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The Equal Protection Clause in the Supreme Court, 1873-1903

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THE EQUAL PROTECTION CLAUSE IN THE SUPREME COURT 1873 - 1903*

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"No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure but it cannot make clearer the intent and purpose to be carried out."†

INTRODUCTION

This essay is a review of the adjudication in the Supreme Court of the United States of claims that a state had denied the equal protection of the laws, guaranteed by the fourteenth amendment, and thus violated one of the constitutional limits on its power. It will focus on the first thirty years of such decisions. More specifically it will examine the process by which the Court decided for itself and for the country, what concrete kinds of legal inequality were forbidden by the constitutional prohibition.[1]

The history of equal protection adjudication in the Supreme Court has been subjected to stark oversimplification. The conventional view is that there have been two phases in the Court's application of the clause. The first, "traditional," period applied a leni-

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† The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 126 (1873) (Swayne, J., dissenting).

1. Thus this study will focus on this single question out of the welter of equal protection interpretation issues which have presented themselves to judges and commentators. It will not dwell on such questions as what are "person[s] within [the] jurisdiction" of a state. Blake v. McClung, 172 U.S. 239, 260-61 (1898). Nor will it explore the question of when an inequality is the result of state action and therefore proscribed. The Civil Rights Cases, 109 U.S. 3 (1883). The extent to which the equal protection clause prohibits plainly public discrimination presents difficulties enough.

ent standard of review to uphold legislation (other than that involving racial discrimination) challenged as in conflict with the constitutional requirement. The second, "new" or "two-tier" equal protection period commenced in the 1960's and involved application of a strict standard of review for certain disfavored legislative classifications, while maintaining a deferential approach toward social and economic regulation.[2]

But even the very beginnings of equal protection adjudication showed far more change and complexity than this model accommodates. Active review of legislative classifications was well established by the end of the period under study. Furthermore, and contrary to commonly held assumptions, this era can best be understood not as one of mechanical formalism but of adjudication without standards or boundaries.[3] The failure to recognize these complications is attributable in large part to the relative neglect of the cases decided prior to the 1930's. General notice of equal protection decisions of the nineteenth century has been confined to a handful of "landmark" cases such as *Yick Wo v. Hopkins*[4] decided in 1886 and *Plessy v. Ferguson*[5] decided in 1896, the citations of which have become shorthand symbols for particular, discrete doctrines of constitutional law. Even with respect to these decisions, however, the failure to understand the developing context in which they were rendered has led to substantial misinterpretations.[6]

This period has, quite correctly, been studied with an emphasis on the Supreme Court's increasing tendency to find legislation invalid when measured against the demands imposed by the Court under the authority of the due process clause of the amendment. In fact, the equal protection decisions roughly tracked these due process developments. Indeed, in a number of cases, the equal protection issues were resolved in conclusory addenda to the Court's

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2. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978)(opinion of Powell, J.); *id.* at 356-59 (opinion of Brennan, J.); G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 657-65 (9th ed. 1975); Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 663-65 (1977); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947 (1975).

3. *See* text accompanying notes 208-10 *infra*.

4. 118 U.S. 356 (1886).

5. 163 U.S. 537 (1896).

6. *See* text accompanying notes 82-106, 179-93 *infra*. Of course, given the interpretations consistently put on such cases, they now, in a sense, stand for the propositions for which they are cited.

more extended discussions of due process.[7] But, equal protection claims presented interpretation questions of their own. A thorough examination of the way those questions were resolved sheds further light on the decisionmaking process of the Court and on the roots of the equal protection doctrines which have survived to this day. In that respect it presents an almost ideal case study of the difficulties involved when the Court enforces imprecise constitutional commands.

I. THE PROBLEM OF INTERPRETATION

In a recent opinion the position of the Supreme Court when first confronted with claims invoking the equal protection clause was likened to that of Adam in the Garden of Eden.[8] The general language of the provision and the absence of any antecedents with developed interpretations that could be applied to it presented the Court with a new world of constitutional possibilities.[9] This situation was bound to create a temptation to use the clause as the basis from which the Court could impose on the states its own judgment as to the propriety or impropriety of different kinds of governmental activity.

This difficulty is one instance of one of the most persistent

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7. *E.g.*, Chicago M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 458 (1890).

8. Trimble v. Gordon, 430 U.S. 762, 779 (1977)(Rehnquist, J., dissenting).

9. Unlike the due process and privileges and immunities clauses of the fourteenth amendment the "equal protection" language had no direct counterpart elsewhere in the Federal Constitution. Nor was it familiar from state constitutions. R. BERGER, GOVERNMENT BY JUDICIARY 168 (1977). However, the Massachusetts Constitution of 1780 did provide that Christians "demeaning themselves peaceably shall be equally under the protection of law." *Id.* (quoting MASS. CONST. art. 3 (1780)). Also consider the following statement from President Jackson's Bank Veto Message of 1832:

> Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

Quoted in J. WHITE, BANKING LAW: TEACHING MATERIALS 15-16 (1976).

and intractable problems of constitutional law and judicial review—that is, the need to accommodate the objective of constitutional government to the inherent imprecision of language. Constitutional government is based on the assumption that governmental power may be defined by written law.[10] But where constitutional words fail to communicate the nature of the limits they are intended to embody, the limitation of government is, to the same extent, more difficult. In the United States government, where policing of constitutional limits is largely entrusted to the judiciary, the problem is most acutely that of the Supreme Court as it exercises its authority to invoke the Constitution. The most carefully drafted language cannot eliminate doubt about its meaning; it cannot provide an automatic answer to claims of unconstitutional activity by the government.[11] The notion, therefore, that the government is limited perfectly by impersonal law, and not at all by the will of the Supreme Court is, at the end, an illusion.

But this imprecision of language is a problem of degree. No order or prohibition is certain in meaning, but some are far more specific than others. The Constitution specifies exactly the minimum age for senators.[12] It sets forth in broad detail the procedure to be followed on a presidential veto of a bill.[13] It prohibits without further direction the imposition of cruel and unusual punishments.[14] Provisions of this last kind create the most severe difficulties for the Supreme Court, as it attempts to maintain limits obviously intended to be placed on the other branches, without imposing its own virtually unreviewable will upon the government and the country.[15]

Nowhere is this difficulty more severe than in the case of the

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10. "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order." Hamilton, *Constitutionalism*, 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 255 (1937).

11. "One half the doubts in life arise from the defects of language, ..." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 232 (1824) (Johnson, J., concurring). *See, e.g.*, Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

12. U.S. CONST. art. I, § 3, cl. 3.

13. *Id.* § 7, cl. 2.

14. *Id.* amend. VIII.

15. On the other hand, as we come closer to perfecting our constitutional limitations through precision and detail, we begin to bear another cost in rigidity which is particularly undesirable in a basic law intended to control well into the future. The result is a compromise between our fear of undefined governmental power and our unwillingness to confine that power with words which unduly restrict the government in the work we want it to do.

equal protection clause. When the fourteenth amendment first came before the Court in 1873[16] the Court was required to apply a limitation whose language was obscure in an extreme degree. In this situation the Court was bound to feel the opposite tugs of its duty to refer to a law outside itself and the temptation to write its own constitutional mandate of equality under the guise of adjudication.

The language of the equal protection clause tells us almost nothing. Indeed, it seems that the clause cannot reasonably be applied as if it means only what it says. What is it, as an abstract matter, to "deny the equal protection of the laws?" The words seem to indicate that only the application of the laws is to be equal, not the substance of the laws themselves. But if this were the meaning of the clause, the most blatant and irrational discrimination would be permissible so long as it were incorporated in a duly promulgated law, faithfully applied. Impartial administration of unequal laws is not an illogical concept and might, indeed, be preferred to arbitrarily selective enforcement of the same laws. But this highly limited interpretation has never commended itself to the Supreme Court.[17] Another possible meaning suggested by the language of the clause would equate "the laws" with the legal system as a whole. In this case the clause might be read to insist that the legal system not be skewed in favor of or against any one individual or group. But this interpretation presents enormous difficulties, particularly in determining what kind of imbalance is prohibited, and has never been seriously considered by the Court.

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

17. *See* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 342 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1170-71 (1969). Some of the early cases came close to this position at least in the rhetoric chosen. *See* Missouri v. Lewis, 101 U.S. 22, 31 (1879); Pace v. Alabama, 106 U.S. 583, 584-85 (1882). This view was repudiated and *Pace* was overruled in McLaughlin v. Florida, 379 U.S. 184 (1964).

A reasonable argument may be made that fair administration of some discriminatory laws merely exacerbates the inequality:

> The critic may wish to say that the more fairly the law in question is administered, the more this frustrates a principle of wider equality in which he himself believes, as when a law based upon the principle of discrimination between coloured and white men is administered fairly, i.e. with scrupulous regard to equal treatment within each category, but is thereby itself the cause of inequality between coloured and white men.

I. BERLIN, CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS 99 (1978).

If we abandon these rather improbable understandings, we are compelled to the conclusion that the prohibition is directed at the content of individual laws, at the inequality in treatment which those laws may require. Indeed the Court soon adopted the not so obvious formula that "the equal protection of the laws" entails "the protection of equal laws."[18] But neither can this interpretation be taken too literally. Certainly not every law which operates unequally on different people is to be condemned as invalid. It is a characteristic of law generally that it classifies with happier consequences for some than for others.[19] Therefore, the coexistence of the clause with the survival of the legal system, as commonly understood, demands that some unequal classifications are improper but others are not. But here we must stop. The language of the clause takes us no further.[20]

Of course the absence of a useful meaning discoverable from the words of the amendment did not by itself leave the Court without any aid for interpretation. It had long been recognized that the Court could look to the intention of the framers of the relevant constitutional language.[21] Few subjects in American law have received such intense scholarly attention as the legislative history of the fourteenth amendment.[22] The variety of sources which properly should be consulted, the weight to be accorded those sources, the meanings of the various expressions of intention discovered,

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18. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

19. Trimble v. Gordon, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting); Tussman & ten Broek, *supra* note 17, at 343.

20. Some commentators, emphasizing the language's command to provide "protection," have read it as imposing affirmative obligations on the states:

> Protection of men in their fundamental or natural rights was the basic idea. Equality was a modifying condition, and the clause in the Fourteenth Amendment was a confirmation of the duty of government to protect men in their natural rights. This clause established the absolute and substantive character of that duty, despite a use of the word "equal" that seems to give the clause a merely relative form. Equal denial of protection, that is, no protection at all, is accordingly a denial of equal protection.

J. TEN BROEK, EQUAL UNDER LAW 21 (1965). At another point the same author claims: "It was because the protection of the laws was denied to some men that the word 'equal' was used. The word 'full' would have done as well." *Id.* at 237. *See* Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 702-05 (1979). For arguments to the contrary, *see* R. BERGER, *supra* note 9, at 183-86.

21. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188-89 (1824).

22. A fairly thorough bibliography of the relevant literature may be found in R. BERGER, *supra* note 9, at 433-46.

have all been the subject of long and unresolved debate. Recently the discussion has been renewed with no more likely prospect of agreement.[23] For the purposes of this article, it is only necessary to know that the Supreme Court itself, while often acknowledging the legitimacy of such questions, has never undertaken a serious and systematic investigation of the original intention as an aid to interpretation.[24] Since this article explores not the "true" meaning of the amendment but rather the way the Court coped with difficult and obscure constitutional limitations, we can consider the Court's behavior without evaluating the academic dispute as to the framers' intention.

Given the difficulties of finding an appropriate literal meaning and the lack of recourse to original intention, the Court was left with nothing but an unspecific bar against some kinds of legislative classifications. It was open for the Court to choose among a vast number of possible ways of distinguishing valid from invalid classifications. The choices it would make would have critical implications for the ways in which state governments could handle the problems they confronted. Those choices were necessarily influenced by the way in which the Court understood the basic problems of constitutional government which have been discussed. The Court could minimize the risk of unrestricted judicial discretion by establishing, as a matter of construction, specific, well-defined interpretations of the constitutional rule.[25] Then, by pursuing

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23. *See id.* Berger's views have been vigorously contested. *See, e.g.*, Soifer, *supra* note 20.

24. During the period under study it was still possible for judges to consult their own recollections as to the purpose to be served by the fourteenth amendment. Thus, in the *Slaughter-House Cases*, Justice Miller's majority opinion ostensibly relied in great measure on the "history of the times" which was "[f]ortunately . . . fresh within the memory of us all." 83 U.S. (16 Wall.) 36, 67-68 (1873). To the extent that certain assumptions as to the history were, for that reason, taken for granted, the impact of the judges' unspoken understanding cannot be measured nor the extent that their conclusions were explicitly applied to cases. Justice Miller established the precedent of referring to the intention of the framers in broad generalities. *Id.* at 71-72. This style has become the staple of the Court's references to the fourteenth amendment's legislative history. Such references have not been obviously influential in deciding uncertain cases. *E.g.*, Brown v. Board of Educ., 347 U.S. 483, 489 (1954). There have been exceptions among the individual justices who have shown a willingness to delve somewhat more deeply into the available materials. *See* Adamson v. California, 332 U.S. 46, 70-75, 92-123 (1947) (Black, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 595-608, 625-32 (1964) (Harlan, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 250-78 (1970) (Brennan, J., concurring and dissenting).

25. Such judicial construction of limiting models has been recognized in the common

a policy of stare decisis, the Court's range of action would be confined. The government as a whole would be more limited, albeit by a combination of constitutional rules provided by the constitutional document and the judicial model so created. With regard to equal protection adjudication this limitation would have to be almost entirely the creation of the Court. But the history of the Court's decisions in the period under study will show movement toward an equal protection position that maximized the Court's latitude in reviewing legislation on a case-by-case basis. Such a course could only increase the departure from limited government inherent in the lack of guidance provided by the equal protection clause itself.[26] This outcome was by no means inevitable. Indeed, the Court's first decision applying the equal protection guarantee indicated an opposite direction altogether.

II. THE SLAUGHTER-HOUSE CASES AND TWO MODELS OF EQUAL PROTECTION ADJUDICATION

State laws were first challenged in the Supreme Court as incompatible with the fourteenth amendment in the *Slaughter-House Cases,* decided in 1873.[27] The dramatic and ironic story of that case has been told many times.[28] The plaintiffs, New Orleans butchers, questioned the legality of the Louisiana legislature's grant of a monopoly for the slaughter of livestock. The Supreme Court's decision upholding the monopoly is best remembered for its disposition of the claim that Louisiana had violated the amendment by abridging "the privileges and immunities of citizens of the United States." By restricting the meaning of that phrase to certain rights connecting the citizen to the national government the

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law creation of sub-rules for particular application of the broad duty of reasonable care in tort law. *See* H. HART, THE CONCEPT OF LAW 129-30 (1961); Dickinson, *Legal Rules: Their Function in the Process of Decision,* 79 U. PA. L. REV. 833, 852-54 (1931).

