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who claims no knowledge of Greek, had confused this sentence with the later one, in which "these offenses" is used to translate "these things." Bury translates: "and that those first guilty of such enormities." n403 Dover construes the "first" differently. The Greek reads: kai to tolmeta ton proton einai. Dover offers two renderings: "a crime of the first order, committed through inability to control the desire for pleasure," n404 and "a crime caused by failure to control the desire for pleasure." n405

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- n400. See Bobonich Laws, supra note 393, at 636c6.
 n401. See Price Letter I, supra note 37, at 1.
 n402. See Pangle Laws, supra note 272, at 636c6.
 n403. See Bury Laws, supra note 59, at 636c6.
 n404. Dover, Greek Homosexuality, supra note 48, at 186.
 n405. Id. at 165.

-End Footnotes-

The first question is one of grammar. On Dover's construal, the Athenian Stranger has to be saying that a certain crime is classified as a crime of the first order (has the predicate of being "of" or "among" the first) on account of people's weakness in the face of pleasure. I do not see any other natural way of construing the predication. Further, this translation makes no sense: why should people's weakness cause something to be classified a crime of the first order? Weakness might of course cause the commission of a crime, but it seems implausible that weakness should cause something to be "among the first" in the ranks of crime, which is what the sentence so construed would say. Dover's "a crime of the first order, committed through inability to control the desire for pleasure" covers over the difficulty; but it is, to say the least, strained, and underimplied by the Greek. His earlier version states that the crime is "caused" by the weakness - but it seems that in the Greek so construed, ton proton is in the predicate position: not "a crime of the first order exists on account of" but "a crime is in the first [*1627] rank on account of." Far more natural and plausible (and in accordance with the usage of all other translations known to me) is to take the "first" to mean "the first people who did it" - the Athenian Stranger has been talking here about the origin of this sexual practice in the gymnasia of Sparta. Then the predicate makes perfect sense: he is saying that the daring act (or whatever we shall say for tolmeta) was done on account of lack of control in the face of pleasure, a crucial assertion for the moral thought of this passage. I might add that Book VIII gives us further reasons against the thought that Plato can be describing these relations as "a crime of the first order": he urges his citizens to believe that this conduct is kalon provided one does not do it within the cognizance of others at that time, n406 a teaching that he certainly does not promulgate for murder, theft, sacrilege, and other major crimes.

-Footnotes-

n406. Plato, Laws 839d-842a.

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Now we get to the word *tolmema*, to the highly pejorative translation to which Finnis attaches much importance. A complete survey of Plato's use of this word group, both in and out of the Laws, leads to the conclusion that it is wrong to translate with a strongly negative (or positive) connotation. The word all by itself connotes only boldness or daring, and in and of itself gives no information about whether Plato approves or disapproves the conduct in question.

In all of Plato's work, the noun *tolmema* occurs only here. Therefore, we ought to interpret it in a way that is consistent with the interpretation of its parent verb, *tolmao*, which occurs very frequently: 123 times, counting only the plain verb and not compounds or derivatives. n407 Closer examination of these occurrences reveals that the verb always denotes some action that is bold or daring. Sometimes the context will show the daring to be good, and sometimes the context will show it to be bad. But the word by itself does not supply this information, given the variety of conduct it may describe. To cite just a few of the many examples in which *tolmao* is used of bold acts that Plato (or his speaker) obviously favors: it is used to say "one must dare (*tolmeteon*) to speak the truth, all the more since it is about the truth that we are speak [*1628] ing," n408 for the daring required to give a worthy praise of Eros, n409 for the daring or courage with which a person gives his life for that of a loved one, n410 for the daring or courage of Achilles in risking his life to avenge Patroclus, n411 and for the daring involved in the proposal that the philosophers should rule the city. n412 Such evidence leads us to the conclusion that we should translate with a neutral notion of boldness or daring, and then use the rest of the context to decide what Plato thinks about the conduct in question. If we were to suggest that in the Laws Plato's usage had shifted and the word had acquired, in and of itself, a pejorative connotation, again we have Plato's usage against us. For very shortly before the passage in question, at 629e, and not too long after it, at 661a, he uses the word for the daring involved in approved military courage. And, as Anthony Price has noted, Plato uses the verb in the Book VIII passage about sexuality to denote the daring or "having-the-nerve" with which athletes in training abstain from making love to either women or young men. n413 So, as Price observes, "If *tolman* implies criminality, both making love to boys and not making love to boys turn out to be crimes; a hard view." n414 Because Price translated it as "crime" (borrowing Dover's translation) in his book, he now writes: "I am afraid that I simply have to retract: untypically and unexactly, I was trusting in authority (that of Dover), and it let me down.... I can only apologize for my carelessness, and promise to correct it in the next reprinting." n415 Dover, too, has now changed his mind. He writes, "I agree that my treatment of *tolmema* was regrettable; 'venture' would have been better than 'crime'." n416 This weakens still further, I believe, Dover's position on the grammatical point, for it is very unclear what a "venture of the first order" would mean.

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n407. See Brandwood, *supra* note 386, at 899.

n408. Plato, Phaedrus 247c.

- n409. Plato, Symposium 177c.
- n410. Id. at 179d.
- n411. Id. at 179e.
- n412. Plato, Republic 474b, 503b4.
- n413. Price Letter I, supra note 37, at 1.
- n414. Id.
- n415. Id.
- n416. Dover Letter III, supra note 35, at 3.

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No good argument can render appropriate Bury's translation on which Finnis relies: "and that those first guilty of such enormi [*1629] ties." n417 No word corresponding to "enormity," with its connotations of perversion, is in the Greek. And the concept of guilt is in any case a very dangerous one to introduce into the translation of any text of this period, because the emotion of guilt is never mentioned in ancient taxonomies of the passions, and it is likely that no ancient Greek thinker had a concept precisely corresponding to the modern concept of guilt as influenced by Christianity. Furthermore, to be "guilty of" lacks the connotation of active daring or doing something out of the ordinary that is always a part of the sense of tolmao and its relatives. Thus, to be "guilty of" would always be an incorrect translation for tolmao. If one needed to defend a pejorative translation consistently for another author, an endeavor that should at least involve studying the entire usage of the term in the corpus of that author, the pejorative rendering would be something like "overboldness" or "outrageousness," not one involving notions of guilt and enormity.

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- n417. Bury Laws, supra note 59, at 636c6.

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Finnis points to the fact that the most recent edition of the Liddell and Scott lexicon, as revised by Jones, includes "shameless act" as one possible meaning for the noun tolmemma. n418 Of course, this only means that some one of Jones' large team of lexicographers thought this was one possible meaning for at least some passage or passages, not that this meaning is necessarily correct. Lexicographers are not always the best scholars, to put it mildly. Nor, dealing as they do with so much material, are they likely to be especially expert on the usage of a single author. But Finnis also appears to misread the entry, for he suggests that the pejorative meaning is offered for the Laws passage in particular. n419 This is not so. There is simply a long list of meanings, followed by a long list of passages and authors that ends with "etc." There is no indication what meaning the lexicographer thinks appropriate for this passage in particular. All we know, then, is that one lexicographer thought, rightly or wrongly, that "shameless act" was an appropriate translation for some passage or passages at some time between the sixth century B.C. and the third century

A.D., with no hint of which passage he had in mind. Further, there is evidence that the [*1630] pejorative meaning was not thought appropriate for this passage, but rather for some later or less central author. The abridged version of the lexicon for schools, which announces that it focuses on the central authors and omits later and rarer material, includes no pejorative translation for tolmeta in its 1972 edition. n420 Plato is, of course, a central author in school curricula, so students are still being encouraged to render this passage in a nonpejorative way. It is also of some interest that a recent, extensive study of the word family by Gottfried Fitzner, n421 the aim of which is to compare meanings of terms in Classical Greek with their meanings in the Greek of the New Testament, comes to the conclusion that the meaning of this word-group in fact remains highly constant. n422

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- n418. See Liddell & Scott, supra note 53, at 1803.
- n419. See Finnis Article, supra note 25, at 1058.
- n420. See Henry George Liddell & Robert Scott, An Intermediate Greek-English Lexicon 811-12 (photo. reprint 1972) (Oxford, Clarendon Press 1889).
- n421. Gottfried Fitzner, Tolmao, in 8 Theological Dictionary of the New Testament 181 (Gerhard Friedrich ed. & Geoffrey W. Bromiley trans., 1972).
- n422. In the Classical language, meanings given include to endure, to suffer, to put up with; to dare, to have courage, to be courageous; to make bold, to presume. Id. at 181-82. In the Gospels, the meanings cited include "to dare" (Mark 15:43, of the daring of Joseph of Arimathea in going to Pilate to ask for Jesus' body), id. at 183; "fear or anxiety," when used in the negative, id. at 184; and "to be bold [or] insolent," as in 1 Corinthians 6:1, id. at 185. This later material is not really relevant to the interpretation of Plato, but it serves to indicate that the word has an unusually consistent history of usage. Furthermore, the study by Fitzner is a scholarly article on the whole history of the word, not the cursory treatment typically given by the Liddell-Scott-Jones lexicon.

