimize the Courts’ shifting constructions of equal protection.

For civil rights advocates, this theory—that equal protection law flows from the Court’s conception of politics—raises other challenges and opportunities. Advocates should consider whether and how they can shift, or sophisticate, the Court’s view of politics. As a strategic matter, advocates should also consider what room the Court’s current view of politics gives them for normative pressure. For example, to the extent that these advocates can show that white institutional capture has led to laws that disadvantage minorities, perhaps they can shame the Court into maintaining consistency with its public choice conception of politics by striking down such actions. On the other hand, civil rights advocates can also try to show that laws that benefit minorities are not the product of racial politics, but rather an attempt to achieve broader racial equality. If civil rights advocates hope to effectively push for
constitutional change, they must begin by being aware of the influence of conceptions of politics on the Court’s equal protection jurisprudence.