26. The extent to which it is desirable to have more or less sharply defined and stable limitations on the powers of government—even one with a written constitution—is, itself, a controversial political judgment. *See* Kay, *Preconstitutional Rules,* 42 OHIO ST. L.J. 187 (1981).

27. 83 U.S. (16 Wall.) 36 (1872).

28. *E.g.,* C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 pt. 1 at 1320-63 (VI History of the Supreme Court of the United States 1971); Franklin, *The Foundations and Meaning of the Slaughterhouse Cases,* 18 TUL. L. REV. 1, 218 (1943); Hamilton, *The Path of Due Process of Law,* 48 ETHICS 269 (1938); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?,* 1972 WASH. L.Q. 405 (1972).

Court may have prematurely buried that potentially drastic limitation on state power.[29] But, in addition, the Court had to deal with the plaintiff's claim that the monopoly "enriche[d] seventeen persons and deprive[d] nearly a thousand others of the same class, and as upright and competent as the seventeen, of the means by which they earn their daily bread . . ."[30] and, therefore, denied to that disfavored thousand the equal protection of the laws.

After going to some length to explain and justify the majority's principal ground of decision, Justice Miller made short work of the equal protection claim. His brief conclusion as to the meaning of that clause has been cited as a paradigm of bad judicial forecasting.[31]

> We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[32]

Justice Miller and the majority solved the problem of limits of the equal protection clause by confining its reach to racial discrimination. This clearly defined view of the scope of equal protection may be seen as one version of a general limiting method. The clause would be used to invalidate only classifications based on certain characteristics. This approach will be referred to as the model of

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29. The restricted reading of the clause has been deemed improper by later commentators. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 423-24 (1978); Kurland, *supra* note 28, at 408-15. *But see* A. BICKEL, THE MORALITY OF CONSENT 42-47 (1975).

30. 83 U.S. at 56 (argument of John A. Campbell).

31. 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART III, RIGHTS OF THE PERSON 490-91 (1968).

32. 83 U.S. at 81. Following this well-known statement Justice Miller added this, still cryptic, amplification:

> But as it is a State to be dealt with, and not alone the validity of its laws, we may safely leave that matter [the applicability of the equal protection clause] until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands.

Id.

This potentially significant limitation on the Court's power under the amendment does not appear to have been further developed in subsequent cases.

Notwithstanding the limitation quoted in text, Justice Miller, in the arguments before the Court in *County of San Mateo v. Southern Pac. R.R.* in 1882, denied that the Court had intended that the protection of the fourteenth amendment, in general, be limited to blacks. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 186-87 (1939).

impermissible classifications. On this view, mere inequality in state laws was not the concern of the amendment. Only if the state should base the inequality on a forbidden factor would the clause come into play. This solution, of course, drew heavily on the concededly primary purpose of the amendment, to restrict official racial discrimination. It narrowed its potentially enormous scope to judicially manageable proportions.

But the dissenters in the *Slaughter-House Cases* were in no mood for a limited view of the fourteenth amendment. The dissent of Justice Field, while infused with the rhetoric of equality, made no specific reference to the language of the equal protection clause.[33] Justice Bradley paused only to make the unadorned assertion that the monopoly constituted a deprivation of the equal protection of the laws.[34] The separate dissenting opinion of Justice Swayne, alone, dealt with the equal protection claim as a discrete question; but it merely stated that the inequitable distribution of privileges and immunities expounded in the other dissenting opinions amounted to a denial of equal protection. He noted, moreover, the fact that the clause's guarantee extended to "any person" precluded the majority's limitation of the amendment to the protection of racial minorities.[35]

From this brief discussion we may infer the existence of an incipient division over the way the amendment, and particularly its requirement of equal treatment, was to be understood. In contrast to the limiting method which the majority employed, the dissenters rejected any narrow restriction. Instead they embraced the

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33. The dissenting opinions, particularly that of Justice Field, did not treat the amendment as containing three strictly separate proscriptions. Rather it was seen as a single guarantee of fundamental rights identified with United States citizenship. Equality of treatment was an integral aspect of that citizenship. 83 U.S. at 95-98, 109-10. The same refusal to analyze the segments of the section separately characterized the famous brief of former Justice John A. Campbell on behalf of the independent butchers challenging the monopoly.

34. 83 U.S. at 122. In a later case Justice Bradley, looking back, put more emphasis on the equal protection defects of the Slaughter-House monopoly:

> But still more apparent is the violation, by this monopoly law, of the last clause of the section—'no state shall deny to any person the equal protection of the laws.' If it is not a denial of the equal protection of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition.

Butchers Union Slaughter-House v. Crescent City Co., 111 U.S. 746, 765-66 (1884) (concurring opinion).

35. 83 U.S. at 128-29.

very breadth and ambiguity of the constitutional language. Thus Justice Bradley was content merely to quote the clause while Justice Swayne felt the applicability of the clause to the case at hand was demonstrated by italicizing the words "*any person.*" This approach, of course, was well adapted to their objective in that case: to bring within the amendment's scope a classification they found odious. But given the need to accommodate the inevitable inequalities of the law, these judges, too, would have to confront the need for a limiting method of some kind.

That alternative limiting method was foreshadowed in the dissenting Justices' opinions with respect to the principal claim that the monopoly abridged the plaintiffs' privileges and immunities as citizens of the United States. The majority opinion had forged a limited version of that constitutional prohibition by restricting its reach to protection of the relationship between the individual citizen and the federal government. Again the dissenters put forward a more expansive position, equating privilege and immunities with "fundamental rights" broadly defined,[36] including the right to choose and pursue a vocation. They went on, however, to inquire whether the abridgement of that right by the monopoly legislation was a reasonable way of achieving a legitimate governmental objective of the state.[37] Only upon concluding that it was not so justified was a finding of unconstitutionality proper. Thus, while the dissenters asserted an extraordinarily broad category of protected rights, they also imposed an equally sweeping qualification on those rights by subordinating them to reasonable police power regulations.

The fact that the dissenting justices needed such a limitation became apparent the very next day, when the Court handed down

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36. *E.g., id.* at 95-98, 100-01 (Field, J., dissenting). *See* Franklin, *supra* note 28, at 83. The argument of the independent butchers offered the Court by former Justice Campbell has been likened to an invitation to incorporate a natural rights philosophy into the Constitution. *See* Hamilton, *supra* note 28, at 274-79. It is interesting that the more limited version of the amendment was presented by counsel for the Slaughter-House monopoly, Christian Roselius, whom Professor Franklin described as an anti-slavery Southern Whig and a positivist:

> His escape from the natural law of the abolitionists took the form, then, not of an acceptance of the fetters for slaves, historically forged by Savigny, but of an acceptance of the agnosticism or positivism of the actuality of the *code civil louisianais* itself. He said he knew nothing but this Code.

Franklin, *supra* note 28, at 56.

37. 83 U.S. at 87-89 (Field, J., dissenting) and at 119 (Bradley, J., dissenting).

its decision in *Bradwell v. State.*[38] In that case an otherwise qualified applicant was denied admission to the practice of law by the Illinois Supreme Court because she was a married woman. Mrs. Bradwell brought her appeal to the United States Supreme Court citing the fourteenth amendment. The Court affirmed with a separate concurring opinion by Justice Bradley joined by Justices Field and Swayne, all *Slaughter-House* dissenters. The case was argued and decided solely on allegation of an abridgment of the privileges and immunities of a citizen of the United States. As such, of course, it presented no difficulties to the majority in the *Slaughter-House Cases,* given their previous narrow construction of privileges and immunities. For the dissenters, however, who just had declared those privileges and immunities to be coextensive with those rights which "belong to the citizens of all free governments," and explicitly had included among those rights a right to earn a livelihood, an affirmance must have come somewhat harder.[39] For those judges the critical difference in the cases was the propriety of the infringement of that right in light of its contribution to a police power objective. In his *Slaughter-House* dissent Justice Bradley had inquired whether the grant of monopoly was a reasonable exercise of the power of the state, and had concluded, by reason of history and economics, that it was instead "onerous, unreasonable, arbitrary and unjust."[40] In *Bradwell,* making the same inquiry and referring to history and theology, he concluded that the state's interference with the abstract right was "founded on nature, reason and experience."[41] The *Slaughter-House* monopoly "has none of the qualities of a police regulation."[42] The Illinois Supreme Court's exclusion of women "fairly belongs to the police power of the State."[43]

This alternative to the limited conception of privileges and immunities espoused by the *Slaughter-House* majority could and would be easily transposed to the interpretation of equal protection. With respect to that clause the majority, adopting the model

38. 83 U.S. (16 Wall.) 130 (1872).

39. *See generally* Corker, *Bradwell v. State: Some Reflections Prompted by Myra Bradwell's Hard Case That Made "Bad Law",* 53 WASH. L. REV. 215 (1978).

40. 83 U.S. at 119.

41. *Id.* at 142.

42. *Id.* at 119-20.

43. *Id.* at 142.

of impermissible classifications, limited its reach to discrimination on account of race. The competing method of adjudication, which we will call the model of unjustifiable classifications, would hold invalid any kind of inequality unless it were part of a reasonable scheme of police power regulation.[44] The different ramifications of these two positions for the expansion of judicial power in constitutional review are clear. The model of impermissible classifications focused on the presence or absence of one, or at least some finite number, of impermissible classifying traits such as race. As such, it necessarily restricted the extent to which the Court felt free to examine other aspects of the challenged legislation. The model of unjustifiable classifications, on the other hand, would focus on the propriety of the classification's purpose (whether it was within the police power) and how well it served that purpose. It thus called

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44. Justice Bradley in his circuit court opinion in the *Slaughter-House Cases* had seen the constitutional right in the same way.

> This right [to pursue an occupation] is not inconsistent with any of those wholesome regulations which have been found to be beneficial and necessary in every state. . . . The next question is: Does the law complained of, and the proceedings under it, conflict with the enjoyment of this fundamental privilege of the complainants; or is it only such a political and police regulation as it is competent for a state legislature to make?

Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652-53 (C.C.D. La. 1870) (No. 8408). The distinction was again made explicit in 1884 when the New Orleans slaughtering monopoly again came before the Court. This time the former monopolists argued unsuccessfully that a subsequent legislature's dissolution of their grant was an impairment of the obligation of contract and therefore a violation of art. I, § 10, cl. 1. In their concurring opinions Justices Field and Bradley restated their earlier dissents. Field stated that the dissenters have not

> denied that the States possessed the fullest power ever claimed by the most earnest advocate of their reserved rights, to prescribe regulations affecting the health, the good order, the morals, the peace, and the safety of society within their respective limits . . . . [T]he recent amendments to the Constitution have not changed nor diminished their previously existing power to legislate respecting the public health and public morals.

Butchers' Union Slaughter-House v. Crescent City Co., 111 U.S. at 754-55 (concurring opinion). Justice Bradley reiterated that the amendment would not touch real police power regulations:

> Suppose a law should be passed forbidding the erection of any bakery, or brewery, or soap manufactory within the fire district, or any other prescribed limits in a large city;-that would clearly be a police regulation; but would it be a police regulation to attach to such a law the grant to a single corporation or person of the exclusive right to erect bakeries, breweries, or soap manufactories at any place within ten miles of the city? Every one would cry out against it as a pretence and an outrage.

Id. at 761 (concurring opinion).

for nothing less than a judicial reconsideration of the utility of the challenged legislation.[45]

We have, thus far, seen the justices developing these options only in the realm of privileges and immunities. The pattern established would, however, control the other operative phrases of the amendment as well.[46] In the privileges and immunities context the more restrictive method was to prevail. With respect to the equal protection clause, however, the model of unjustifiable classifications was to compete with the model of impermissible classifications, and would be, by the end of the period under study, the dominant mode of adjudication.

III. Early Cases

The Court employed the model of impermissible classifications again in 1879 in three decisions dealing with the constitutionality of all-white juries.[47] In majority opinions by Justice Strong the Court held that a statutory policy excluding blacks from jury duty denied the equal protection of the laws to black defendants in criminal trials and that Congress was authorized under section five of the amendment to make unlawful the administration of such a policy by state officials.[48] In discussing the reach of the equal pro-

45. These two models will suggest the "two-tier" equal protection model developed by commentators and eventually adopted by the Court itself in the late 1960's and early 1970's. The upper tier invokes strict scrutiny and almost certain invalidity on the basis of the kind of classification alone. The lower is, in theory at least, an inquiry into the relation of the discrimination to a permissible police power purpose. In their modern incarnations the method of impermissible classifications has been associated with judicial activism and the method of unjustifiable classifications with restraint, the opposite of the tendencies described in text. *But see* note 207 *infra* on the use of the model after the turn of the century.

46. The transformation of broad constitutional rules into vehicles for judicial re-examination of the aptness of challenged legislation is a recurring theme in American constitutional law. Thus state legislation imposing a burden on commerce would be valid if enacted in reasonable pursuit of a proper state police power goal. *E.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). State laws impairing the obligation of contracts could be saved by the same justification. *See* note 44 *supra*. The due process clause in its classic substantive aspect would, of course, also become a vehicle for judicial review of the reasonableness, in light of a permissible public purpose, of legislation which impinged on rights of property and liberty. This is seen in its purest form in the paradigm case of Lochner v. New York, 198 U.S. 45 (1905). *See* C. Haines, The Revival of Natural Law Concepts 177-95 (1965); B. Twiss, Lawyers and the Constitution 130-40 (1942).

47. Strauder v. West Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879).

48. Strauder v. West Virginia, 100 U.S. at 308-12; *Ex parte* Virginia, 100 U.S. at 346-48 (dissenting opinion). In *Virginia v. Rives*, the Court reaffirmed these points but concluded

tection clause, the majority opinions dealt almost exclusively with the vice of racial discrimination, per se, repeating the emphasis in the *Slaughter-House Cases* on the historical context of the amendment:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?[49]

The Court did expand the range of prohibited classifications somewhat. It assumed that the amendment would equally prohibit an exclusion of white men or "all naturalized Celtic Irishmen."[50] But in setting juror qualifications the State was free to limit this duty "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."[51] The amendment was unconcerned with such inequalities. "Its aim was against discrimination because of race or color."[52] Only the use of this forbidden classifying trait would trigger the amendment's protection.

Again, however, there was a dissenting view. In separate opinions, joined by Justice Clifford, Justice Field continued to press the broader and less sharply defined interpretation of the fourteenth amendment which he argued in his dissent in the *Slaughter-House Cases*.[53] The model of impermissible classifications,

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that Congress had not provided for removal to federal court if the all-white jury were not mandated by state law. 100 U.S. at 319-20. Justice Field, joined by Justice Clifford, dissented in *Strauder* and *Ex parte Virginia* and filed a separate concurring opinion in *Rives*, arguing, *inter alia*, that the racial exclusion did not amount to a constitutional violation. *Ex parte* Virginia, 100 U.S. at 360-63 (dissenting opinion).

49. Strauder v. West Virginia, 100 U.S. at 307.

50. *Id.* at 308.