-End Footnotes-

Moving from translation to interpretation, what should we say about this passage? First of all, we must note that it has two parts. In the first half, the Athenian Stranger says what he himself thinks about same-sex conduct. In the second half (beginning with "And whether one is jesting or being serious"), he tells his companions what citizens, presumably in the future city, should think about this conduct. The fact that this second half is prefaced by the suggestion that he may not be serious must itself be taken quite seriously. Plato thus does not talk about the condemnation of robbery, murder, and sacrilege. Dover suggests that the right way to understand the contrast is not as between the laughter-provoking and the solemn, but as between "playing an intellectual game" and "saying what one really thinks." n423 The Athenian Stranger indicates, then, that there may be at least some elements of the proposal that do [*1631] not embody his own ideas but are simply an intellectual game that he is playing. The first half of the passage says that same-sex pleasures were encouraged by public gymnasia. (Note that Plato takes it for granted that males will find the sight of naked males arousing.) These pleasures, when a custom of long standing,

have spoiled the pleasures of the type of intercourse we naturally share with the beasts - which should mean, given the Phaedrus, the pleasures of paidosporein, of reproductive intercourse. It would appear that the Athenian Stranger is alluding to the cultural commonplace that these pleasures are especially powerful and intense, causing others to pale by comparison. The second half of the passage goes further, holding that the opposite-sex pleasures are "in accordance with nature" and the same-sex pleasures "contrary to nature"; it also alleges a lack of self-control in the face of pleasure as the reason for the start of the same-sex practices, female and male. Now, as I argued in interpreting the Phaedrus, n424 the appeal to animal nature can have no great moral weight for Plato, given his condemnations of it elsewhere. It would be odd for him to make in his own most serious voice a Eudoxan point criticizing a practice as "contrary to nature" in any normatively serious sense just because we do not share it with the animals. Plato has told us in the Philebus, however, that such appeals to animal nature are extremely popular, and that the "many" rely on them. I suggest that the element of tentativeness in the "joking or serious" passage comes from this fact: the Athenian Stranger is putting this forward as a powerful rhetorical device that will have a serious effect on his citizens. He subscribes to the essential substance of the proposal that same-sex pleasures are to be criticized as violations of the virtue of sophrosune or self-control and to be discouraged on the grounds that they spoil people's pleasure in reproductive activities. But the appeal to animal nature is put in for its effect more than for its philosophical substance in Plato's thought. It is not clear whether the claim about Zeus and Ganymede is in the Athenian Stranger's own voice or in his recommendation to others. Still, we can probably credit Plato with the thought, given his condemnation in the Republic of myths about the sexual activities of the gods. n425 [*1632]

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n423. Dover Letter III, supra note 35, at 4 (citing Plato, Symposium 197e7, and Plato, Gorgias as examples).

n424. See supra notes 258-71 and accompanying text.

n425. See Plato, Republic 390b-392c.

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In any case, we find that there is no identification of the pleasures in question as depraved or wicked. What Plato seems to think is that they are intensely and powerfully pleasant. Indeed, they make the pleasures of procreative sex pale by comparison and lead people to deviate from self-control. This is a common Greek view, and should not surprise us. Nor should it surprise us that Plato, suspicious as always of appetitive pleasures, should be unusually censorious about nonnecessary indulgences. But the sort of criticism he actually makes is quite far from one that alleges the activities in question to be perverted or wicked; nor does he at any point say that the desire for or preference for such pleasures is itself depraved or wicked.

We turn now to Book VIII. Difficulties of text and translation, though present, are not as central here, apart from the issue about parergon mentioned earlier, n426 and Pangle's unfortunate tendency to translate paides as "children." I shall assume that the reader is consulting Pangle's version and shall proceed to describe the contents of the passage.

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n426. See supra text accompanying notes 79-80.

-End Footnotes-

1. 835d-836d

The Athenian Stranger introduces the topic of moderation with respect to erotic love, explicitly speaking both of male-female love and of "the love of male and female paides," which I take to mean the love of adult lovers, probably male but possibly both male and female, for both male and female young people. n427 The Athenian Stranger says that this topic needs careful management and the taking of "proper precautions." He then announces that it is not an easy topic, for on other topics he had the support of Cretan and Spartan customs. But if someone were to

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n427. Pangle takes the genitive to be at once subjective and objective, writing "love of and for children." See Pangle Laws, supra note 272, at 836a. Though this is possible, it is, I think, less plausible given cultural convention. Dover concurs in my interpretation. See Dover Letter III, supra note 35, at 4.

-End Footnotes-

follow nature and lay down the law that prevailed before Laius, if he were to say that it was correct to avoid, with males and youths, sexual relations like those one has with females, bringing as a witness the nature of the beasts and demonstrating that males don't touch males with a view to such things because it is not according [*1633] to nature to do so, his argument would probably be unpersuasive, and not at all in consonance with your cities. n428

Here we must note, first, that the Athenian Stranger recognizes how radically any curb on same-sex practices will clash with the customs of his culture. Second, we find that the appeal to nature is complex. The Athenian Stranger mentions the fact that turning males into females is not to follow nature; this would be a common Greek idea, one he could expect his companions to comprehend. n429 Price is, I think, correct to stress that this is the point of the appeal to nature in the first part of this sentence. n430 The witness the "someone" might now adduce is said to be "the nature of the beasts." Once again, the Athenian Stranger is speaking of what someone might say in an argument that aims to persuade. We should not conclude that this appeal to the animal world clearly meets with the Athenian Stranger's own approval.

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n428. There is a textual problem at the end of this sentence, but because Pangle solves it, I think correctly, following Dies, I shall not bother to go into it.

n429. See Dover, Greek Homosexuality, supra note 48, at 60-63 (discussing this idea in the speech of Aeschines).

n430. See Price, supra note 206, at 231 n.14.

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2. 836d-837a

The Athenian Stranger now asks what would follow if same-sex activity were approved, as in Sparta and Crete. n431 He asks whether this acceptance would not promote violation of self-control on the part of the erastes, and a failure of manliness n432 on the part of the younger partner, who is performing "the imitation of the female." He suggests that the answer to these questions is "yes" and that people who have the right sort of reasoning will not encourage the practices. Once again, note that the problems are overindulgence on the one side, and being turned into a woman on the other. These worries are consistent with Greek popular morality, though, as ever, Plato is more acutely worried than the rest of his culture, especially in his criticism of the erastes. Same-sex conduct is not [*1634] singled out as per se depraved and wicked, nor is the desire for that conduct problematized.

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n431. From this point on, he is thinking only of male-male relations, and the topic of female-female relations disappears. Nor does he mention sex with male prostitutes. He focuses on the relation between the erastes and the citizen eromenos.

n432. "Courage" as in Pangle, correctly, but there seems to be a play on the connection of andreia, "courage," with the "manliness" it more literally designates.

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3. 837a-e

The Athenian Stranger now introduces two sorts of affection (philia): affection between similars in character and affection between opposites, as between the needy and the wealthy. He says the "vehement" form of both of these is called eros. Affection between opposites is terrible and savage and seldom mutual; the other is "gentle and mutual throughout life." There is a mixed form, but it is unstable. The Athenian Stranger now characterizes the fierce sort as a hunger of a male for the bodily "bloom" of a younger male, where the older does not honor the soul of the beloved. This is the sort of male-male relation that

Pausanias criticizes; once again, as in the Phaedrus, Plato follows cultural conventions, though with his own intense suspicion of the body. The lover who loves the (similar) virtues of soul, he now says, "holds the desire for the body to be secondary; looking at it rather than loving (eron) it, with his soul he really desires the soul of the other and considers the gratification of body by body to be wantonness." Here we seem to have the same view as in the Phaedrus: the most noble sort of lover, whose bodily desire is connected with a reverence for the soul, will abstain from orgasmic gratification. But note that this is a perfectly general claim about all love of similars, and thus does not serve to put any other form of love ahead of male-male love. Nor is there any suggestion that the male-male form of love is depraved or wicked. The whole question, here as elsewhere, is whether genital expression is or is not a kind of overindulgence in and of itself. This passage is clearly the Athenian Stranger's own view, expressed in his own voice.

4. 837e-838e

The Athenian Stranger now turns to the topic of persuasion: how can he get others to engage in the type of behavior he prefers, where the most seductive form of intercourse, "intercourse with beautiful persons" (given the preceding, this genitive should probably be understood to be masculine, "beautiful males"), is concerned. He suggests that, just as in the case of incest, people refrain from a sex act because of widespread social condemnation [*1635] and the suggestion that it contravenes divine law, so too we might get people in our city to have this belief about the sex acts of the erastes and the eromenos. He refers here to the strong effect of custom and popular sayings on people's beliefs about sex. n433 Once again, we have to see the Athenian Stranger as focusing not on the development of his own view but on the influencing of popular belief. He never says in his own voice that the acts are on a moral par with incest; in fact, he doesn't say what he himself thinks about incest either.

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n433. Dover observed to me that the role of divine condemnation is rather muted in what we can discern of the Makareus-Kanake story, mentioned in 838c: "Not surprising; the gods [would] have invited the retort, "Look who's talking!" See Dover Letter III, supra note 35, at 4.

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5. 838e-839d

The Athenian Stranger now claims to have an art that will "promote the permanent establishment" of the law he thinks best. Once again, he is focusing on the issue of persuasion, though he appears to describe what he himself would actually like to achieve. It is difficult to know whether the language he chooses to express his goal is his own language, or the terms in which he would like to persuade the many. What he announces as his art is an art

of using in accordance with nature sexual intercourse for the production of children - by abstaining on the one hand from intercourse with males, and not deliberately killing the human species, and not sowing seed on rocks or stones where it will never take root and generate a natural offspring, and on the other hand by abstaining from any female field in which you wouldn't wish your seed to grow. n434

The Athenian Stranger here focuses on what males will or will not do; he is not giving any instructions at all to females. He does not appear here to focus only on married males, as he does later. His preference is that they will neither have male-male intercourse nor commit infanticide, nor sow their seed on rocks and stones (a refer [*1636] ence, it would seem, either to masturbation or to coitus interruptus - or else a general metaphor for all sterile intercourse), nor engage in heterosexual intercourse with any female with whom they do not wish to have children. He seems to be intensely focused on the possible waste of male reproductive fluids and on the killing of newborn children. Plato elsewhere seems to express strong approval of contraception and possibly also abortion. In Book V he insists on the importance of keeping population size constant, neither too high nor too low. The "greatest and most honorable" ministry oversees both the promotion of increased fertility, should size fall too low, and the limiting of population size, to be enforced through incentives of both a positive and negative kind. Plato's reference to what the ministry will recommend in the case of overpopulation is exceedingly vague: "There are many devices, including ways of preventing birth (epischeseis geneseos) in those who conceive too many offspring . . ." It is not impossible that one of these "ways" would be abstinence, but we have no reason at all to suppose that Plato would differ from Greek culture in favoring such methods of contraception as were known, as well as abortion, which was also well known. n435 The term epischeseis strongly suggests some artificial intervention. Certainly the passage shows that Plato did not have the positive esteem for the potentially procreative sex act that Finnis has: it has no worth at all when the population size tilts in the wrong direction. I suggest that at least one theme in Book VIII is a return to this obsession with population: having argued in Book I that same-sex relations make people lose interest in opposite-sex relations, he now urges the avoidance of those relations, in order to preserve male bodily fluids for their procreative purpose. Underpopulation was a more grievous worry at this time in the Greek world than overpopulation, and was especially acute in Sparta - though Plato would be wrong to blame it on same-sex conduct, rather than on wars.

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n434. I have substituted a more awkwardly literal version for Pangle's at several points, though with no basic change of sense. The only substantial point of difference is that, in the first phrase, Plato does not clearly assert that only reproductive intercourse has a natural use, as Pangle's translation might lead the reader to conclude; Plato just speaks of his art as one regarding the natural use of that sort of intercourse. See Dover, Greek Homosexuality, supra note 48, at 166.

n435. See the discussion of Aristotle, supra note 317.

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6. 839d-842a

The Athenian Stranger urges physical training as an incentive to sexual moderation, citing the restraint of athletes in training. He now says that their argument has reached an impasse *dia kaken ten* [*1637] *ton pollon*, "through the defectiveness of the many," overtranslated by Pangle as "through the depravity of the many." The many are defective in the way that the bad horse in the *Phaedrus* is defective n436 in that they are highly appetitive, n437 not given to the sort of self-control the Athenian Stranger favors. Nonetheless, we must forge ahead, says the Athenian Stranger, and insist that our citizens should not be inferior to the birds, which have sex only in the context of pairing for reproduction. But if they do get corrupted by "the other Greeks and most of the foreigners" (note the alleged ubiquity of views that contradict Plato's emphasis on continence), then there will have to be a second law made for them. The strength of their appetites can be diminished by engendering a sense of shame about "the use of sexual intercourse." n438 Note that what is expressed here is a general teaching about sexual pleasure. In order to engender this sense of shame we will lay down "in habit and unwritten law, that among them it is *kalon* to engage in these activities if one escapes notice, but shameful if one doesn't escape notice - though they are not to abstain entirely." *Kalon* usually designates strong moral approval in Plato, and is usually rendered "fine" or "noble"; it is the standard contrary of *aischron*, "shameful" or "ugly."

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n436. See Plato, *Phaedrus* 247b3 (*ho tes kakes hippos metechon*).

n437. "Full of a lot of seed." *Id.* at 839b.

n438. Pangle's "indulgence in sexual things" is adequate, but less literal.

-End Footnotes-

What does the Athenian Stranger mean by "escapes notice" (*lanthanein*)? There seem to be three possibilities: (a) it is *kalon* as long as one does it in private; (b) it is *kalon* as long as one does it in a way that nobody at the time knows one is doing it; (c) it is *kalon* so long as one does it in a way that nobody knows one is doing it, then or later. The text does not permit us to settle the question with finality, but I would be inclined to reject (a) as far too liberal for Plato. I doubt that he is simply worried about preventing public copulation, which was no great threat (except in mythic stories about the Cynics). n439 If he has that concern, he should attach the warning to married sex as well. To choose (a), furthermore, would be to impute to Plato a more liberal position toward same-sex relations than the surrounding culture, which attached many more restrictions beyond privacy to conduct with [*1638] the *eromenos*. I find that implausible. More plausible is (b), recommended to me by Dover, combining privacy with secrecy - it is something one does not want to have known about oneself. I was at first inclined to (c), which imposes the strongest restriction on same-sex conduct, but have not found support in this from other scholars. Note that, however we interpret the regulation, it would be exceedingly odd if Plato thought the conduct in question wicked or a "crime of

the first order." He says nothing like this about serious crimes such as robbery or murder. And he says it here about all sex, not just same-sex relations. We see here Plato's compromise between his own preference for continence and the reality of human desire. It is a compromise much more favorable to same-sex pursuits than the "don't ask, don't tell" policy of the current U.S. Administration with regard to the military: for this policy only says same-sex sex is not to be punished if one does not get caught. Plato teaches his citizens that it is kalon, fine or noble, if you do not get caught.

-Footnotes-

n439. Diogenes Laertius, Lives of Eminent Philosophers VI.96-98.