51. *Id.* at 310.

52. *Id.* The Court, however, did not rule out and, indeed, implicitly left open the possibility that the clause might be put to other purposes. *Id.*

53. *See* text accompanying notes 33-38 *supra*. There is little continuity of faction on the Court in the developing models of the fourteenth amendment. Field was unusual in his singular dedication to an expansive interpretation. But the cases discussed in text are typical in illustrating the shifting majorities. Clifford, who joined Field in these jury cases, was among the Justices in the *Slaughter-House* majority. Justices Bradley and Swayne, fellow dissenters in the earlier case, parted company with Field here. Of course this is easily explicable on the face of things. Swayne and Bradley's activist views of the amendment were in no way at odds with their position in favor of invalidating racially exclusive juries. If anything, it is Field who, at first glance, seems to have shifted ground. But, as noted in text, at

based on a forbidden classifying trait, such as race, was far too narrow for him. Whereas his more expansive view of the amendment's coverage served in the earlier case to provide a basis for arguing the invalidity of classifying legislation, in the jury cases the same view was marshalled to support the proposition that the challenged state action was not included in the constitutional prohibition. He now argued that the thirteenth and fourteenth amendments were not intended to touch at all the political arrangements of state government, including the operation of the courts.[54] And this position was made more, rather than less, plausible by virtue of the fact that these amendments extended beyond mere racial discrimination. With regard to the equal protection clause he stated:

> All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The quality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.[55]

Field thus appeared to argue for another variant of the model of impermissible classification—one based not upon the classifying trait employed by the state, but rather upon the activity to which the classification applied. Discrimination with respect to "political rights" was not restricted. "Political rights," those "aris[ing] from the form of government and its mode of administration,"[56] defined the relationship of citizen and state and included voting, office holding, and the carrying out of public duties such as jury service. Only discrimination with respect to "civil rights," those defining the legal status of private persons, was prohibited.[57] But this version of impermissible classifications answered few questions about

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a deeper level Field was developing a consistent model of equal protection which would eventually carry the day.

54. *Ex parte* Virginia, 100 U.S. at 358-62 (dissenting opinion).

55. *Id.* at 367. *See also* Virginia v. Rives, 100 U.S. at 335 (concurring opinion).

56. *Ex parte* Virginia, 100 U.S. at 367 (dissenting opinion).

57. As to the distinction between civil and political rights, *see* R. BERGER, *supra* note 9, at 27-36; Cerny, *Appendix to the Opinion of the Court*, 6 HASTINGS CONST. L.Q. 455, 460-65 (1979).

the effect of the amendment. Limiting its reach to racial discrimination drastically curtailed the impact of the amendment's proscriptions. But restricting its operation to discrimination in civil rights, although leaving all-white jury selection intact, still left open a vast field of potential unconstitutionality. Field's conception of civil rights was extremely broad, commensurate with the wide range of privileges and immunities asserted in his *Slaughter-House* dissent, encompassing, among other things, "the acquisition of property and the pursuit of happiness."[58] Social and economic regulations of every sort would still be open to constitutional scrutiny notwithstanding this "limiting" model, the protection of which was extended to "all persons of every race, color, and condition."[59] Thus, this version of the model did not, itself, provide a satisfactory solution to the problem of separating valid from invalid legislative classifications. For that, Field would have to have recourse to the model implicit in the *Slaughter-House* dissents, the model of unjustifiable classifications.

Indeed, the Court seems to have already employed this model in upholding a challenged legislative classification. In the 1877 term, in a brief opinion by Chief Justice Waite, the Court turned aside a constitutional challenge to a Richmond ordinance which, in specific terms, forbade the Richmond, Fredricksburg and Potomac Railroad from operating a steam engine on Broad Street.[60] The Court first found the ordinance not to be an unconstitutional impairment of contract or deprivation of property without due process of law. But since the complaining railroad had been singled out for especially restrictive treatment, an equal protection claim was presented as well. The Chief Justice disposed of this contention in a paragraph. He did not, however, do so by arguing that the clause was applicable only to discrimination on account of race. Rather, after noting that only the plaintiff operated on Broad Street, he suggested that safety considerations might well justify special regulation of this line. "While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them

58. *Ex parte* Virginia, 100 U.S. at 367 (dissenting opinion). Field contrasted this scope with that of the fifteenth amendment which, by its very terms, adopted a model of impermissible classification, both as to classifying trait (race) and subject of regulation (the vote).

59. *Id.* at 368.

60. Railroad Co. v. Richmond, 96 U.S. 521 (1877).

from all. It is the special duty of the city authorities to make the necessary discriminations in this particular."[61] It is clear that a very different technique was being used here from that utilized by the majority in the *Slaughter-House Cases* and which would be called on in the jury cases. It reflected, instead, the approach implicit in the *Slaughter-House* dissents. The inquiry was not into the *kind* of discrimination at issue but into its necessity, its reasonableness, its "propriety."

The same model seems to have been behind the Court's upholding in 1879 of Missouri's disparate schemes for criminal appeals.[62] In most areas of the state convictions could be appealed directly to the state Supreme Court. In the St. Louis area, however, appeal was to a local appellate court and further review was unlikely. As in the street railroad case, the Court's opinion, this time by Justice Bradley, noted the possibility that different conditions might call for different measures in creating an effective judicial system. The fourteenth amendment guaranteed nothing more than that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes *in the same place and under like circumstances.*"[63] Only by taking account of difference in circumstances and conditions could a state further "the welfare of all classes within the particular territory or jurisdiction."[64]

Both of these cases dealt with the equal protection question without citation to precedent. They used conclusory rhetoric and failed to spell out the reasons why the classifications were to be judged on the basis of their utility in effecting proper police power objectives. But during the 1884 term two cases were brought before the Supreme Court challenging the validity of an ordinance of the city of San Francisco regulating the establishment and operation of laundries.[65] The Court upheld the regulation in both cases in opinions by Justice Field. Those opinions contain the first extended discussion of the model of unjustifiable classifications in equal pro-

61. *Id.* at 529.

62. Missouri v. Lewis, 101 U.S. 22 (1879). The Court also noted, in a rather unworthy argument, that the fourteenth amendment protected only persons, not geographical areas. *Id.* at 30-31.

63. *Id.* at 31 (emphasis added).

64. *Id.* at 32.

65. The ordinances were part of a long and stubborn pattern of state and municipal harassment of Chinese residents. *See* note 87 *infra.*

tection adjudication. San Francisco had set licensing and inspection procedures for all clothes laundries operating within designated areas of the city. In particular it had made unlawful the washing and ironing of clothes within these establishments between 10 p.m. and 6 a.m. Because laundries outside the designated area were not restricted in their hours of operation, an equal protection question was presented. In *Barbier v. Connolly*,[66] the Court upheld the regulation as a permissible health and safety measure related to the danger of overnight use of fire in certain areas. Justice Field first unconvincingly asserted that the ordinance was "not legislation discriminating against anyone" since all persons in similar conditions were treated alike.[67] But in a subsequent paragraph he came to grips with the basic incompatibility of truly equal treatment and any effective regulation under the state's police power:

> Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.[68]

On its surface, this looks like double talk, but it contains the germ of a method for determining which legislation imposing special burdens or granting special benefits is valid notwithstanding the general injunction against legislative inequalities. Justice Field conceded the propriety—indeed the necessity—of inequality in schemes devoted to the general welfare. In such cases the inequality was merely the incidental fallout from the obviously permissible business of state government. Such incidental inequality was different from true "class legislation discriminating against some and favoring others" which was invalid. The distinction seems to

66. 113 U.S. 27 (1885).
67. *Id.* at 30-31.
68. *Id.* at 31-32.

be between inequality as a means and inequality as an end. Therefore, at the very beginning of equal protection adjudication, the identification of invalid discrimination by reference to the objects such classifications serve can be seen to lead inevitably to considerations of legislative motivation. This problem, of course, is still one of the thorniest in constitutional law.[69]

But to base the determination of constitutionality solely on the asserted presence or absence of a proper governmental purpose, would be an invitation to legislative subterfuge. Surely the mere recitation or hypothesizing of a police power objective which might be served by the inequality attacked could not immunize it from constitutional scrutiny. The clause would prohibit nothing but artlessness if there were no inquiry into the validity of the asserted state purpose.[70] Such a judicial investigation might be made in two ways. One would be to investigate directly the motivation of the legislature to see whether the inequality was the primary purpose of the legislation rather than its inevitable and incidental by-product. This was the approach urged by counsel in the second laundry case of the term, *Soon Hing v. Crowley*,[71] in which it was argued that the true purpose of the same ordinance was the special harassment of the Chinese residents of the city.[72] But Justice Field

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69. *See* Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); Tussman & ten Broek, *supra* note 17, at 356-61; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). The model of impermissible classifications can present motivation questions of its own if the presence or absence of a certain motivation is crucial in determining whether facially neutral official conduct, may in fact be using a forbidden trait. *See* Washington v. Davis, 426 U.S. 229 (1976). *Cf.* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

70. The need for the Court to investigate the actual extent to which a classification serves a legitimate governmental objective was stated more explicitly in the separate concurring opinions of Justices Field and Bradley in Butchers Union Slaughter-House v. Crescent City Co., 111 U.S. at 754-55, 761, discussed at note 34 *supra*. The same reasoning was employed to justify an investigation into the appropriateness of the asserted police power measures which invaded protected interests in due process clause adjudication of the same era. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887). A similar kind of reasoning continues to be used in cases where the Court must consider a claim that state regulations impinging on interstate commerce are sustainable as a legitimate police power measure. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

71. 113 U.S. 703 (1885).

72. The plaintiff asserted that 250 of the 275 Chinese laundries in the city were within

cast this suggestion aside, questioning the propriety as well as the practicality of "penetrating into the hearts of men," and noting that nothing had been shown on the face of the ordinance or its legislative history to support such a conclusion.[73] Any determination on the improper motive of inequality would have to be restricted to those inferences "disclosed on the face of the acts, *or inferrible from their operation.*"[74]

Justice Field thus signaled the possibility (not realized in this case) of a second method of identifying discrimination which is not justifiable as incident to the proper exercise of the police power. This method called for an evaluation of how well the discrimination served the state's legitimate purpose. "The motives of the legislators, considered as the purposes they have in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments."[75] But some discriminatory classifications will not naturally and reasonably further the claimed police power objective. In those cases the mere incantations of a legislative purpose will not legitimate the discrimination. The police power justification would not be available and we would be left with nothing but the rank unjustifiable discrimination[76]—"class legislation discriminating against some and favoring others"—and nothing more.

Here we see translated to equal protection adjudication, as the model of unjustifiable classifications, the approach first adumbrated in the dissenting opinions in the *Slaughter-House Cases* and Justice Bradley's concurrence in *Bradwell.* In that case, he asked whether the state's act resulting in the unequal treatment complained of "fairly belonged to the police power of the state" or whether it was "onerous, unreasonable, arbitrary and unjust." In the laundry cases, the ordinance was not unconstitutional discrimination because it was nothing more than the ordinary legislative

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the designated area and that it was well known that the Chinese were in the habit of working late at night. Transcript of Record on Certificate of Division at 5. Brief for Plaintiff in Error at 19-22. As to the campaign of municipal harassment of Chinese, *see* note 87 *infra.*

73. 113 U.S. at 710-11.

74. *Id.* at 710 (emphasis added).

75. *Id.*

76. *See* Butchers Union Slaughter-House v. Crescent City Co., 111 U.S. at 761 (concurring opinion), in which Justice Bradley presumed that discriminatory legislation which plainly did not serve an asserted police power objective would be "a pretence and an outrage."

work of the state.

Police power regulation and unconstitutional activity were thus seen as mutually exclusive categories.[77] Prohibited discrimination was that which was unredeemed by a proper public justification and which had to be treated, therefore, as discrimination for its own sake. This approach can be understood as one that was concerned with discrimination solely based on hostility or vindictiveness towards those disadvantaged. Since such motive would rarely be overt, it was necessary to identify such discrimination by evaluating the plausibility of the claim that it was something else. This necessarily entailed an evaluation of how well the classification served the police power interest.[78] Here, then, is the theoretical basis for the model of unjustifiable classifications. Classifications were not good or bad according to the classifying traits they employed or the interests they affected. The result of examining the legislative motive by reference to the legislation's effects was to find them good or bad as they served or failed to serve legitimate state interests.[79] Classifications reasonable in light of these interests were permissible; unreasonable ones were prohibited. This judicial interpretation effectively rewrote the equal protection clause in terms equivalent to those of the equality provision of the French Declaration of the Rights of Man and of the Citizen of 1789: "Men are born, and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public

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77. *See* B. TWISS, *supra* note 46, at 31-32. It has been suggested that in this era it was generally assumed that the Civil War Amendments did not change the core federalist notion that states were vested with an irreducible and inviolable set of powers. *See* Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39. The equal protection and due process cases also seem to embrace a companion assumption that the police power of the states excluded any redistributive purpose. *See* B. TWISS, *supra*, at 83-89, 139; McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 978-81 (1975).

78. The reasons for the kind of inquiry into the rationality of the challenged legislation, discussed in text, suggest that it may be inaccurate to assume that the requirement that valid classifications have a rational basis in legitimate state power can be entirely separated from a ban on improperly motivated legislation. *See* Ely, *supra* note 69, at 1222-23. Rather the absence of a rational basis may be viewed as a surrogate for a direct finding of unconstitutional motivation. *See* J. ELY, DEMOCRACY AND DISTRUST 251 n.69 (1980).

79. *See* Clark, *supra* note 69, at 978-84, 1037-38; Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1156-57 (1972); Perry, *supra* note 69, at 1071; Simon, *supra* note 69.

utility."[80] This idea underlay equal protection analysis in the period under consideration and, indeed, thereafter.

But we have yet to see the model in action. The classifications tested in all of the cases discussed were valid under either of the competing models posited. The test of the model of unjustifiable classifications would be its utilization to strike down a classification. This did not occur until 1886 in the great case of *Yick Wo v. Hopkins*.[81]

IV. YICK WO

Yick Wo v. Hopkins is cited and quoted in case after case for a number of important propositions, many of only tangential importance in the decision itself. It is cited for the extension of fourteenth amendment rights to noncitizens,[82] for the application of the equal protection clause to racial discrimination against groups other than blacks,[83] and, drawing upon an *obiter dictum* of an extreme sort, for the importance of the political franchise as a "fundamental political right, because preservative of all rights."[84]

Most prominently, however, *Yick Wo* is remembered for the assertion that the enforcement of a law neutral on its face may amount to a denial of the equal protection of the laws where the law is administered so as to discriminate on the basis of race "with an evil eye and an unequal hand."[85] This conclusion seems a logical extension of the model of impermissible classifications based on race, expounded above. But a reading of the complete text of the Court's opinion reveals that its condemnation of racial discrimina-

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80. DECLARATION OF THE RIGHTS OF MAN AND CITIZEN § 1 (1789).