-End Footnotes-

The Athenian Stranger now proposes two alternative laws governing sexual conduct. Both appear to be addressed to males only, and to males who are imagined as having wives. It is not clear what their implications will be for young, unmarried males. The first law enjoins: (a) no sex with any freeborn person other than the person's wife, (b) no reproductive intercourse with concubines, and (c) no "sowing sterile seed in males contrary to nature." The second law: (a) enjoins one from all male-male sex; (b) states that if one has extramarital sex with a woman and is detected, one is barred from honors in the city.

These laws have several peculiarities. First, it is hard to know what difference there is between the first and the second. It would appear that the second is slightly more lenient toward extramarital male-female intercourse than the first, as it mentions that one will not suffer punishment if one avoids doing it within people's cognizance. But any thinking person will realize that one never does get punished for any violation if it is not done within the cognizance of others. Further, the citizens have been brought up to think that it is kalon to do these things beyond anyone's cognizance. Therefore, it is very unclear what force this qualification should be expected to have. Recall, too, that Plato's citizens are to pore over the text of the Laws itself as a centerpiece of their education. All [*1639] the qualifications, false starts, and oddities of the text would be part of the public teaching about sex that citizens would receive. Second, we note again a reference to nature, this time presumably in connection with the behavior of the erastes, because he is sowing seed. This cannot be a reference to the unnaturalness of assuming a womanish position, but must be a reference to animal nature. Once again, this reference, like the one to the birds, is in a public discourse, which is explicitly said not to be the Athenian Stranger's own first choice. It is not made clear just what the Athenian Stranger himself thinks about the appeal to animal nature. Third, one thing is clear: the prohibition is a general one of all extramarital sexual relations, in context of a typically Platonic condemnation of appetitive indulgence. There is no reason to think that Plato sees any special positive value in the marital act. Indeed, he clearly prefers continence, except where the necessity of reproduction makes coitus (or heterosexual intercourse) a civic imperative. And again, recall that he wants reproduction only up to his ideal number, and attaches no value to the reproductive act once that number is reached.

In short, the passage is difficult and obscure. It shows Plato in some degree of harmony with the culture of his time, insofar as he prefers

soul-based to merely body-based relations between males, and insofar as he worries about the passivity of the eromenos. But it shows him flying in the face of his culture, by his own account, in his strong suspicion of sexual acts generally, and his determination to keep those acts to the minimum consistent with human reality. He adopts a variety of devices to promote these ends, at least one of which - the teaching that it is noble if you do not get caught - strongly indicates that his view is not after all very different from the view of the Phaedrus, in which male-male intercourse is inferior to continence, but second best rather than wicked. As in the Phaedrus, the desire involved in a male-male love of the higher kind is not itself reprov'd, though it is not elaborately praised as in the Phaedrus. Marital desire and the marital act are not praised, nor are they the locus of any special moral admiration. Nor is there any indication of how Plato will regulate the sexual behavior [*1640] of females. n440 His essential contrast is between sex that the city needs and sex that it does not need; same-sex activity is curtailed because it falls in the latter category and may even subvert the former. But he is aware that this radical proposal will win few supporters. Like our own "don't ask, don't tell" military policy on same-sex relations (though rather more favorably) Plato's own policy awkwardly recognizes the real Greek world; he acknowledges that there will likely remain a gap, one he encourages to some extent, between public rhetoric and private reality.

-Footnotes-

n440. The fact that he is silent about female-female relations, which had been given equal prominence with male-male relations in the Book I passage, may suggest that he is not so worried about intercourse that could not affect the population one way or another. On the other hand, it may just suggest that he has forgotten about women.

-End Footnotes-

[*1641]

Appendix 4

Dover and Nussbaum Respond to Finnis n441

-Footnotes-

n441. This Appendix is co-authored by Martha C. Nussbaum and Kenneth J. Dover.

-End Footnotes-

Because we believe it is very important to counter erroneous accounts of ancient Greek homosexuality, and because Professor Finnis' citation of Dover as if he supports Finnis' position n442 has made public clarification of Dover's position urgent, we jointly state our position below.

-Footnotes-

n442. See Finnis Article, supra note 25, at 1055-57, 1059, 1060.

- - - - -End Footnotes- - - - -

I

Concerning Athenian culture of the Classical period, Finnis holds that, although there was "an ideology of same-sex 'romantic' relationships," sexual conduct between males was regarded "as involving at least one of the partners in something 'most shameful' and 'contrary to nature.'" n443 We believe that Dover has decisively refuted this claim in Greek Homosexuality. The active (penetrative) partner certainly incurred no reproach, nor was there any question of regarding his conduct or desire as shameful or unnatural. Where the receptive partner is concerned, it would be shameful to form habits of passivity or to evince a predilection for the "feminine" role. Seduction of very young boys, and all use of force or undue enticement, would also be criticized. But if proper protocols were observed (including a concern for the younger male's well-being and education and, very probably, a conventional norm of intercrural intercourse) sexual conduct with older males was considered perfectly all right for adolescent males (although fathers often chose to protect their sons from the possibility that a lover's treatment would violate these norms). As Plato's Pausanias observes, summarizing widely held views, sexual conduct between an older and a younger male is not good or bad in itself; it all depends how it is done, with what motives and intentions. Relationships in which sexual conduct occurred were widely regarded as sources of love and intense pleasure for the older male, of affection and education for the younger. They were widely thought to be supportive of valuable civic and personal goals. [*1642]

- - - - -Footnotes- - - - -

n443. Finnis Affidavit, supra note 25, 32.

- - - - -End Footnotes- - - - -

II

Turning to the philosophers: Finnis claims that "all three of the greatest Greek philosophers, Socrates, Plato, and Aristotle, regarded homosexual conduct as intrinsically shameful, immoral and indeed depraved or depraving. That is to say, all three rejected the linchpin of modern " 'gay' ideology and lifestyle." n444 He repeatedly suggests that in doing so they use, or at least suggest, an argument similar to his own, one that relies on the moral centrality of marital sex acts that are open to procreation. We do not necessarily agree with Finnis' rankings of philosophers, which unfairly demotes the Stoics and Epicureans. Still, we shall focus on the three he does discuss.

- - - - -Footnotes- - - - -

n444. Finnis Article, supra note 25, at 1055.

- - - - -End Footnotes- - - - -

A

Finnis' positive account is nowhere implied in any of these three philosophers. Aristotle not only approves of abortion as hoshion (unobjectionable, or consistent with religious piety), but also advocates it in certain circumstances, holding that the law should fix the number of children to be born and that excess conceptions should be aborted early. n445 He also holds that no "deformed" child should be raised to adulthood. n446 Although he does not discuss contraception, his position on abortion makes it unlikely that he would have disapproved of it. Plato appears to approve of contraception (possibly abortion as well) in the Laws, where he states that the greatest and most honorable ministry in the city will have charge both of promoting fertility should population size fall too low, and of providing "devices" (mechanai) for impeding conception (epischeseis geneseos) should the number get too high. n447 Although one cannot rule out that abstinence is among the epischeseis, the characterization of the impediments as "many devices" strongly suggests that the class includes artificial contraception. Furthermore, Plato gives a low ranking to marital sex in the Symposium and the Phaedrus, holding that it expresses a low-grade sort of creative desire, [*1643] focused on bodily rather than spiritual or metaphysical goals. n448 Even in the Laws, where he ranks marital sex acts above other sexual conduct, his concern about population size causes him, as we have noted, to give strong endorsement to devices that limit population size. Plato's Republic argues that marriage as conventionally practiced must be altogether eradicated if the goals of the ideal city are to be achieved.

- - - - -Footnotes- - - - -

n445. See Aristotle, Politics 1335b19.

n446. See id. at 1335b20.

n447. Plato, Laws 740d.

n448. See Plato, Phaedrus 250e; Plato, Symposium 208e; see also Plato, Symposium 181b-c, 192a-b (praising the superior nature of same-sex relationships).

- - - - -End Footnotes- - - - -

B

In all of these three philosophers, the bodily arousal of a male at the sight of male beauty, and the consequent desire for sexual intercourse with a male, is found to be entirely natural and normal. Socrates himself reports such strong desires in Charmides. Plato gives them a central metaphysical and ethical role in the Phaedrus, ranking them well above opposite-sex desires in metaphysical and ethical value. In Phaedrus and Symposium, the language of genital arousal is used to describe the reaction to male beauty. n449 It would be rather curious if Plato, after using such language, regarded the performance of the actions it provokes as "depraved." Aristotle considers that same-sex desire can be the basis for a friendship of the highest kind.

- - - - -Footnotes- - - - -

n449. See Plato, Phaedrus 253e6; Plato, Symposium 206d3-7. The arousal in question is certainly male in Phaedrus; in Symposium, as the subsequent argument in the dialogue makes clear by implication, it is as much male as female.

- - - - -End Footnotes- - - - -

C

Where sexual conduct is concerned, we must consider the philosophers one by one.

1. Socrates

The first thing that must be said is that we know Socrates only from the testimonies of others. These testimonies vary in the sexual conduct and the views on sexual conduct that they impute to Socrates. Dover would prefer to say just this; Nussbaum would prefer to go further and to say that the testimony of the early dialogues of Plato n450 constitute by far our most reliable evidence for the views and conduct of the historical Socrates, because, unlike the other source materials, they show a philosopher who is worthy of the reverence and attention that the historical Socrates actually received. Nussbaum holds that Xenophon's evidence is far less reliable where it conflicts with Plato's. Both Nussbaum and Dover agree that the different sources for Socrates must be kept distinct, and that the "Socratic dialogues" of Plato must be kept distinct from the dialogues in which Plato uses Socrates as a mouthpiece for his own mature views. Dover grants that in Greek Homosexuality he did not sufficiently emphasize the difference between the Socrates of Plato and that of Xenophon, and that he did not make sufficiently clear the distinction between the historical Socrates and Plato's use of Socrates to develop his own views.

- - - - -Footnotes- - - - -

n450. These include Protagoras, Charmides, Lysis, and, with caution, the Alcibiades narrative in the Symposium, though not that dialogue's metaphysical doctrines. They do not include Phaedo, Republic, Phaedrus, or the doctrinal portions of the Symposium.

- - - - -End Footnotes- - - - -

We may begin by noting that at least one source, ultimately deriving from Aristoxenus, depicts Socrates as a womanizer and as sexually wanton (akolastos). n451 Other sources depict him as showing an intense sexual interest in young men, as in the Platonic portrait of Socrates. With respect to that portrait, our primary sources for Socrates' views about homosexual conduct are three Platonic dialogues: Charmides, Protagoras, and Symposium. In none of these works does Socrates take the line that homosexual conduct is "intrinsically shameful, immoral, and indeed depraved or depraving." In Protagoras he strongly suggests that homosexual conduct, and, indeed, everything else, is inferior to the pursuit of wisdom. n452 It does not follow from this that such conduct should be avoided as an impediment to the pursuit of wisdom, and there is no definite

evidence in the early Platonic dialogues that Socrates has such a belief. Platonic works such as Phaedo and Republic do contain such ideas about sexual conduct generally, but we should not use them as evidence for the historical Socrates' position. n453 [*1645]

-Footnotes-

n451. See Cicero, Tusculanarum Disputationum IV.80 (recounting a story in which Socrates represents himself as someone wanton by nature who has overcome this tendency by reason). It seems unlikely, then, that Socrates actually behaved as a womanizer.

n452. See Plato, Protagoras 309b-d.

n453. In this respect, Dover's use of Republic 403b in Greek Homosexuality, supra note 48, at 159, was misleading if read as supplying evidence about the historical Socrates, though Dover intended only to comment on the representation of Socrates as a literary character. But without that passage, that paragraph in Dover relies on the Symposium passage for its conclusion about the conduct of the historical Socrates.

-End Footnotes-

The Symposium passage, our most important piece of evidence, shows Socrates as avoiding intercourse with Alcibiades for two reasons. First, he feels the lure of philosophy so strongly that no inferior course of action arouses him or seems worth pursuing to him. Second, he has a pedagogical relationship with Alcibiades that would have been undercut by responding to Alcibiades' sexual overtures. n454 In neither of these cases does Socrates single out same-sex conduct for special condemnation: no bodily pursuit matches the pursuit of wisdom. And the Symposium passage makes it clear that Socrates does not condemn same-sex conduct as wicked and depraved. He views Alcibiades' proposal exactly as one might expect a heterosexual male to view a proposition from an attractive woman whom he was determined for some reason to turn down: as natural and normal, even as flattering. The audience for the work is expected to find the story amusing.

-Footnotes-

n454. Dover's Symposium commentary focused on these issues, drawing no definite conclusion one way or the other about whether the passage entails a general condemnation of same-sex conduct. See Dover, Greek Homosexuality, supra note 48, at 157-58.

-End Footnotes-

In Greek Homosexuality, Dover stated that the Socrates of both Plato and Xenophon "condemns" homosexual copulation. Moreover, in a letter to Finnis, Dover wrote: "It is certainly my opinion that the Socrates of Plato and Xenophon condemned homosexual copulation as such . . ." First of all, however, Dover never claimed that Socrates condemns this copulation as wicked, shameful, and depraving; he said quite clearly that it was condemned as inferior to the pursuit of wisdom, on the grounds that one should not pursue an inferior good when one might pursue a superior good. "Inferior" does not mean "wicked," nor does "condemns" mean "condemns as wicked and depraving." Someone who says,

"Polonius condemns borrowing," does not imply that Polonius regards borrowing as wicked or depraved. Thus, Finnis' use of Dover's letter to support Finnis' own position is inappropriate. In addition, as we have said above, the part of Dover's argument in Greek Homosexuality that relied upon the combination of Plato and Xenophon and upon the use of the Republic as evidence for the historical Socrates should now be revised. What we are left with when we revise [*1646] the view in that way is (a) Socrates' own clear judgment in his own case with Alcibiades, which rests, at least to some extent, on the pedagogical nature of their relationship; and (b) a suggestion, not formulated as an unambiguously universal prescription, that same-sex indulgence (and, presumably, all sexual indulgence) is inferior to the pursuit of wisdom, and therefore should be avoided as a potential impediment to that pursuit.

The Socrates of Xenophon, on the other hand, offers two different reasons against homosexual conduct, reasons he is prepared to recommend to others. First, the pleasures of sex can enslave reason. Second, sexual gratification resembles scratching an itch: it is a relief from tension, not a good in itself. Neither of these arguments singles out same-sex conduct for special blame, and neither characterizes this conduct as wicked and depraved. Xenophon's Symposium prefers love of the soul to all bodily love. n455 In that work, Socrates is represented as taking an antisensual line in speaking of myths that have an erotic ingredient.

- - - - -Footnotes- - - - -

n455. See Xenophon, Symposium 8.12.

- - - - -End Footnotes- - - - -

2. Plato

It is absolutely crucial not to separate Plato's statements about same-sex conduct from his general view of the bodily appetites and the tripartite soul and thus from the general suspicion of all genital activity pervading Plato's mature thought. In the Republic, all appetitive expression is tightly regulated by the state, and much care is taken not to encourage the development of strong sexual desires of any kind. A nonconsummated male-male relationship is preferred to a consummated relationship, but latitude is offered for sexual expression "up to the point of health and well-being." n456 In Symposium and Phaedrus, bodily love for a male and the bodily response to the sight of male beauty are given central philosophical importance, and male-male erotic love is held to be superior to male-female marital love. n457 Although in the Phaedrus a nonconsummated bodily relationship (which includes bodily caresses of various kinds) is preferred to a consummated relationship, lovers who do consummate their relationship are richly rewarded by a [*1647] happy afterlife in the light, in which they recover their wings together because of their love. Marital sex, by contrast, is treated with disfavor as the choice of people whose vision of beauty and truth is dim.

- - - - -Footnotes- - - - -

n456. Plato, Republic 559a-b.

n457. See supra Parts VI.B.2, VI.B.4.