81. 118 U.S. 356 (1886).

82. *Id.* at 369. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971).

83. 118 U.S. at 369. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. at 289-90, 292 (opinion of Justice Powell).

84. 118 U.S. at 370. *See, e.g.*, Reynolds v. Sims, 377 U.S. at 562.

85. 118 U.S. at 373-74. This certainly is the modern understanding of the case's significance both by the Court itself, *see, e.g.*, Personnel Adm'r. v. Feeney, 442 U.S. 256, 275 (1979), and by commentators, J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 528, 551 (1978). Indeed, so prevalent is this view that most modern constitutional law casebooks edit the case down to this point of text alone. *See* J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 587 (1975); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 489-91 (1975); G. GUNTHER, CONSTITUTIONAL LAW 693-94 (9th ed. 1975); P. KAUPER, CONSTITUTIONAL LAW 777-78 (4th ed. 1972). *But see* E. BARRETT, CONSTITUTIONAL LAW 766-69 (5th ed. 1977); P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW 869-71 (4th ed. 1977).

tion in the administration of the challenged law was a secondary theme. The major focus of the opinion took a very different approach, one which strongly suggests the conclusion that the ordinance was condemned *on its face,* under an application of the equal protection clause in keeping with the model of unjustifiable classifications.[86]

The ordinance challenged in *Yick Wo* was another feature of San Francisco's scheme of laundry regulation. Chinese immigration into California during a period of economic depression had resulted in violent hostility toward the Oriental population. The ordinances dealing with laundry operations were part of an unrelenting series of legal harassments in the form of municipal ordinances, state laws and state constitutional provisions.[87] The particular reg-

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86. The opinion was one of the best known works of Justice Stanley Matthews who served on the Court from 1881 to 1889. He generally sided with the activist pro-business majority of the Court, the most prominent member of which was Justice Field. *See* Filler, *Stanley Matthews,* in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, 1357-60 (L. Friedman & F. Israel eds. 1969).

87. The hostility with which California regarded its Chinese residents was reflected in a persistent series of measures designed to deter their immigration, to minimize the extent to which they could compete with citizens, and generally to make their lives uncomfortable. The city of San Francisco, the most important center of Chinese population, was particularly active in anti-Chinese legislation. For example, the city repeatedly passed "cubic air" ordinances (over the veto of the Mayor) calling for a minimum of 500 cubic feet of space per resident in dwelling places. The ordinance was directed at the crowded living conditions in the Chinese quarter. The officials were chagrined, however, when upon enforcement the Chinese declined to pay the fines levied, preferring jail sentences. In response the city passed (over the Mayor's veto) the "queue" ordinance to make imprisonment a more drastic punishment. *See* M. COOLIDGE, CHINESE IMMIGRATION 261-62 (1909); Sandmeyer, *California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations,* 5 PAC. HIST. REV. 189, 198-99 (1936). One version of the "queue" ordinance was found unconstitutional in the United States Circuit Court in a well known opinion by Justice Field. Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D.Cal. 1879) (No. 6546) discussed at text accompanying notes 112-16 *infra.*

A particular target of these municipal impositions was the hand laundry business which was dominated by Chinese. The ordinance at issue in *Yick Wo* called for all laundries to be housed in buildings of one story with twelve-inch walls of brick or stone, and with roofs, doors and window sills of metal. Laundries failing those specifications could operate only with the consent of the Board of Supervisors. This ordinance was enacted in 1880. Two years later the ordinance was amended to prohibit all laundries in certain districts unless they were recommended by twelve citizens and taxpayers resident within a block of the proposed site. This law was held invalid for obscure reasons in a Circuit Court opinion by Justice Field. *In re,* Quong Woo, 13 F. 229 (C.C.D.Cal. 1882).

In 1884 a further amendment imposed the hours restrictions upheld in Barbier v. Connolly, 113 U.S. 27 (1885), and Soon Hing v. Crowley, 113 U.S. 703 (1885), discussed at text accompanying notes 71-74 *supra. See* Brief for Respondent-Defendant in Error at 91-92, Yick Wo v. Hopkins, 118 U.S. 356; Sandmeyer, *supra,* at 209-10. *See generally* C. SWISHER,

ulation attacked was part of an 1880 ordinance which made unlawful the operation of a laundry in buildings other than those made of brick or stone "without having first obtained the consent of the board of supervisors."[88] Yick Wo operated such a laundry notwithstanding the board of supervisors' refusal to consent. He was arrested, convicted and, failing to pay the $10 fine, imprisoned. His writ of habeas corpus was discharged by the California Supreme Court which held, inter alia, that the legislation was valid on the authority of *Barbier v. Connolly* and *Soon Hing v. Crowley*.[89] In a companion case, Wo Lee, imprisoned for violating the same ordinance, sought his release in the United States Circuit Court for the District of California. There, Judge Sawyer expressed the opinion that the statute was unconstitutional but, deferring to the California Supreme Court, also discharged the writ.[90] In deciding the cases on appeal, the Supreme Court took as admitted certain facts about the operation and effect of the regulation. About 320 laundries existed in the city of which 240 were owned by Chinese. About 300 laundries were constructed of wood and therefore subject to the consent of the board; 200 Chinese laundrymen had petitioned for consent and all were denied. All but one of the applica-

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STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 205-39 (1930) (Phoenix ed. 1969).

California's hostility to the Chinese did not restrict itself to legal action. The state generally and San Francisco in particular, were the scene of anti-Chinese demonstrations and riots. *See* M. COOLIDGE, *supra*, at 266-68; L. CHINN, A HISTORY OF THE CHINESE IN CALIFORNIA: A SYLLABUS 25 (Chinn ed. 1969). California government officials pressed for tightening federal restrictions on immigration. The official attitude is reflected in the statement of a San Francisco representative before a committee of Congress on the subject:

> The burden of our accusation against them is that they come in conflict with our labor interests; that they can never assimilate with us; that they are a perpetual unchanging, and unchangeable alien element that can never become homogenous; that their civilization is demoralizing and degrading to our people; that they degrade and dishonor labor; that they can never become citizens, and that an alien, degraded labor class, without desire to citizenship, without education, and without interest in the country it inhabits, is an element both demoralizing and dangerous to the community within which it exists.

C. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 25 (1939). In 1879 a referendum in which state voters expressed themselves on the subject of immigration resulted in a vote against the Chinese of 150,000 to 900 although there were some questions as to whether the issue had been fairly phrased. *Id.* at 62-63.

See note 99 *infra* on the anti-exhumation ordinance and note 132 *infra* on the treatment of Chinese in the 1879 state constitution.

88. 118 U.S. at 358.

89. *In re* Yick Wo, 68 Cal. 294, 305, 9 P. 139, 145-46 (1885).

90. *In re* Wo Lee, 26 F. 471, 476-77 (C.C.D.Cal. 1886).

tions of non-Chinese were granted.[91] Counsel for Yick Wo therefore argued that the "ordinance in question, like the panther's foot, looks harmless in repose, but not so in action."[92]

The immediate focus of the Court's opinion by Justice Matthews, however, was not the operation of the ordinance but its terms. The major defect was the nature of the authority granted the board. The ordinance prescribed no standards or guidance of any kind with respect to the cases in which consent should be given or withheld. The Court rejected the city's interpretation of the ordinance:[93] that permission was to be granted or withheld based upon an evaluation of the fire risk in each building.

> There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.[94]

Given this interpretation the ordinance was fatally distinguishable from the regulation of laundry hours upheld in *Barbier* and *Soon Hing* that had been treated principally as fire prevention measures and only incidentally as a discrimination.[95] The Court also distinguished cases upholding a state's power to condition liquor sales on the obtaining of a license. The Court found such regulations were understood to call for an evaluation of the character of the applicant.[96] They were classifications of the safe and the unsafe, the fit and the unfit: "purely . . . police regulation[s], within the competency of any municipality possessed of the ordinary powers belonging to such bodies."[97] Under the model of unjustifiable classifications these discriminations were therefore valid.

But the same could not be said of the ordinance challenged in *Yick Wo:*

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91. 118 U.S. at 359. These statistics, which were extremely important if the critical aspect of the decision were its application, were, in fact, hotly contested by the city and may have been the result of a mere pleading error. The city argued in its brief that the allegations were false and that actually only two permits had been issued, albeit both to white men. Brief for Respondents-Defendants in Error at 10-11, 103, 105-06.

92. Brief for Appellant and Plaintiff in Error at 12.

93. Brief for Respondents-Defendants in Error at 37-40, 110.

94. 118 U.S. at 366.

95. *Id.* at 367.

96. *Id.* at 368.

97. *Id.* at 367.

> [I]t divides the owners or occupiers [of wooden laundries] into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living.[98]

Such a classification, of course, could not be understood as an ordinary measure for advancing the health, safety, or morals of the public. No standards in the ordinance would lead to excluding a business that posed any particular threat to those interests. The ordinance provided the board with power to discriminate, pure and simple—not as an inevitable incident of the ordinary business of lawmaking under the police power. The city had argued strenuously that this was not the case and that the power given was one to be used "to regulate a dangerous business *by a consent which should be granted for proper reasons and denied in their absence.*"[99] But the Court read the ordinance for itself and saw nothing in the text to support the city's contention. If the object was

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98. *Id.* at 368.

99. Brief for Respondents-Defendants in Error at 110 (emphasis in original). The ordinance's object, it was argued, "was to prevent our people from being burned in their beds at night by careless and irresponsible people using dangerous fires in wooden shanties so inflammable that no underwriter would insure them." *Id.* at 37. The city's argument that the ordinance was a mere safety measure, of course, could not be taken very seriously given the pattern of anti-Chinese municipal actions both before and after this ordinance. *See* note 87 *supra.* The city revealed itself even in its brief, which was peppered with attacks on the Chinese association, the Tung Hing Tong, Brief for Respondents-Defendants in Error at 17-20, and included the following profession of interracial amity:

> Why should we want to destroy the chinese laundry business? Do we not voluntarily give them our clothes to wash? Have we not given them three-fourths of the laundry business of San Francisco? We take them into our families as cooks and butlers, and into our churches and sunday-schools, and they sleep with us (temporarily) in our cemetaries.

Id. at 95.

The last reference apparently is to the custom of the Chinese to exhume, when possible, the bodies of the dead for reburial in China. *See* M. COOLIDGE, *supra* note 87, at 261. Indeed the California authorities were not content to let the Chinese alone even in this regard. A municipal ordinance, and later a state law, prohibited the movement of dead bodies without a permit from the municipal authorities granted only on compliance with elaborate health precautions and the payment of a substantial fee. The statute was upheld against a constitutional challenge in the United States Circuit Court. *In re* Wong Yung Quy, 2 F. 624 (C.C.D.Cal. 1880). *See* M. COOLIDGE, *supra* note 87, at 264; C. SANDMEYER, *supra* note 87, at 54-55.

public safety the ordinance was entirely unsuited to it.[100] It would not, therefore, be treated as a police power regulation but rather as rank discrimination. It must be noted that this determination was made and the ordinance clearly condemned, without reference to the board's racially discriminatory administration of the ordinance.

This is not to say that the admissions as to racial discrimination under the ordinance did not influence the Court. The opinion suggested that alternate grounds were open for the decision—either because the statute was void on its face or because its administration amounted to unlawful discrimination even if the ordinance were "fair on its face and impartial in appearance."[101] But the discussion of the latter ground, considered in the context of the whole opinion, may also be understood as the concluding piece of a single argument. In finding that the unguided discretion left to the board created an unconstitutional defect, the Court quoted at length and with approval the decision of the Maryland Supreme Court in *City of Baltimore v. Radecke*.[102] That opinion discussed a similar power, vested in city officials allowing the revocation of permits for the operation of steam engines. The state court found such a power inconsistent with the furtherance of police power objectives since it was in no way calculated to provide "safety and security." Indeed its exercise "may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed."[103]

It was directly from this statement of the opportunity for abuse presented by the ordinance that the opinion proceeded to consider its discriminatory administration. Given its lack of standards, the ordinance could not reasonably advance the goals of the police power. Instead it provided an opportunity for discrimination for no reason other than to favor those benefitted or injure those disadvantaged. The thrust of the opinion was that this was defect enough. The discrimination need not be shown actually to have been put to any particular obnoxious use. The potential for such use was obvious. And in this case, given the admissions, there was

100. 118 U.S. at 366.
101. *Id.* at 373-74.
102. 49 Md. 217 (1878), *cited in* 118 U.S. at 372.
103. *Quoted in* 118 U.S. at 373.

no need to "reason from the probable to the actual."[104] The demonstration that the injury was imposed on a particular racial group merely confirmed the fact that the Court was confronted with a case of discrimination for its own sake rather than for the general good: "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."[105]

The fact of racial discrimination, therefore, does not substitute for but supplements the defect already discussed. It is not the presence of race but the absence of justification which is paramount. *Yick Wo* invalidated, for the first time, according to the model of unjustifiable classifications, discrimination without acceptable reasons, that is, discrimination without sufficient grounding in the police power of the state.[106]

V. Distinguishing the Models

While an examination of the opinion in *Yick Wo v. Hopkins* seems to support the ascendancy of the model of unjustifiable classifications, it also suggests the distinction between that model and

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104. *Id.*

Yet another interpretation of the Court's reasoning is consistent with both aspects of the discussion. This would be a conclusion that the Court's holding was only as to the statute *as applied* but that the vice perceived was not the impermissibility of the racial trait used but the unjustifiability of such a classification in terms of the police power. As to the necessary connection of these two facets of racial classification *see* text accompanying notes 107-25 *infra*. In *Yick Wo*, however, the major part of the opinion appears to be entirely independent of the admitted facts of the ordinance's administration.

105. 118 U.S. at 374. The Circuit Court decision of Judge Sawyer had put the relationship of the two kinds of defects succinctly: "And the uncontradicted petition shows that all Chinese applications are in fact denied, and those of Caucasians granted; thus in fact making the discriminations in the administration of the ordinance *which its terms permit.*" *In re* Wo Lee, 26 F. at 473-74 (emphasis in original). Similarly the brief on behalf of Yick Wo and Wo Lee coupled the claims of racial discrimination with the arbitrary character of the power granted the Board: "He who would wash clothes for hire in a frame building anywhere within the broad limits of San Francisco county must, without light, court the smiles of caprice and grapple prejudice." Brief for Appellant-Plaintiff in Error at 3.

106. This aspect of the opinion has not gone entirely unnoticed. *See* McCurdy, *supra* note 77, at 978, in which it is remarked that in *Yick Wo* "the major components of Field's *Slaughter-House Cases* dissent received the approbation of the court." This was also the understanding of more contemporaneous commentators. 4 Harv. L. Rev. 236 (1890). The case was also cited by the Court in this period for both of the points discussed in text. Gundling v. Chicago, 177 U.S. 183, 186 (1900).

the rival model posited—the model of impermissible classifications—may not be real, at least when the latter model is premised on the illegitimacy of racial classifications. Put more precisely, the objection to discrimination on grounds of race may be merely a special case of the objection to classifications not reasonably related to a police power objective. The assimilation of the two models becomes complete by acceptance of the proposition that race is never a relevant basis for a government's distinguishing between persons. Under this assumption, a distinction based on race is ipso facto an unjustifiable classification and therefore invalid. This way of understanding the objection to racial discrimination entails as a necessary conclusion that one governmental end, the relative subjugation of blacks and elevation of whites, must be deemed illegitimate.[107]

This is one application of the general proposition that the mere preference of one group over another, that is, legislation based only on favoritism or on spite, is outside the scope of proper governmental activity. The objection to unjustifiable discrimination implies that discrimination is an evil, albeit a tolerable one in the pursuit of other state objectives. But discrimination requires justification; it never justifies itself.[108]

This view of racial classifications, as an example of unjustifiable classifications rather than objectionable per se, is consistent

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107. *Cf.* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-12 (1976) (arguing that racial discrimination is attended by vices other than irrationality).

108. *See* text accompanying notes 77-80 *supra*. Therefore under the fourteenth amendment equality of treatment was understood to be the norm of governmental activity and inequality a departure from that norm which had to be justified. This has long been an axiom of liberal political theory. *See, e.g.*, J. LOCKE, TREATISE OF CIVIL GOVERNMENT 85, 95 (Appleton-Century-Crofts ed. 1937); J. RAWLS, A THEORY OF JUSTICE 507 (1971); Isaiah Berlin has put in this way the idea that the presumptive evil of inequality really is "self-evident":

> The assumption is that equality needs no reason, only inequality does so; that uniformity, regularity, similarity, symmetry, the functional correlation of certain characteristics with corresponding rights of which Wollheim speaks, need not be specifically accounted for, whereas differences, unsystematic behaviour, change in conduct, need explanation and, as a rule, justification. If I have a cake and there are ten persons among whom I wish to divide it, then if I give exactly one tenth to each, this will not, at any rate automatically, call for justification; whereas if I depart from this principle of equal division I am expected to produce a special reason.

I. BERLIN, *supra* note 17, at 84. *See* French Declaration of the Rights of Man and Citizen, § 1, at text accompanying note 80 *supra*.

with the views of Justice Field, probably the most articulate and influential advocate of the model of unjustifiable classifications. That Field was not acutely offended by racial discrimination itself is evident from his dissents in the all-white jury cases.[109] It is true that Field is remembered for a number of decisions rendered while sitting on the California Supreme Court and the United States Circuit Court which protected the rights of Chinese residents against racial discrimination.[110] His sincerity in objecting to the oppression of Chinese immigrants in those cases need not be doubted, but the legal bases of those decisions were usually the overriding protection granted Chinese residents under United States treaty obligations.[111] His best known decision on this subject invalidated the San Francisco "queue ordinance" that required prisoners in the local jail to have their hair cut to within an inch of the scalp.[112] The effect was to work a particularly powerful punishment on Chinese men who valued the long queues in which their hair was customarily braided. This ordinance was invalidated in an opinion by Field sitting on the Circuit Court. He found it to be intended especially to impose pain and disgrace on Chinese prisoners and to be, therefore, a violation of the fourteenth amendment.[113] But in this case, as well, the utility of the measure in effectuating police power purposes was material. The equal protection determination, however, was an alternate holding. The ordinance was also declared invalid

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109. *See* text accompanying notes 53-58 *supra*. Similarly a letter from Field to John Norton Pomeroy dated April 14, 1882, commenting on President Arthur's veto of the Chinese Exclusion Act shows a less attractive side of the Justice's views on the Chinese in America:

> It must be apparent to every one, that it would be better for both races to live apart—and that their only intercourse should be that of foreign commerce. The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people . . . . You know I belong to the class, who repudiate the doctrine that the country was made for the people of *all* races. On the contrary, I think it is for our race—the Caucasian race. We are obliged to take care of the Africans; because we find them here, and they were brought here against their will by our fathers. Otherwise, it would be a very serious question, whether their introduction should be permitted or encouraged.

Quoted in H. GRAHAM, EVERYMAN'S CONSTITUTION 105 (1968).

110. *But see* Lin Sing v. Washburn, 20 Cal. 534, 582 (1862) (Field, J., dissenting). *See generally* C. SWISHER, *supra* note 87, at 205-39.

111. *See Id.*

112. Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D.Cal. 1879) (No. 6546). For the background of the ordinance, *see* note 87 *supra*.

113. Ho Ah Kow v. Nunan, 12 F. Cas. at 255.

as beyond the municipal power delegated by the state. State statute provided that the city's power to punish crimes was to be limited to fine, forfeiture, or imprisonment. The haircuts fell outside any of these permitted categories. Moreover the measure could not be interpreted as anything but punishment. It was not justifiable as a health or discipline regulation. Justice Field felt the ordinance was in no way adapted to these purposes and such concerns, in any event, were committed to the prison authorities, not to the city officials who had passed the challenged rule.[114]

The vice of racial discrimination, therefore, while "equally conclusive"[115] was unnecessary to the decision in the "queue" case. But Field concluded that the atmosphere surrounding the passage of the ordinance and its application in practice made it plain that it was directed exclusively against Chinese, as to whom it constituted cruel and unusual punishment. While Field did not expressly employ any form of the model of unjustifable classifications, the opinion showed a concern with the propriety of the haircutting requirement as a means towards an accepted state objective. First, since more severe punishment was imposed on only one group for the commission of identical crimes, an inference was possible that the measure was not really necessary to accomplish the ends of the criminal law. Second, the separate regulation of alien nationals was the exclusive business of the federal government. In making this point, Field contrasted the state's power to "exclude from its limits paupers and convicts of other countries, persons incurably diseased, and others likely to become a burden on its resources . . . [and perhaps,] persons whose presence would be dangerous to its established institutions. But there its power ends."[116] Discrimination for these police power purposes was presumably proper, but hostile and spiteful legislation against the Chinese could not be so justified.

This opinion, therefore, is compatible with Justice Field's position embracing the model of unjustifiable classifications and does not explicitly or implicitly condemn racial classification merely as such—as would be the case with an application of the model of impermissible classifications. This is consistent with his later deci-

114. *Id.* at 253-54.

115. *Id.* at 255.

116. *Id.* at 256. *See also In re* Ah Fong, 1 F. Cas. 213 (C.C.D.Cal. 1874) (No. 102) (Field, J.).

sion in the *Soon Hing* case in which he found an ordinance limiting hours of laundry operation valid notwithstanding the highly plausible claim that it was, in fact, directed against Chinese.[117] The critical difference was that in *Soon Hing* he was able to find that there was a reasonable police power objective from the face of the ordinance. In the "queue" case he could find no such explanation. This deficiency and not the racial character of the discrimination condemned it.

The foregoing discussion supports the contention that *Yick Wo* was only incidentally a decision invalidating racial discrimination. Although both models discussed would support the *Yick Wo* result, the fact that the Supreme Court seemed to settle on the model of unjustifiable classifications is a matter of significance. First, it indicated the precarious basis of the idea that racial classifications themselves were invalid. Under that model their invalidity must have rested on the assumption that race was never a relevant criterion in pursuing a state police power goal. This assumption could, and, it may be argued, did, change.[118] Since it was not the use of race itself which caused the constitutional defect, but only its failure to contribute to a proper state function, the way was open to sustain "reasonable" racial classification.[119]

From another perspective, the importance of the choice of model would be revealed not in the classifications which it would lead the Court to sustain, but in those which would be struck down. The most important feature of the model of impermissible classifications is its ability to confine the discretion of the Court. It would lead to automatic approval of any legislative classification not implicating the finite number of forbidden traits or protected interests. No occasion for further examination would exist once the

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117. Soon Hing v. Crowley, 113 U.S. 703, 710 (1885). For the background of anti-Chinese legislation, *see* note 87 *supra*. Counsel for Soon Hing pressed heavily on the racial motivation of the law citing particularly the "queue" case and Justice Field's assertion that "[w]hen we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." Brief for Plaintiff in Error at 19-24. *See* C. SWISHER, *supra* note 87, at 227-29.

118. *See* text accompanying notes 179-202 *infra*.

119. *Cf.* Brest, *supra* note 107, at 6-12; Tussman & ten Broek, *supra* note 17, at 353-56. The same question was renewed under a somewhat different doctrinal apparatus in the recent "affirmative action" cases. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (racial discrimination under Title VII); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *See generally* Clark, *supra* note 69, at 1025; Simon, *supra* note 69, at 1071-74.

presence or absence of such a factor were determined. The model of unjustifiable classifications possesses just the opposite qualities. It opened for the Court a field of inquiry of extensive latitude. The Court had first to determine whether the claimed goal of the classification was permissible, given the elastic definition of the police power. More importantly, it required the Court to test the reasonableness of the classification as a means to the state objective that the Court found legitimate. This inquiry was necessarily an empirical one, depending on the circumstances in which the regulation was to operate. The model thus involved the Court in that difficult and open-ended factual exploration and evaluation of technique that is classically the function of the legislature.[120] Contentions as to the reasonableness of legislative schemes are infinitely arguable and must be settled ultimately not by recourse to a rule of decision but by consultation of interests.[121]

This is not to say that the choice of model would automatically determine the breadth of judicial supervision of legislation. The model of impermissible classification would only restrict the Court if the list of impermissible factors were a short and closed one. Otherwise the vehicle for judicial intervention would be merely transferred to decisions about the content of that category of factors.[122] By the same token, the model of unjustifiable classifications was capable of being applied with great deference toward the legislative determination of reasonableness.[123] Still the ease of manipulation and the opportunities for ad hoc judicial review seem far greater with the latter model. It had built into it many more of

120. *See* Tussman & ten Broek, *supra* note 17, at 346-47; *Developments in the Law—Equal Protection, supra* note 17, at 1076-1132.

121. One commentator has gone so far as to say that the test of requiring a rational basis for concluding that the classification serves a proper governmental objective imposes no real restraint at all given the potential for definitional twisting. *See* Note, *supra* note 69, at 128. *See also* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 201-22 (1976). As to the relative desirability of models of constitutional adjudication allowing more or less liberty to the court, *see* Kay, *supra* note 26.

122. To the extent that equal protection questions utilizing "strict scrutiny" are analogous to impermissible classifications, this kind of dispute is evident in the modern cases. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979) (classification of aliens with respect to teaching positions does not merit strict scrutiny). *Contra id.* at 84 (Blackmun, J., dissenting). *See also* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1977)(classifications with respect to right to marry merit strict scrutiny). *Contra id.* at 407 (Rehnquist, J., dissenting).

123. *See* note 207 *infra* on the use of the model of unjustifiable classifications after the turn of the century.

the features that a court desiring to expand its discretion would wish to consider in challenging legislation.[124] The potential use of the equal protection model of unjustifiable classifications integrated readily with the manner of deciding the validity of statutes that has come to be known as substantive due process. In both cases the Court translated the textual proscriptions into a rule of reason with largely undefined criteria for constitutionality. The consequences for the scheme of constitutional government discussed at the outset are clear. As the Court seized the opportunities the model presented, the powers of government would be restricted not by known and relatively stable rules but by the changing judgment of members of the Court about the appropriateness and effectiveness of the exercise of that power.[125]

VI. THE EQUAL PROTECTION JURISPRUDENCE OF JUSTICE FIELD

To this point we have observed the development of the model of unjustifiable classifications, but we have yet to see it applied as a means of enforcing against the states the Court's view of the proper functions of government and the proper methods of executing those functions. In fact, however, by the time the Supreme Court had decided *Yick Wo v. Hopkins*, Justice Field had already put the model to this more predictable use in two decisions in the federal Circuit Court of California. In those cases railroad companies challenged California's property tax valuation rule.[126] The

124. We are thus dealing not with absolute categories but with tendencies. Perhaps a court attracted to an activist mode of review will always develop a doctrinal device to accommodate it. But it is not implausible to think that a fully developed restraining model together with a reluctance to scrap casually the Court's policy of *stare decisis* will at least impede movement in that direction. *See* J. ELY, *supra* note 78, at 112 ("But it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing.").

125. Of course, the impact of such a role for the Court in the particular era under study is thought to be a product of the the Justices' own economic and political philosophies as to the proper roles of the individual and the state. The effect of the imposition of this view under the constitutional licenses of the fourteenth amendment, the contracts clause and the commerce clause is commonly understood to be the creation of a judicial censor against the developing economic and social regulations designed to reduce the inequalities and dislocations arising in the wake of rapid economic change and industrialization. *See* C. HAINES, *supra* note 46, at 149-65.

126. County of Santa Clara v. Southern Pac. Ry. Co., 18 F. 385 (C.C.D.Cal. 1883); County of San Mateo v. Southern Pac. Ry., 13 F. 722 (C.C.D.Cal. 1882). The Supreme Court affirmed the former case and a companion case in opinions which avoided the constitutional issue by basing the decisions on the improper inclusion of property not taxable under California law. San Bernardino County v. Southern Pac. Ry., 118 U.S. 417 (1886); Santa Clara

general scheme of property taxation allowed the taxable value of property to be reduced by the amount of any mortgage on the property. However, an exception was made for the property of railroad corporations which were not permitted any mortgage deduction. The purpose of the exception was found in the fact that most railroads were mortgaged "for at least all they were worth."[127] Since the mortgagees were not taxed on their interests and since, in any event, the creditors of the railroads (including the United States) were largely outside the taxable jurisdiction of the state, the railroad property would otherwise escape taxation altogether. Since the state applied unequal valuation methods to railroads, on the one hand, and all other property owners on the other, the railroads claimed a violation of the equal protection clause. Justice Field considered the validity of this classification in two circuit court opinions, one in September, 1882, one in September, 1883. These cases, therefore, preceded the Field opinions for the Supreme Court in *Barbier v. Connolly* and *Soon Hing v. Crowley,* but they revealed that the model of unjustifiable classifications was already well developed in Field's mind. In particular, they show that he probably considered racial discrimination to be objectionable only insofar as it was a case of unjustifiable classification.[128]

As with the dissents in the *Slaughter-House Cases,* Field's opinions stressed the universality of the protection ensured by the fourteenth amendment, denying that it was exclusively for the benefit of racial minorities. He acknowledged the historical impetus for the amendment was a reaction to racial discrimination but claimed this problem had stirred the framers to deal with the more general problem of unequal law.[129] Racial classifications, however, did provide the prototype for invalid discrimination being based solely on the difference in the people affected and not on any other state purpose. Thus he conceded that *property* might be classified

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County v. Southern Pac. Ry., 118 U.S. 394 (1886). The *Santa Clara* case is best known for the Court's conclusory dictum that corporations were to be considered persons for the purposes of fourteenth amendment adjudication. *See generally* H. GRAHAM, *supra* note 109, at 30-97.

127. C. SWISHER, *supra* note 87, at 251. The background for these cases is described in H. GRAHAM, *supra* note 109, at 397-99.