- - - - -End Footnotes- - - - -

In the Laws, we agree that the Book I passage criticizes same-sex conduct as a violation of norms of moderation and blames this conduct for ruining people's pleasure in marital sex. We also agree that the disputed term tolmemia in that passage should be translated "venture," "daring," or "having-the-nerve," rather than "crime." We agree, further, that the Athenian Stranger's appeals to animal nature, and his hint that he is playing an intellectual game rather than being completely serious, complicates any attempt to take the passage as a major Platonic statement. The Symposium indeed uses such an appeal to establish a general fact about the behavior of species; n458 but both Philebus and Gorgias condemn the use of such appeals to reach normative ethical conclusions. n459 The Book VIII passage cannot be understood without reference to Plato's general suspicion of all sexual gratification. It does not single out same-sex conduct as any more problematic than other forms of nonmarital conduct, and it allows that both same-sex and opposite-sex nonmarital conduct are acceptable as long as one escapes the notice of others in so acting. The preference for marital sex is new, but it does not lead to a position like Finnis', because Plato's focus on keeping population size constant supports contraception and possibly even abortion. Nor is marital sex necessarily a good thing; it is just necessary.

- - - - -Footnotes- - - - -

n458. See Plato, Symposium 207b-c.

n459. See Plato, Gorgias 483c (ascribing such appeals to the immoralist Callicles); Plato, Philebus 67b.

- - - - -End Footnotes- - - - -

Whatever one may say about the Laws, one should certainly not say that "to know or tell Plato's views on the morality, the immorality, of all such nonmarital conduct as homosexual sex acts, one need go no further than these unmistakably clear passages in the Laws, texts with which every other text of Plato can readily be seen to be consistent." n460 This, however, is Finnis' position. The Laws passages are not "unmistakably clear." Indeed, they are remarkably difficult. One thing, however, may be said about them with confidence: they are not consistent with "every other text of [*1648] Plato." Dover agrees that his interpretation of the relevant passages of Laws calls for reconsideration.

- - - - -Footnotes- - - - -

n460. Finnis Article, supra note 25, at 1061.

- - - - -End Footnotes- - - - -

All in all, then, there is no evidence that Plato regarded same-sex conduct as morally worse than other forms of sexual conduct. In fact, in the Phaedrus and Symposium, it is regarded as distinctly superior to other forms of sexual conduct. The inclination to this conduct is given extremely high praise and is

connected with Plato's highest goals. There is no evidence, then, that Plato, even at his most ascetic, shared either Finnis' particular condemnation of same-sex conduct as necessarily depraving and shameful, or his reasons for that condemnation.

3. Aristotle

The thought of Aristotle is far more in tune with Greek popular thought than Plato's. Although Aristotle says little about sexual matters, the most reasonable conclusion seems to be that his views are similar to those of the character Pausanias in Plato's Symposium: same-sex conduct is acceptable if the motives and manner are good, not if they are not. In particular, same-sex conduct has the potential to form part of a friendship of the best type, if the parties focus on character and not only on bodily beauty. Sexual abuse of children, here coercion or early seduction, is regarded as bad because it may give rise to a taste for passive pleasure in the adult. Once again, Finnis errs in holding that there is any evidence at all in Aristotle's writings for the proposition that same-sex conduct is regarded by Aristotle as "intrinsically perverse, shameful and harmful both to the individuals involved and to society itself." n461 When Finnis writes that Dover's analysis "does not contradict the scholarly consensus that Aristotle rejected homosexual conduct," n462 he imagines a consensus where there is none (or where there is one opposed to his imagined one) and gives an erroneous impression of Dover's position. Given that Aristotle thinks male-male arousal natural and also thinks the indulgence of sexual desire acceptable, we regard it as inconceivable that he would think it incorrect to act on one's same-sex arousal. [*1649]

-Footnotes-

n461. Id.

n462. Id.

-End Footnotes-

In conclusion, Finnis' affidavit has given a fundamentally incorrect picture of Athenian attitudes to same-sex conduct. Dover's Greek Homosexuality provides all the reasons for calling that position incorrect, but Finnis appears to have misunderstood or ignored those reasons. n463

-Footnotes-

n463. Further, Finnis' assessment of David Cohen's book might profit from Dover's review of it in Gnomon. See Dover, supra note 120. For further discussion of Cohen and a response by Cohen to Finnis' use of his book, see supra note 120.

-End Footnotes-

III

We now comment on the issues themselves. Finnis holds that the only sexual acts capable of promoting genuine human goods are those that occur within a heterosexual marriage in which no artificial contraception is used. He also contends that the only human goods sexual conduct may promote are procreation and friendship (again, only under the above circumstances). We, by contrast, believe that bodily pleasure is itself an important human good, and that there is absolutely nothing wrong with using one's body for the purpose of getting pleasure. Going for a swim, hiking, and masturbating are all different ways of using the human body for pleasure, and we see nothing intrinsically objectionable about any of them. Finnis holds that masturbation is "manifestly unworthy of the human being and immoral." n464 But what is "manifestly" true to some is as manifestly untrue to others. Even if one granted that interpersonal sex is in some respects superior to masturbation, it is not immoral to choose an inferior form of pleasure when the superior one is unavailable, or as a preparation for engaging in the superior form. A violinist who rehearses the violin part of a string quartet alone, in the absence of the other musicians, does not thereby perform an immoral act, even though it might be better to participate in the performance of the whole quartet.

-Footnotes-

n464. Finnis Affidavit, supra note 25, 41.

-End Footnotes-

Finnis will respond that the sexual use of one's body differs from other uses of one's body in games or skilled performances. n465 The violinist who rehearses his part is still actualizing a genuine human good of skilled performance, whereas the solitary masturbator is not. We find this distinction, as articulated in Finnis' Affidavit, unconvincing. Sexual activity can certainly be a skilled perform [*1650] ance. The assertion that this activity must be different from other activities in which the body is used for pleasure merely because it involves sexual organs and sexual pleasure appears to be deduced from a religious or metaphysical axiom with which we are unfamiliar.

-Footnotes-

n465. See id. 48.

-End Footnotes-

Where interpersonal sex is concerned, there are many different ends that may be promoted in addition to procreation: physical pleasure, joy and fun, the expression of love and friendship. There is no reason to suppose that openness to procreation is essential to these other goods. Contracepted sex within heterosexual marriage, same-sex conduct, and nonmarital sex of many types may all promote them.

Nor does Finnis' conclusion follow that same-sex relationships must always be "radically and peculiarly nonmarital," n466 unless one defines marriage in such a way as to make procreation by the two parties to the marriage, or the reasonable expectation of such procreation, definitive of marriage. But to

define marriage in this way begs the question. Many same-sex couples live lives of commitment and friendly devotion; many also have and raise children, whether their own from previous relationships, adopted, or engendered by artificial insemination within the same-sex relationship. It seems difficult to distinguish them in a principled and rational way from sterile heterosexual couples, except by pointing out that some do in fact have children in the ways mentioned. Finnis' conclusion follows, then, only if one grants him a definition of the marital relationship that seems narrow and contrary to the views and practices of many reasonable people.

-Footnotes-

n466. Id. 41.

-End Footnotes-

We are not in full agreement on this point. Both Dover and Nussbaum believe that the aim of procreating and of raising children is an important human aim. Dover feels that deliberate joint procreation is qualitatively different from nonprocreative sex and that the latter is, so to speak, playing at procreation. (Play, however, may be very important.) He is therefore uneasy about the idea of homosexual marriage. Nussbaum does not agree with this view; she holds that the expression of love and friendship in sex are to a great extent independent of procreative aims. She is therefore inclined to define marriage in terms of love and commitment [*1651] rather than procreation. She also would emphasize that children become present in a marriage in many different ways, not all of which involve procreation by the two parties to the relationship, and many of which are available to same-sex couples. We agree that many reasonable people do not accept Finnis' narrow definition of the marital relationship.

Finnis asserts that "all who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments to be put to whatever suits the purposes of the individual "self' who has them." n467 It is, however, an extraordinary error to suppose that someone who regards x as sometimes or often a good must, if consistent, regard it as good in all circumstances. n468 We doubt whether there is any human capacity which can legitimately be treated as an instrument for the realization of whatever suits the purposes of an individual. One may certainly admit that same-sex acts are acceptable in some, indeed in many, circumstances while denying that they are good in others: for example, when they involve a person below a reasonable age of consent, or when they involve manipulation or cruelty. These are some of the more prominent difficulties we see in Finnis' argument.