128. To the extent the more limited version of equal protection found in the *Slaughter-House Cases* was controlling law, Field's opinions in these cases were of questionable propriety. *See* H. GRAHAM, *supra* note 109, at 148-49, 392, 576.

129. 13 F. at 738-40; 18 F. at 397-98.

for the purposes of taxation and different classes of property might be taxed at different rates. Such classification would serve the public interest in either encouraging or discouraging certain activities or the public interest in equitable taxation itself, by recognizing the inherent difference in value or utility of different kinds of property.[130] But classification of property, which was permissible, was to be distinguished from classification of and discrimination among *property owners*. In the case at hand, the only distinguishing criterion for the two methods of assessment was the character of the property owner. Field acknowledged the unusual debt status of the railroad companies but declared that, like any other personal characteristics, this could not be relied on by the state for differing treatment. Discrimination against different kinds of persons, as such, was no different than racial discrimination. A paragraph from one of the opinions makes the point plainly:

> Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power.[131]

The model of unjustifiable classifications distinguishes between those classifications that serve as a permissible governmental end and those that serve only inequality itself. Racial discrimination is condemned because it is deemed to have no purpose other than mere subjugation of a disfavored class. Justice Field in the quoted language essentially equated the characteristics of race and business organization.[132] He extended the idea that race distinctions do

130. *Id.* at 737-38; 18 F. at 407-09.

131. 18 F. at 396.

132. The association in Field's equal protection discussions of discrimination against Chinese and discrimination against business corporations presents some interesting parallels with the two most significant political issues in California in the middle of the nineteenth century, a period in which Field's political and legal views matured. In the public discourses at the time, the Chinese, who worked for low wages, and the corporations were seen as part

not serve as a proper governmental objection to personal qualities in general.[133] Of course, by this analogy Field proved too much. Legislative distinctions serve public purposes only because of some difference in the character of the person affected. Every classification can reasonably be characterized as depending on personal qualities. The differing rates for different kinds of property, that Field approved, may as aptly be described as classifications among taxpayers owning real property and taxpayers owning personal property. A legitimate state interest is deemed served by extracting more from one class than from another. It is certainly hard to see anything inherently less odious about this distinction than about that between "men doing business alone" and "men doing business in partnerships or other associations." Considerations of public policy or tax equity may persuade that some distinctions ought to be drawn and others not. But there is no abstract category of "mere personal discrimination" that may, a priori, be labeled as unrelated to legitimate governmental concerns, and consequently a condemnation of all classifications based on such qualities cannot substitute for an examination of the justification for the discrimination.[134] For California, the considerations of tax equity demanded disparate assessment for owners of heavily mortgaged property, a group roughly approximated by railroad corporations.[135]

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of a single conspiracy against the workingman. One commentator has noted that "[s]ince the Chinese were employed by most of the corporations, whether engaged in transportation, in manufacturing, or in land development, they were opposed not merely as competitors for employment, but also as tools of the capitalists in their efforts to control the economic and political life of the state." C. SANDMEYER, *supra* note 87, at 67. Thus radical politics and racial hostility were united in such movements as the Workingmen's Party led by Dennis Kearney. That party was the major influence in the drafting of the State Constitution of 1879 which had as its special targets the Chinese and the corporations with particular hostility reserved for railroad corporations. *See id.* at 67-74; Sandmeyer, *supra* note 87, at 200; L. CHINN, *supra* note 87, at 25. *See also* H. GRAHAM, *supra* note 109, at 14-15, 397.

133. The idea that it is hostility to persons *as such* that makes for unconstitutionality is an unrelenting theme in the model of unjustifiable classifications. *See, e.g.*, the language from *Yick Wo v. Hopkins* quoted at text accompanying note 105 *supra*.

134. Thus a per se condemnation of racial classifications is basically inconsistent with this model of equal protection adjudication. *See* text accompanying notes 179-202 *infra*. Of course it is just this refusal to stop the inquiry at any superficial characteristics of the classification challenged that distinguished this model from that of impermissible classifications.

135. Field's objection did not seem to be one of insufficient "fit" between railroad corporations and the target class of highly mortgaged property. 13 F. at 735-38; 18 F. at 392-95,

This analysis enables us to see more clearly the inevitable result of the use of the model of unjustifiable classifications. To declare a classification unconstitutional under that model requires a finding that the classification did not sufficiently serve a legitimate police power objective. If taken seriously, no easy definitional approach could take the place of an honest inquiry into the value of the classification as an instrument of public policy. The rejection of the model of impermissible classifications and the flaws in Field's analysis in the railroad tax cases make this clear. Having embraced the criterion of public utility there could be no turning back from a review of the wisdom of challenged classifications. As long as this model remained at the bottom of the Court's understanding of its job, more restricted techniques of adjudication would necessarily have to give way.

VII. Variations on the Model of Unjustifiable Classifications

It now remains only to survey the application of the model of unjustifiable classifications to cases brought before the Supreme Court during the rest of the period under study. We will be able to note, in particular, other efforts to restate or to translate the elements of that model into formulas for testing constitutionality which looked less obviously like a reexamination of the intelligence and general propriety of challenged legislation. While these efforts may have stemmed from the Court's reluctance to engage in unabashed second guessing of the legislature, there remained an even greater reluctance to abandon the model itself. That being so, the Court could never embrace a formula of equal protection adjudication that precluded a case-by-case investigation of the public purpose which a classification served and the aptness of the classification in achieving it.

These attempts to refine the model, however, did not develop until late in the period under discussion. Although the model of unjustifiable classifications was well established by the time of the *Yick Wo* case in 1886, the Court made sparing use of it until the last years of the century. It then began to strike down with increasing regularity what it viewed as inappropriate social and eco-

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401-02, 408. *See* Tussman & ten Broek, *supra* note 17, at 347.

nomic regulation.[136]

We will first consider applications of the model of unjustifiable classification which focused on the novelty or experimental nature of the legislation under attack. Given the model's premise that unequal classification was appropriate in carrying out the ordinary and necessary functions of government[137] and invalid otherwise, it is not surprising that the Court's decisions began to examine more seriously new forms of government regulations where such regulations resulted in unequal treatment. This approach is illustrated by the Court's discussion in an 1890 challenge to a state scheme of taxation which assessed corporate bonds at their nominal or par value while other obligations were assessed at their actual value.[138] The Court upheld the classification, noting, as Field had in the California railroad tax cases, that states had traditionally taxed different trades, professions or kinds of property at different rates.[139] Citing Field's opinion in *Barbier v. Connolly*, the Court reiterated the right of a state to discriminate to further the general welfare by using classifications "which every State, in one form or another, deems it expedient to adopt."[140] But in making its inquiry into the extent to which tax classifications were within the state's power, the Court evinced an intention to be guided by what states had traditionally applied as "general usage." "[C]lear and hostile discriminations against particular persons and classes, especially

136. In Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890), the Court invalidated a scheme of railroad rate regulation principally on the ground that it deprived the railroad of liberty and property without due process of law. In an extremely summary discussion, Justice Blatchford's decision also concluded that disallowing a reasonable return to railroads while allowing it to other businesses constituted a denial of the equal protection of the laws. *Id.* at 458. With this exception the Court does not appear to have based a holding of unconstitutionality on the equal protection clause from *Yick Wo* in 1886 until Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897), discussed at text accompanying notes 151-56 *infra*. Commentators have noted that also with respect to substantive due process adjudication the Court did not become significantly "activist" until the 1890's. *See* C. HAINES, *supra* note 46, at 198-99; M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 366-70 (1977); Gaffney, *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 CATH. U.L. REV. 207, 225-28 (1976).

137. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (The state "is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.").

138. Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232 (1890).

139. *Id.* at 237. Justice Field joined the opinion of the Court by Justice Bradley.

140. *Id.* at 237-38.

such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."[141]

The same strain was apparent in a 1900 case, upholding the exemption for planters and farmers from a tax on the refining of sugar and molasses. Invoking the usual police power inquiry, Justice Brewer's opinion distinguished between classifications like the one under scrutiny, "founded upon a reasonable distinction," and those based upon "considerations having no possible connection with the duties of citizens as taxpayers," and that were, therefore, "pure favoritism."[142] The discrimination challenged was "obviously intended as an encouragement to agriculture," but it was not "pure favoritism" because "from time out of mind it has been the policy of this government, not only to classify for the purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market."[143] Moreover, federal statutes had granted similar exemptions since 1813. This history showed "that the discrimination [was] based on reasonable grounds."[144] But this was not to say that every kind of processing of farm produce by farmers could constitutionally be exempted from a general tax on such processing. It was common practice for farmers to grind and refine their own sugar and molasses. But a "somewhat different question might arise" if they were to work their sugar into "confectionary, preserves or pastry," because once mixed with other ingredients they were not "the natural products of the farm."[145] Since the latter hypothetical exemption would equally aid agriculture, the determining factor seems to be the familiarity of mere refining and the time sanctioned recognition of it by the government. In contrast, an exemption of pastry making from taxes would present a discrimination "of an unusual

141. *Id.*

142. American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92 (1900). The discussion also contains further evidence of the assimilation of the objection to racial discrimination within the model of unjustifiable classifications. Classifications based on such factors as "differences of color, race, nativity, religious opinions [and] political affiliations," *id.*, are cited as denials of equal protection not because they are somehow automatically offensive but because they are "arbitrary, oppressive or capricious . . . having no possible connection with the duties of citizens as taxpayers." *Id.*

143. *Id.* at 92, 95.

144. *Id.* at 93.

145. *Id.* at 92.

character, unknown to the practice of our governments."[146]

The favored treatment of traditional practice is not unexpected given the elements of the model of unjustifiable classifications. It is natural to assume that one would identify reasonable measures to appropriate governmental ends by reference to the traditional, familiar, and ordinary working processes of government. Any classification departing from these processes was suspect as something other than the incidental fallout of government at work, that is as pure favoritism. On this view, of course, any novelty was in trouble. This understanding was bound to conflict with the changing view of the proper role of government reflected in the increasing volume of social and economic regulation by the states during one of the most creative legislative periods in American history. Rate regulation, health, safety, and wage and hour laws, antitrust and workers' compensation were only a few of the fields in which legislatures were becoming involved.[147] Such legislative experiments were plainly in jeopardy unless the Court could assimilate them to some established category of police power legislation.

But it was precisely the ready power to describe novel legislation in traditional terms which made this particular technique for applying the model no more restrictive than the model simpliciter. The hypothetically unconstitutional tax exemption in the sugar refining case was put in terms of one for making "confectionary, preserves or pastry," and, as such, was an unheard of government subsidy. But if the favored activity were put in such terms as "preparation of farm produce for the market" it could easily be understood as within the traditional governmental activity of promoting agricultural production. So while new kinds of government regulation were vulnerable to this kind of adjudication, they were, by no means, foredoomed. Rather, the Court was free to style the classification as an unexceptional goverment activity or as an innovative discrimination. The judges' perceptions of the proper role of goverment, developed from sources outside of positive constitutional law, undoubtedly affected the light in which the classification appeared.

A similar difficulty beset a second way of applying the model

146. 134 U.S. at 237.

147. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 384-445 (1973).

of unjustifiable classifications. This is the concept first clearly described by Tussman and ten Broek and often referred to as the aptness of the classificatory "fit".[148] In order for discriminatory legislation to serve a public purpose it must be true that there are differences in the groups that the law regulates which call for correspondingly different kinds of state treatment in order to achieve the state's goal. But since precise identification of individuals qualifying for particular kinds of treatment is ordinarily impossible as an administrative matter, the state substitues for the true "target" group another group more easily ascertainable. As these two groups diverge, the posited public purpose is less well served and the classification is less easily justifiable.[149] But as with the identification of novel or traditional state functions, the terms of description adopted will be critical. The more precise the Court is in specifying the law's purpose, that is in defining the true "target" group, the less likely it is a neat fit will be apparent. The same will be true as the Court concentrates on the borderline cases of the substitute group defined by the legislature rather than on its core characteristics. Given such characterizations the classifications will look like mere rank discrimination unredeemed by a police power justification.[150]

Consider, for example, the Court's decisions in two cases governing the imposition of plaintiffs' attorneys' fees on railroad corporations in civil actions brought against them. In *Gulf, Colorado & Santa Fe Railway v. Ellis*,[151] the railroad successfully contested the validity of a Texas statute which made losing railroad defen-

148. *See* Tussman & ten Broek, *supra* note 17, at 347.

149. *Id.*

150. *See* Note, *supra* note 69, at 126-40. The author suggests that any classification may be deemed rationally related to a public purpose by defining the public purpose in terms of the different treatment imposed. One need never concede that a statute exists merely to favor one group over another since there will always be some permissible goal which can be attached to any conceivable statute. Similarly any classification may be found invalid by using one of three methods: "(A) ignoring a purpose, (B) stating the purpose as a unit rather than as a mix of policies, and (C) manipulating the level of abstraction at which the purpose is defined." *Id.* at 132. *See* I. BERLIN, *supra* note 17, at 82-83:

> To state the principle in this way leaves open crucial issues; thus it may be justly objected that unless some specific sense is given to 'sufficient reason' the principle can be reduced to a trivial tautology (It is reasonable to act in manner X save in circumstances Y, in which it is not rational, and *any* circumstances may be Y.).

151. 165 U.S. 150 (1897).

dants liable for limited attorneys' fees in actions in which fifty dollars or less was at issue. The opinion for the Court by Justice Brewer found the statute created two classes of losing defendants, one consisting solely of railroad corporations.[152] In another light, the Court regarded the statute as working a discrimination between the railroad defendants and the plaintiffs in actions against railroads.[153] After restating the elements of the model of unjustifiable classifications, the opinion went on to state that the proper inquiry in this case was whether there was "some reason why the duty of payment is more imperative in the one instance than in the other."[154] Justice Brewer then examined a catalogue of possible reasons for the unequal treatment, but found each one inadequately served. The burden imposed could not be justified on account of the special corporate privileges allowed since only railroad corporations were affected. It could not be approved on the basis of the special duties of common carriers, because other such forms of transportation were omitted. Nor was it needed to protect less powerful litigants because the fees would be awarded to any plaintiff, rich or poor. It could not be allowed as a safety measure since the statute applied to claims of all kinds against railroads, not merely those involving operations of special danger. Therefore, the Court was left not with a reasonably functional legislative classification but rather with mere "arbitrary selection."[155] The Court defined certain narrow and isolated police power goals and measured the specific attributes of the classification against them. This technique, not surprisingly, proved fatal.[156]

In contrast is the Court's decision in *Atchison, Topeka & Santa Fe R.R. v. Matthews*,[157] decided two years later in another opinion by Justice Brewer.[158] The railroad challenged a Kansas

152. *Id.* at 153.

153. *Id.*

154. *Id.* at 157.

155. *Id.* at 157-59.

156. In comparison, the dissenting opinion by Justice Gray, joined by Chief Justice Fuller and Justice White, dealt far less specifically with "little questions of costs." Rather, Justice Gray was content to note the traditional power of states to regulate costs in judicial proceedings and that states had a right to employ that power to discourage stalling by a group of defendants who, the legislature may have concluded from experience, was prone to such tactics. *Id.* at 166-68. The majority opinion's manipulation of the definition of the public purpose served is discussed in Note, *supra* note 69, at 133-37.

157. 174 U.S. 96 (1899).

158. This time Justice Brewer was joined by Justices White and Gray and Chief Justice

statute which imposed plaintiffs' attorneys' fees on unsuccessful railroad defendants in actions for damages from fires caused by railroad operations. This time the Court upheld the statute. The Court conceded that an inequality between railroad corporations and other litigants had been created. But in *Matthews,* unlike *Ellis,* the inequality was reasonably related to a proper police power objective inasmuch as it provided some incentives for railroads to exercise a heightened degree of caution and thus minimize the incidence of fires. Noting the special risk of destructive prairie fires from sparks escaping from moving trains, the Court found the special burden on railroads a reasonable regulation.[159] This conclusion, of course, could not withstand the kind of analysis to which Justice Brewer had submitted the Texas statute in *Ellis.* For example, it could be argued that a bona fide fire prevention measure would extend to all defendants in actions for recovery of fire damage, not just to railroads.[160]

The comparison of *Ellis* and *Matthews* illustrates the malleability of judicial examination of the aptness of legislative classification in accomplishing state purposes and, in particular, the unreliability of the concept of "fit", without more, as a consistent way of applying the model of unjustifiable classifications. In *Matthews,*

Fuller, who had dissented in *Ellis,* as well as Justice Shiras, who had been in the *Ellis* majority. Justice Harlan, joined by Justices Brown and Peckham, all of whom had joined Brewer's majority opinion in *Ellis,* dissented. They were joined in dissent by Justice McKenna who had been appointed in the interim. It may be of some significance that in the same intervening period Justice Field had retired. Brewer was not only Field's nephew but, in many ways, his intellectual protege, as well. *See* C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 389 (1939); L. PFEFFER, THIS HONORABLE COURT, A HISTORY OF THE UNITED STATES SUPREME COURT 208 (1965); Paul, *David J. Brewer,* in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, 1515 (L. Friedman & F. Israel, eds. 1969). *But see* J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY 1890-1920, 244-45 (1978). A double damages provision for livestock injured by railroads that had refused to fence had been upheld by the Court in Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885), in a unanimous opinion by Justice Field.

159. 174 U.S. at 101-02.

160. Justice Brewer's assertion that "[n]o other work done, or industry carried on, carries with it so much of danger from escaping fire," *id.* at 102, was not self evident. But even accepting this, one could question why the statute by its terms applied to fires created by any railroad operations and not merely those from the special danger of locomotives speeding through the prairies. Later cases would find this kind of lack of fit—over-inclusiveness—permissible in that the state could reasonably adopt broad prophylactic measures and need not draw classifications with mathematical precision. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314-17 (1976); Tussman & ten Broek, *supra* note 17, at 351-52.

Justice Brewer was content to state an obvious connection between the group affected and the evil to be eradicated without asking the nitpicking questions which might have been put. In *Ellis*, his opinion was nothing but a series of such questions. This is not to say that the "fit" was not, indeed, better in *Matthews* than in *Ellis*. It is only to question why the line of constitutional and unconstitutional inequality should have been drawn between them. It is exactly upon such distinctions that this view of the model of unjustifiable classifications is based, but in the drawing of which it can provide no guidance.[161] In fact, Justice Brewer seemed acutely aware of this difficulty in *Matthews:*

> It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness . . . .
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> . . . .
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> Is the classification or discrimination prescribed thereby purely arbitrary or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion . . . but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line.[162]

The point is not that *Ellis* and *Matthews* were inconsistent. They were not. They were both properly explicable as products of the technique of equal protection adjudication under discussion. But decisions that both statutes were constitutional, or both were unconstitutional (even perhaps that the *Ellis* statute was valid and the *Matthews* statute invalid), would also have been consistent applications of this method. As was the case with Justice Field's condemnation in the railroad tax cases of discriminations based on personal characteristics and with attempts to isolate unusual or novel classifications, judging classifications according to "fit" did not satisfy the need for a limit on judicial discretion that was put forward at the outset.

All of these formulations of the model of unjustifiable classifications were incomplete as modes of decision. They permitted different, even inconsistent results. So in choosing a result the court

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161. *See* Note, *supra* note 69, at 124 n.11 ("There seems to be an axiom to fit any degree of accuracy the courts might wish to require.").

162. 174 U.S. at 103, 105-06.

had to look elsewhere.[163] But the true sources of decision were not deduced either from the Constitution or the devices of adjudication that the Court had developed. They were almost never articulated. It cannot be surprising if, as is commonly assumed, the Justices turned consciously or instinctively to the economic and social philosophies dominant among men of their background and class at that time[164] or, since these philosophies themselves were far from determinate, that their decisions yielded no discernable pattern of adjudication.

The potential which such techniques of adjudication had for the incorporation of extra-constitutional bases of decision was unusually obvious in another opinion by Justice Brewer.[165] The decision invalidated Kansas' regulation of the rates charged by stockyards. The Justice's economic biases were particularly apparent. The statute applied only to stockyards dealing with an average daily volume of 100 or more head of cattle or 300 or more head of hogs or sheep. Justice Brewer's opinion first condemned the rates allowed as confiscation and therefore a deprivation without due process.[166] But he found the restriction on rates according to size also a violation of equal protection. Although the size limit insured

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163. *Cf.* H. HART, *supra* note 25, at 154-63.

164. *See,* for example, the well-known remarks of Justice Miller in a letter written December 5, 1875:

> It is vain to contend with judges who have been at the bar the advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence.

Quoted in C. FAIRMAN, *supra* note 158, at 374. *See* C. HAINES, *supra* note 46, at 180; J. SEMONCHE, *supra* note 158, at 95, 133; Mendelson, *Mr. Justice Field and Laissez Faire,* 36 VA. L. REV. 45 (1950). *But see* McCurdy, *supra* note 77, at 973, which argues that, at least with respect to Field, his opinions follow a coherent vision of the proper spheres of public and private power. *See generally* M. KELLER, *supra* note 136, at 369-70.

165. Cotting v. Kansas City Stock Yards, 183 U.S. 79 (1901). Justice Brewer's opinion was, however, only joined by two other justices. The extent to which the opinion reflects the views of the other Justices is not clear. Justice Harlan spoke for six Justices in noting, in a brief statement, that the statute was unconstitutional on equal protection grounds because it applied, in fact, only to the Kansas City Stock Yards. He explicitly refused to express any views on whether the statute was a deprivation of property without due process of law. *Id.* at 114-15. This leaves in doubt the extent to which these Justices agreed with the broader equal protection discussion in Justice Brewer's opinion. Professor Semonche suggests that the division was a result of Justice Brewer's exceeding the mandate given him in conference by expanding into the due process question and that the equal protection point was relatively uncontroversial. *See* J. SEMONCHE, *supra* note 158, at 145-46.

166. *See* note 165 *supra.*

that the regulation would operate only on the Kansas City Stockyard,[167] Justice Brewer found it wanting on broader equal protection grounds. He asked whether the state could justify a discrimination "between stockyards doing a large and those doing a small business."[168] The state claimed large volume stockyards raised a threat of monopolistic pricing and that the large volume allowed profitable operation at lower rates. Justice Brewer acknowledged that such considerations might justify a classification based on the "character or value of the services rendered," but not one based "simply on the amount of the business which the party does."[169] He then proceeded to parse the classification with the kind of precision he had utilized in *Ellis*:

> There can be no pretence that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other . . . . If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would.[170]

Again the critical feature of the analysis is the specificity with which the classification and the asserted end are examined in deciding whether the discrimination is an apt means to the state goal. Justice Brewer did not stick to a discussion of "large volume" and "small volume" stockyards between which a difference in treatment would seem reasonable in light of the state interest claimed. Rather he compared stockyards handling 99 head per day with those handling 101 head per day. That comparison made the distinction look outrageous. This result was reached although the former classification necessarily included the latter.[171] With the judi-

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167. This was the sole ground relied on by the other six Justices. *See* note 165 *supra.*

168. 183 U.S. at 103.

169. *Id.* at 104.

170. *Id.* at 112.

171. Compare this opinion with that of the Court in Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283 (1898), in which a challenge was raised to the Illinois inheritance tax. A similar way of looking at the classification involved was urged on the Court since different tax rates were imposed according to the value of the estate. It was argued that to tax only a 3% tax on a $10,000 legacy and 4% tax on $10,001 legacy was indefensible. But in *Magoun* the classification was held valid, with the Court rejecting the claim that the mere specification of dollar amounts was enough to invalidate it. *Accord,* Clark v. Titusville, 184 U.S. 329 (1902). Justice Brewer dissented in *Magoun* (but not in *Clark*), finding the statute "unequal because based upon a classification purely arbitrary, to wit, that of wealth—a tax directly and intentionally made unequal." 170 U.S. at 303.

cial eye focused on such narrow differences, no state end would appear well served by a classification.

Justice Brewer's opinion is remarkable for the candor with which it revealed the reasons for his hostility toward the legislation, *i.e.*, the reasons why he found it unjustifiable.

> The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits.?[172]

Neither the idea of traditional practice nor the concept of "fit," both so vulnerable to judicial manipulation of the terms describing the classification, could avoid the basic problem with the model of unjustifiable classifications. That problem was the need to review the suitability of classifications to the work of government with no external a priori guidelines as to what that work properly was or what in any case was a reasonable pursuit of it.

We have thus reached the first decade of the twentieth century, a period in which the doctrine of economic substantive due process is generally thought to have reached its ascendancy.[173] The same may be said of the doctrine of unjustifiable classifications in equal protection adjudication. Both doctrines were apt vehicles for the judicial imposition of substantive policy criteria on legislative determinations. We may look at one further example, *Connolly v. Union Sewer Pipe*,[174] decided on March 10, 1902. In that case, we see the result of the model of unjustifiable classifications and the difficulties noted in extracting principled decisions from that model. There the validity of an Illinois statute, making combinations in restraint of trade unlawful, was put in issue. In particular, the Court was asked to consider the statute's exemptions for trade in "argicultural products or live stock while in the hands of the producer or raiser."[175] The Court held the law unconstitutional in

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172. 183 U.S. at 104-05.

173. *See* C. HAINES, *supra* note 46, at 182-85; *see generally* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895 (1976).

174. 184 U.S. 540 (1902).

175. *Id.* at 554.

an opinion by Justice Harlan. The opinion is significant in its failure to articulate any reasoned basis for the decision within the model of unjustifiable classifications. Given the classification at issue and its resemblance to those dealt with in earlier precedent, none of the techniques discussed, analytical or rhetorical, could do the job the Court wanted done. The classification was not (nor could it have been)[176] labelled an "unusual" discrimination. Nor could the Court complain about the classification's lack of "fit" with a state purpose. The Court did not even consider and reject the claimed state justifications for the exemption. Instead, Justice Harlan's opinion is a pastiche of quotations from the Court's equal protection cases denouncing unequal and arbitrary state regulation and setting out, in its most general terms, the model of unjustifiable classifications and finally concluding that the statute "is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."[177] No restricting rule, not even the elastic standards discussed, was sufficient to serve a Court apparently bent on case-by-case adjudication.[178] The model of unjustifiable classifications thus reverted to its most general, and therefore least restrictive, form and the inclusion or exclusion of particular legislative discriminations was reduced to an exercise in *ipse dixit.*

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176. This was especially true in light of the American Sugar Refining case discussed at text accompanying notes 142-46 *supra,* in which the Court upheld an exemption for farmers from the tax on sugar and molasses refining as an appropriate encouragement to agriculture. Justice Harlan attempted to distinguish that case and the *Magoun* case discussed in note 163 *supra* as follows:

> It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

184 U.S. at 563. This style of argument pervades the opinion.

177. *Id.* at 564.

178. *See* J. SEMONCHE, *supra* note 158, at 95 ("[T]he activist court of the 1890s was attracted to the formulation of a general rule, the application of which it would judge anew with practically each relevant case.").

VIII. Racial Classifications

By the turn of the century, the triumph of the model of unjustifiable classifications for equal protection analysis was complete. Perhaps no feature of constitutional adjudication of the period illustrates its ascendancy more than the Court's altered treatment of state discrimination on the basis of race. Such classification, of course, provided the paradigm for the model of impermissible classifications, inferred from the majority opinion in the *Slaughter-House Cases*. On that view, discrimination against blacks on account of race would be invalid without regard to the utility of the classification as judged by the Court. Such a model might have provided a far more limited field of judicial action under the equal protection clause. The Court did not extend that model outside the area of race to strike down or uphold any challenged classification. Moreover, even with respect to racial discrimination, two cases decided in this period seem to demonstrate that racial classifications, as well, would be subject to the more flexible model of unjustifiable classifications.

The better known case is *Plessy v. Ferguson*[179] decided in 1896, upholding Louisiana's statutory policy of separate cars on the state's railroads for black and white. *Plessy* may be understood in one of two ways, the first of which only marginally implicates the problems under discussion. That is the contention that the policy of forced separation involved no inequality at all and that the equal protection clause was therefore entirely inapplicable.[180] The opinion contained language to this effect, including the frequently quoted conclusion that any stamp of inferiority connected with the statute existed "solely because the colored race chooses to put that construction upon it."[181] However, perhaps conscious of the insubstantiality of this claim, this position was not a major theme in the opinion. As the dissenting opinion made clear, the system of segregation was a component of a racial caste system in which blacks were plainly relegated to a position of inferiority.[182] Instead, the

179. 163 U.S. 537 (1896).

180. This was the holding with respect to the claim of racial discrimination in Pace v. Alabama, 106 U.S. 583 (1882), decided much earlier in this period in which the Court upheld a statute providing more severe penalties for interracial fornication or adultery than for the same crimes committed between people of the same race.

181. 163 U.S. at 551.

182. Every one knows that the statute in question had its origins in the purpose,

majority opinion at times seemed to acknowledge the inequality of the scheme of laws of which the statute was a part, but denied that such inequality was proscribed by the fourteenth amendment.[183] And, in a now familiar way, it went on to conclude that such legislation was a well-established and proper exercise of the state's police power.

The Court rejected the claim that, if this statute were valid, it would signify that other laws of separation would necessarily be valid, such as one requiring separate cars for persons with different hair colors or for citizens and aliens.[184] Nor did the validity of this law say anything for the constitutionality of laws

> requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.[185]

If the Court's approval of the law in *Plessy* were merely on the ground that it created no inequality, the hypothetical regulations would be indistinguishable. But the Court apparently felt that those regulations, as well as the one in the case before it, presented sufficient questions of inequality to subject them to the same inquiry to which unequal classifications were generally subjected.