-Footnotes-

n467. Id. 53.

n468. In fact, we need only look to the Greek philosophers to find criticism of this error: Plato's Pausanias, Aristotle, and the Greek Stoics all hold that in judging the rightness of an action its particular circumstances must be taken into account. See, e.g., Plato, Symposium 180e, 183d; Aristotle, Nicomachean Ethics 1104b20-24; Sextus Empiricus, Outlines of Pyrrhonism I.160, III.200, III.245; Ionnaes Stovaios, Eclogarum Physicarum II.9-11.

-----End Footnotes-----

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THE TYRRELL WILLIAMS MEMORIAL LECTURE: THURGOOD MARSHALL: MAN OF CHARACTER

JAMES O. FREEDMAN

SUMMARY:

... I want to use this opportunity to talk of Thurgood Marshall. ... Houston was the better writer, Marshall the better speaker, lacing his conversations with humor, logic, [and] salty and streetwise language...." Two years after joining the NAACP staff full-time, in 1938, when Houston retired, Thurgood Marshall, at age thirty, became chief counsel of the NAACP, which later would establish its legal division as a separate organization, the NAACP Legal Defense and Educational Fund, Inc. ... Surely *Brown v. Board of Education* was the crowning achievement of Marshall's career - either before his service on the Supreme Court or after. ... I do not breach a law clerk's obligation of confidentiality in recounting here a story, more than thirty years after the fact, that describes one of the most powerful lessons that Judge Marshall taught me. ... Conversely, Marshall understood the opportunities he could give to minority lawyers by virtue of his position as a Justice of the Supreme Court. ... Because of his deep commitment to the democratic process, Marshall placed a high value on securing for blacks the right to vote. ... In the end, that progress toward the achievement of equality for all will be Thurgood Marshall's greatest legacy. ...

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913 to 1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's foremost legal scholars, judges, public servants, and practicing attorneys.

James O. Freedman is President of Dartmouth College. He was previously President of the University of Iowa and Dean of the University of Pennsylvania Law School. President Freedman received his A.B. from Harvard College and his LL.B. from Yale Law School. He clerked for Thurgood Marshall, then a Judge of the United States Court of Appeals for the Second Circuit, from 1962-1963. President Freedman delivered the 1994 Tyrrell Williams Memorial Lecture on the campus of Washington University in St. Louis on February 16, 1994.

TEXT:
[*1487]

It is a pleasure to join you today to deliver this year's Tyrrell Williams Memorial Lecture. As a former law school dean, I have long admired Washington

University's School of Law, and I have especially rejoiced in its fortunes since my good friend Dan Ellis became its dean.

I want to use this opportunity to talk of Thurgood Marshall. In the years ahead, significant volumes of biography and history will undoubtedly [*1488] enlarge our understanding of his skill as an advocate and his stature as a judge. I want, instead, to speak of Justice Marshall as a man of character.

In 1742, Henry Fielding, one of the first great English novelists, began Joseph Andrews with the sentence, "It is a trite but true observation, that examples work more forcibly on the mind than precepts: and if this be just in what is odious and blameable, it is more strongly so in what is amiable and praise-worthy." n1

-Footnotes-

n1. Henry Fielding, Joseph Andrews 39 (R.F. Brissenden ed., Penguin Books 1977) (1742).

-End Footnotes-

In calling attention to the power of example to shape our respect for human achievement, Fielding performs an important service. He reminds us that exemplary lives matter. For me - as for the thousands of people, young and old, white and black, from all walks of life, who filed through the Great Hall of the Supreme Court when the Justice's body lay in state in January 1993 - the example of Thurgood Marshall as a person of character does truly matter and carries extraordinary power.

There are doubtless those who worked with Thurgood Marshall whose lives were not changed by that experience. But I have yet to meet one. All of us - his law clerks, his associates at the NAACP Legal Defense and Educational Fund, and his colleagues at the Justice Department, on the United States Court of Appeals for the Second Circuit, and on the United States Supreme Court - were marked indelibly by Justice Marshall's idealism and courage, his compassion and humanity, his craftsmanship and wit. The force of his moral example changed our lives utterly, and in ways that have made us better citizens and more reflective lawyers.

If this nation had an equivalent to Plutarch's Lives - a set of commentaries on men and women who had lived instructive and noble lives - an essay on Thurgood Marshall would surely be included. It would capture and memorialize the essential qualities of Marshall's character - his physical courage, his intellectual brilliance and professional expertise, his moral strength, and his utter disregard for fame and wealth. It would explore, above all, the beliefs that anchored his lifetime's commitment to racial and social justice.

In his own Tyrrell Williams Memorial Lecture in 1967, entitled Law and the Quest for Equality, Thurgood Marshall argued that the history of the litigation leading up to Brown v. Board of Education n2 indicated "that law can not only respond to social change but can initiate it, and that lawyers, [*1489] through their everyday work in the courts, may become social reformers." n3 Indeed, he went further in stating that "lawyers have a duty in addition to that of representing their clients; they have a duty to represent the public, to be social reformers in however small a way." n4 That lecture states the credo of

a career.

-Footnotes-

n2. 347 U.S. 483 (1954).

n3. Thurgood Marshall, Law and the Quest for Equality, Tyrrell Williams Memorial Lecture (1967), in 1967 Wash. U. L.Q. 1, 7.

n4. Id. at 9.

-End Footnotes-

Thurgood Marshall was the child of a pragmatic American liberalism. He was an idealist who believed deeply in the rule of the law, in the power of government to improve the social and economic conditions of its citizens, and in the promise of the Declaration of Independence. He knew that idealism was the most certain foundation of immortality. Idealists are not perfect, but their examples endure.

In The Souls of Black Folk, published in 1903, W.E.B. Du Bois argued, in an oft-quoted passage, that the central issue for American blacks was the "racial two-ness" that lies at the heart of their identity. n5 "One ever feels his two-ness," he wrote, "an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body The history of the American Negro is the history of this strife - this longing to attain self-conscious manhood, to merge his double self into a better and truer self." n6 Like Du Bois, Thurgood Marshall was fiercely proud to be an American and fiercely proud to be a Negro. And for Marshall, as for Du Bois, the complex fate of being an African-American was the overarching challenge of his life.

-Footnotes-

n5. W.E.B. Du Bois, The Souls of Black Folk (1903).

n6. Id. at 3-4.

-End Footnotes-

Marshall's life is one of the great American stories. It is emblematic of a heroic theme: a young man from modest circumstances, confronted by racial discrimination and social hostility, contributes mightily, by the power of his mind and the strength of his character, to the redemption of his nation's highest ideals.

Born in Baltimore in 1908, the grandson of a freed slave and Union soldier, n7 Thurgood Marshall became one of the most important public lawyers of the century (only Louis D. Brandeis belongs in his class) and the first African-American to serve as a Justice of the Supreme Court. Marshall was also the first Marylander appointed to the Court since Chief Justice Roger B. Taney, author of the Dred Scott decision, which held that [*1490] Negroes were not "citizens" and had no rights under the Constitution. n8 Marshall's succession to the seat held by Justice Tom C. Clark, grandson of a Confederate soldier, symbolized the slow playing out of our national destiny.

-Footnotes-

n7. Michael D. Davis & Hunter R. Clark, Thurgood Marshall 31 (1992).

n8. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

-End Footnotes-

Thurgood Marshall came from a proud and close-knit family; his was a privileged background, compared to many African-Americans at the beginning of the century. His mother, Norma Marshall, was a college-educated elementary-school teacher. His father, William Canfield Marshall, was a Pullman car porter and, later, a country-club steward at an all-white yacht club on Chesapeake Bay. n9

-Footnotes-

n9. Davis & Clark, supra note 7, at 35-36.

-End Footnotes-

From his parents he derived a sense of identity, of self-worth, of destiny. He learned from them not to be bitter in the face of racial discrimination and to judge people, white and black, by their character and their achievements. Marshall loved repeating his father's remark, "[Son, if a]nyone ever calls you [a] 'nigger,' you not only got my permission to fight him - you got my orders to fight him." n10 On a number of occasions, Marshall carried out those orders. A democratic American with a small "d," Marshall was not a respecter of rank. When he was introduced to Britain's Prince Philip, the Duke of Edinburgh asked, "Do you care to hear my opinion of lawyers?" Justice Marshall, mimicking the superior tones of the royal accent, replied with a disarming smile, "Only if you care to hear my opinion of princes." n11

-Footnotes-

n10. Id. at 40.

n11. Elena Kagan, For Justice Marshall, 71 Tex. L. Rev. 1125, 1126-27 (1993).