The Court's differentiation of the Louisiana statute from the hypothetical laws described in the quoted language was in terms of the model of unjustifiable classifications:

> The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class . . . .
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not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary.

163 U.S. at 557 (Harlan, J., dissenting). For a discussion of the 19th century legal developments evidencing a recognition that racially segregated transportation entailed unequal treatment, *see* Frank & Munro, *The Original Understanding of "Equal Protection of Laws,"* 1972 WASH. U.L.Q. 421, 452-56.

183. 163 U.S. at 549-51. The case might also be understood as admitting the inequality but attributing it entirely to nongovernmental sources, thus putting it beyond constitutional attack under the rule of The Civil Rights Cases, 109 U.S. 3 (1883).

184. 163 U.S. at 549-50.

185. *Id.*

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.[186]

To the extent the Court was proceeding on the assumption that segregation did present a case of discrimination, the question reduced itself to the now familiar investigation of the utility of the law in effecting proper government functions. No stricter inquiry was called for merely because the disadvantaged group was a racial one. The case had been argued primarily in terms of the propriety of segregation as a police power measure.[187] One brief contended that the proper governmental nature of the law was evidenced by the fact that the regulation did not apply to urban street railways since those lines "are only possible in thickly populated centres, where the white and colored races are numerically in a ratio of equality, enjoy a more advanced civilization, and where the danger of friction from too intimate contact is much less than it is in the rural and sparsely settled districts."[188] Indeed the Court explicitly relied on a finding that the classification was calculated to promote the "public peace and good order."[189] The majority opinion cited *Yick Wo* not as a lesson in the proper way to treat racial discrimination, but as a case in which a classification was invalid because it bore no relation to the "competency" or "propriety" of the penalized group carrying on the forbidden laundry business.[190] Racial classifications were—like classifications in general—invalid when they failed to be justified as appropriate governmental measures, otherwise valid.[191]

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186. *Id.* at 550.

187. Brief for Plaintiff in Error (by S.F. Phillips & F.D. McKenney) at 10-11; Brief for Plaintiff in Error (by James C. Walker, of counsel) at 14-19; Brief for Defendant in Error (by Alexander Porter Morse, of counsel) at 4-9.

188. Brief for Defendant in Error (by Alexander Porter Morse, of counsel) at 5. *See* J. SEMONCHE, *supra* note 158, at 83-84.

189. 163 U.S. at 550. The reference to the established practices of the community also reflects the variation of the model of unjustifiable classifications favoring familiar and customary regulation. *See* text accompanying notes 137-47 *supra*.

190. 163 U.S. at 550.

191. This often overlooked aspect of the opinion has been recently noted in an opinion of Justice Stewart. Fullilove v. Klutznick, _ U.S. _, 100 S. Ct. 2758 (1980)(dissenting

The well known dissent of Justice Harlan is in stark contrast. His denial that any legislation may validly have reference to the race of those it governs, is an almost classic statement of the defunct model of impermissible classifications.[192] He rejected, explicitly, the notion that the Court could substitute its own evaluation of the "reasonableness of the regulation challenged" for a simple inquiry into the basis of the classification. He found such techniques to be an infringement on the legislative power "a dangerous tendency in these latter days."[193] The use of race was, in his view, sufficient to seal the fate of the challenged law.

The strictness with which Justice Harlan applied this test in *Plessy* and his criticism, in his dissent, of the model of unjustifiable classifications makes his opinion for the Court in the second case, *Cumming v. County Board of Education*,[194] all the more remarkable. A state statute charged the Richmond County, Georgia, Board of Education with the responsibility of operating a system of elementary schools in the county and empowered the Board, if it so chose, to establish and levy taxes for the support of such high schools as it judged "the interest and convenience of the people" required.[195] In 1876 the Board established a high school for white girls and provided a subsidy to a denominational high school for white boys. In 1880 it established a high school for black children but abolished it in 1897, "ascertaining that it had not funds sufficient to carry on the colored high school and at the same time afford school privileges to some 400 colored children in the primary schools."[196] These 400 children apparently could not be accommo-

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opinion).

192. 163 U.S. at 554-55. Justice Harlan's famous assertion that "[o]ur Constitution is color-blind," *id.* at 559, appears to be adapted from one of the briefs. "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind." Brief for Plaintiff in Error (by James C. Walker, of counsel) at 19.

193. 163 U.S. at 558.

194. 175 U.S. 528 (1899). An interesting and thorough review of the background of and parties to this litigation is Kousser, *Separate but not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. SOC. HIST. 17 (1980). Justice Harlan's aversion to the model of unjustifiable classifications in the dissent in *Plessy* is also in contrast to his enthusiastic application of it in Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902), discussed at text accompanying notes 174-78 *supra*, and his dissent in Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899), discussed at text accompanying notes 157-60 *supra*.

195. 175 U.S. at 534.

196. Board of Educ. of Richmond County v. Cumming, 103 Ga. 641, 643, 29 S.E. 488, 488 (1898).

dated in the existing black schools. Black parents and taxpayers sued, charging that by providing public support only to the high school education of white children the Board had worked a denial of the equal protection of the laws. A trial court ordered the Board to refrain from supporting any white high school until equal facilities were provided for black children.[197] But the Supreme Court of Georgia reversed, and the United States Supreme Court affirmed the decision. Justice Harlan's opinion was particularly obtuse in failing to acknowledge that any racial inequality existed at all.[198] Instead he dwelled on the fact that the relief sought—an injunction against the funding of white high schools—would be of no benefit to the black children. But it is very clear that Justice Harlan was also impressed with what he understood to be the difficult choice which had faced the Board. That was to close the black high school or to turn away black children "who were without an opportunity in primary schools to learn the alphabet and to read and write."[199] He closed with the suggestion that the fourteenth amendment should not override decisions governing education in state maintained schools, since those decisions were "a matter belonging to the respective states, and any interference on the part of the Federal authority with the mangement of such schools cannot be justified except in the case of clear and unmistakable disregard of rights secured by the supreme law of the land."[200] While the language of "reasonableness" and references to the police power were absent, the model of unjustifiable classifications seemed to be the predominant influence in the decision. The decision certainly did not apply the model of impermissible classifications as explicated in Harlan's dissent in *Plessy*.

In placing the entire impact of its fiscal problems on black students the Board was most assuredly not color blind.[201] But the

197. The trial court's decision was actually based on a violation of the state enabling act. The trial judge stressed, however, that any other construction of the act would mean that it violated the equal protection clauses of the state and federal Constitutions. Transcript of Record at 35-37.

198. This was not because the argument had not been clearly made. *See* Brief for Plaintiffs in Error at 12-15.

199. 175 U.S. at 544.

200. *Id.* at 545.

201. While not free of ambiguity, one of the county's briefs seems, at one point, to have conceded the fact of inequality of the schools as well as revealing the racial biases of the writer:

> But it will be said the classification now in question is one *based on color*, and so

mere use of racial criteria was not found sufficient to invalidate otherwise proper managerial decisions by the Board. The Court permitted the racial discrimination because it was applied in a reasonable way for a proper governmental end.[202]

CONCLUSION

The model of unjustifiable classifications could provide no coherent and stable guide to the validity of state legislation involving race or otherwise. Each attempt to reformulate it so as to yield some more definite standard of adjudication ultimately failed. Finally the jurisprudence of equal protection was reduced to the kinds of generalized harangues about the unfairness of legislation exemplified by the opinion in *Connolly v. Union Sewer Pipe.*[203] Such a model of decision naturally tended toward an incorporation into fundamental law of the Justices' own views on the proper aims and operation of government regulation.

It has been noted that the developments which have been traced here paralleled similar changes in the Supreme Court's use of the due process clause, a phenomenon better known and more widely discussed.[204] In each case, the Court was faced with an obviously important, but textually obscure constitutional provision. In

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> it is; but the color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences created different social relations, recognized by all well organized governments. If we cast aside Chimercial [*sic*] theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage. It is true, Brummell's children must go 3-½ miles to reach a colored school, while no white child in the district is required to go further than 2 miles. The distance which these children must go to reach a colored school is a matter of inconvenience which must arise in any school system. *The law does* not undertake to establish a school within a given distance of any one, white or black. The inequality in distances to be travelled by the children of different families is but an incident to any classification and furnishes no substantial ground of complaint.

Brief for Defendant in Error (Miller) at 18 (emphasis in original).

202. The briefs argued the case, at least in substantial part, in terms of the model of unjustifiable classifications. *See* Brief for Plaintiff in Error at 12-14; Brief for Defendant in Error (Miller) at 19; Brief for Defendant in Error (School Board) at 14.

203. *See* text accompanying notes 173-78 and note 176 *supra.*

204. *See, e.g.,* C. HAINES, *supra* note 46. B. TWISS, *supra* note 46; Corwin, *The Supreme Court and the Fourteenth Amendment,* 7 MICH. L. REV. 643, 650 (1909); Hamilton, *supra* note 28.

each case it declined the opportunity to define the prohibition and thereby restrict its own power. Instead it followed a policy which failed to give notice to the legislatures—arguably, the principal addressees of the fourteenth amendment[205]—of the kind of activity which would be deemed impermissible. Even the conservative economic philosophy which evoked so much of the Court's work was never applied consistently. The fourteenth amendment cast a shadow over state regulatory legislation, but the dimensions of that shadow were a matter of perpetual doubt.

It is important to recognize that these results were not the consequence of misapplication of the model of unjustifiable classifications. That model was necessarily incomplete as a method of decision, omitting any strict criteria for distinguishing proper and improper measures under the police power. Rather than defining such standards, the Court proceeded only with such catchwords as "reasonable" and "arbitrary," the meanings of which were uncertain. Thus, laws segregating, isolating, and limiting the education of blacks could be seen as perfectly reasonable, while those imposing special burdens and restrictions on large business enterprises could be viewed as oppressive and tyrannical.[206]

The model of unjustifiable classifications permitted such results. It by no means required them. A different emphasis applied to the same model could lead to results of extreme deference to legislative judgments. In different hands, the same model might produce only the mildest of restraints on legislative discretion. Indeed, the end of the period under study appears to be the high point of an era of judicial activity invalidating state regulatory legislation.[207]

It is something of an irony that this era of American law is

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205. *See* Linde, *Judges, Critics and the Realist Tradition,* 82 YALE L.J. 227, 252-55 (1972).

206. *See* H. GRAHAM, *supra* note 109, at 11-13; G. WHITE, THE AMERICAN JUDICIAL TRADITION 86 (1976).

207. *See* note 136 & accompanying text *supra.* This period would be followed by a time of increasing restraint in judicial review. The Connolly decision was delivered on March 10, 1902. On December 8, 1902 the Justice who was to be the principal influence in establishing such judicial restraint, Oliver Wendell Holmes, Jr., took his seat on the Supreme Court bench. Some examples of the way the model of unjustifiable classifications was used by Holmes as an instrument of judicial deference may be found in Buck v. Bell, 274 U.S. 200 (1927); Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912); Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267 (1904).

commonly regarded as one of high formalism.[208] Some commentators have argued that stability replaced flexibility in the legal system just as the drastic economic changes of the first half of the nineteenth century were coming to an end. The formalist emphasis in American law is thus regarded as locking into place the newly accomplished redistribution of power and wealth.[209] While there are probably many versions of "formalism," the highly elastic kind of adjudication which has been described here is not likely to fit into most of them. This was not a period in which the Court forced dissimilar factual controversies into unyielding doctrinal categories. In fact, quite the reverse was true. The law was bent to every shade and nuance of fact which struck the judges as significant.[210]

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208. *See* G. GILMORE, THE AGES OF AMERICAN LAW 60-66 (1977); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, 255-66; Belz, *The Constitution and the Gilded Age,* in ESSAYS IN NINETEENTH CENTURY AMERICAN LEGAL HISTORY 110 (Hall ed. 1971); Nelson, *The Impact of the Anti Slavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America,* 87 HARV. L. REV. 513, 514-15 (1974).

No clear definition of formalism has emerged from legal scholarship. Professor Nelson has succinctly stated a central characteristic when he notes its concern with "the preservation of the logical structure of the rules and fundamental principles of the law." Nelson, *supra,* at 515. This is usually contrasted with "activism" or "instrumentalism" which is more sensitive to the policy results of adjudication. *See id.*; K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38 (1960); Kennedy, *Legal Formality,* 2 J. LEGAL STUD. 351, 354 (1973). But this does not exclude use of the term to describe other qualities of adjudication and opinion making. Indeed, Nelson, later in the article cited, seems to identify formalism not with a concern for rules, procedures, and sources of legitimacy over results but with judicial invocation of large abstract moral notions as authority in contrast with more particular economic and political justifications. Thus he sees the anti-slavery litigators of the ante-bellum period as arguing in the formalist style while the judges who turned down their idealistic claims were more hard-headed instrumentalists. *Compare* Nelson, *supra,* at 538-45 *with* R. COVER, JUSTICE ACCUSED (1975). Nelson sees this human rights rhetoric as triumphant in the constitutional law of this period—hence its denomination as formalist. Of course, the use of grand moralistic and unspecific language is quite consistent with the kind of free-wheeling, unpredictable and undisciplined adjudication under the fourteenth amendment discussed in text.

209. *See* G. GILMORE, *supra* note 208, at 66; M. HORWITZ, *supra* note 208, at 253-54.

210. "Justice Peckham's opinion [in *Lochner v. New York*] that there were no reasonable grounds for interfering with the right of free contract by determining the hours of labour in the occupation of a baker may indeed be a wrongheaded piece of conservatism but there is nothing automatic or mechanical about it." Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 611 n.39 (1958).

It is possible to understand this period in Supreme Court history, however, as both nonformalist and protective of the newly established economic interests. Those interests were primarily served through crystallization of private law doctrine—principally a product of common law adjudication. But the gravest threat to the stability of such doctrine arose from the social and economic experimentation of the legislatures. Effective judicial control of that legislation required a free-wheeling Court and an adaptable arsenal of constitutional

Of course, this development was directly at odds with the idea of constitutional law as setting enforceable boundaries for proper governmental action. Instead of a limited government we had an unpredictable judicial veto. The limits of governmental power were unknown except on a day-to-day or year-to-year basis. This was no less inconsistent with the concept of constitutional limits because it was the judiciary and not the legislature that was in charge of the ongoing redefinition. But, given our unreviewable institution of judicial review and the apparent implicit invitations of the "majestic generalities"[211] of the Constitution, the temptation to assume that power may have been irresistible. It would have taken a Court of extraordinary fortitude in self-abnegation to choose the model of impermissible classifications over the model of unjustifiable classifications. Few Justices in history have demonstrated a willingness to choose such a course and fewer still an ability to follow it.

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weapons. Such an effort would be ill served by *a priori,* limited, knowable, and therefore inflexible constitutional doctrine. We might then find a tendency toward formalism in private law and activism in constitutional law as complementary developments, limiting the judicial reach with respect to private centers of power while expanding it with respect to the legislatures.

211. Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).