-End Footnotes-

After Marshall was graduated from public high school in Baltimore, his mother pawned - and did not reclaim - her wedding and engagement rings so that he could go to college. n12 He followed his brother, Aubrey, to Lincoln University in Chester, Pennsylvania. Known as the "black Princeton" because many of its faculty were Princeton graduates, Lincoln was the nation's oldest all-black college. Among Marshall's classmates were the poet Langston Hughes, the musician Cab Calloway, and Kwame Nkrumah, the first president of Ghana. n13

-Footnotes-

n12. Davis & Clark, supra note 7, at 42.

n13. Id. at 43.

-----End Footnotes-----

Having received his degree from Lincoln, Marshall was rebuffed in his efforts to attend the all-white University of Maryland Law School - a ten [*1491] -minute trolley ride from his home. n14 Instead, he was forced to commute to Howard Law School in Washington, D.C., where he was graduated in 1933 as valedictorian of his class. n15

-----Footnotes-----

n14. Id. at 47.

n15. Id. at 48.

-----End Footnotes-----

It was at Howard that he met the most important mentor of his life, Charles Hamilton Houston, the law school's Harvard-educated dean. Houston impressed upon Marshall the obligation of eliminating segregation and taught him that lawyers are either "social engineers" or "parasites." n16 Many years later, Marshall conferred a high compliment upon Houston by describing him as "the engineer of it all."

-----Footnotes-----

n16. Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's struggle for Equality 128 (1976).

-----End Footnotes-----

Marshall declined a graduate fellowship at Harvard Law School in order to enter private practice in Baltimore. n17 At twenty-four, it was time to support himself and begin his life's work of fighting segregation. In one of his first cases after law school, working in collaboration with Houston and the National Association for the Advancement of Colored People (NAACP), he brought suit to compel the University of Maryland Law School to enroll its first African-American student. n18 Winning the case, Marshall said, was "sweet revenge." n19

-----Footnotes-----

n17. Davis & Clark, supra note 7, at 69.

n18. Id. at 78.

n19. Id. at 90.

-----End Footnotes-----

Despite this early success, Marshall's years at the Baltimore bar were difficult ones. The Depression made it virtually impossible for him to earn a living. With paying clients few and far between, he threw himself into community activities, including those of the NAACP, in order to establish his reputation as a lawyer. n20

-Footnotes-

n20. Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950*, at 45 (1987).

-End Footnotes-

Houston cautioned Marshall not to neglect the development of his own private practice for the work he was doing for the NAACP on the side. n21 But the advice was to no avail. Marshall's attention and talents were increasingly captured by the cases he was handling for the NAACP. In 1935 Marshall told Houston, "Personally, I would not give up these cases here in Maryland for anything in the world, but at the same time there is no opportunity to get down to really hustling for business." n22

-Footnotes-

n21. *Id.* at 46.

n22. *Id.* at 45.

-End Footnotes-

[*1492]

Marshall began to cast around for other sources of income. He applied to teach at Howard Law School, and in September 1936 he wrote to Houston, who by then had become the legal director of the NAACP, that "something must be done about money." n23 During the prior six months, Marshall had earned less than \$ 200 from his NAACP work, and this was virtually his entire income for the period. n24 When Marshall asked that he be paid a monthly retainer of \$ 150 for his NAACP work, Houston suggested that Marshall instead join him on the legal staff of the national NAACP in New York. n25 Thus, under circumstances that were hardly auspicious, Marshall moved to New York in October 1936 and began to work full-time with the NAACP n26 - an association from which history would be made. Marshall now had the momentous opportunity to ally his formidable talents with an idea whose time had come.

-Footnotes-

n23. *Id.*

n24. Tushnet, *supra* note 20, at 47.

n25. *Id.* at 46.

n26. *Id.* at 47.

-End Footnotes-

Houston and Marshall complemented each other in styles, strengths, and personalities. Two biographers of Marshall, Michael D. Davis and Hunter R. Clark, have written: "Houston was low-key, well organized, formal in his demeanor.... Thurgood was the gregarious extrovert, a backslapper who quickly won friends. Houston was smart. Marshall was shrewd. Houston was the better writer, Marshall the better speaker, lacing his conversations with humor,

logic, [and] salty and streetwise language...." n27 Two years after joining the NAACP staff full-time, in 1938, when Houston retired, Thurgood Marshall, at age thirty, became chief counsel of the NAACP, n28 which later would establish its legal division as a separate organization, the NAACP Legal Defense and Educational Fund, Inc.

-Footnotes-

n27. Davis & Clark, supra note 7, at 103.

n28. Id. at 105.

-End Footnotes-

When Houston had offered Marshall the job at the NAACP, he had warned that extensive traveling would be required and that some of the travel would be dangerous. n29 He was right on both counts. During those years - before jet planes or the interstate highway system - Marshall traveled an average of 60,000 miles a year, mostly across the South, trying cases and establishing a network of lawyers - white and black - who were willing to take civil rights cases. n30 Danger was always close at hand. He [*1493] frequently was escorted by armed black guards. n31 In undertaking the defense of criminal cases throughout the South, Marshall demonstrated one of the significant components of his character: physical courage.

-Footnotes-

n29. Id. at 98.

n30. Id. at 21, 103.

n31. Id. at 107-08.

-End Footnotes-

Marshall often told of the time when he was waiting for a train in a small Mississippi town where he had investigated a lynching. Hungry, he decided to "put my civil rights in my back pocket and go to the back door of the kitchen [of a local restaurant] and see if I could buy a sandwich," he recalled. "And while I was kibitzing myself to do that, this white man came up beside me in plain clothes with a great big pistol on his hip. And he said, "Nigger boy, what are you doing here?" And I said, "Well, I'm waiting for the train to Shreveport." And he said, "There's only one more train that comes through here, and that's the four o'clock, and you'd better be on it because the sun is never going down on a live nigger in this town." Marshall concluded: "Guess what? I was on that train." n32

-Footnotes-

n32. Sandra Day O'Connor, Thurgood Marshall: The Influence of a Raconteur, 44 Stan. L. Rev. 1217, 1219 (1992).

-End Footnotes-

Another component of Marshall's character was his respect for intellect. He was a man who appreciated intellectuals. From the beginning of his career, he eagerly enlisted the talents of individuals more learned than practicing lawyers could hope to be. He said, "I never hesitated to pick other people's brains - brains I didn't have." n33

-Footnotes-

n33. Davis & Clark, supra note 7, at 109.

-End Footnotes-

The names of those members of the academic world who assisted him in the years leading up to Brown v. Board of Education is an honor roll of outstanding scholars, including Erwin N. Griswold, Walter Gellhorn, Charles L. Black, Jr., Louis H. Pollak, John Hope Franklin, C. Vann Woodward, Robert K. Carr, and Kenneth B. Clark. In addition, Marshall had an uncanny ability to recognize legal talent. The lawyers with whom he worked over the years included Robert L. Carter, Constance Baker Motley, and Spottswood W. Robinson, III, all of whom went on to distinguished careers as federal judges, as well as William T. Coleman, Jr. and Jack Greenberg. n34

-Footnotes-

n34. Id. at 20-21, 28, 336.

-End Footnotes-

But Marshall's special genius lay in his ability to apply the learning of intellectuals from many fields in ways that advanced his cause dramatically. The most famous example of Marshall's practice of bringing the scholarship of others to bear upon legal argument was his use of Gunnar Myrdal's comprehensive study of the Negro in the United States, An American [*1494] Dilemma. n35

-Footnotes-

n35. Id. at 137-38. See generally Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944).

-End Footnotes-

Published in 1944, Myrdal's book made a stunning impression upon American policymakers. It demonstrated that segregation was not only devastating to the black minority, which lived in fear of harsh and arbitrary treatment, but was also deleterious to the white majority, which experienced a profound sense of moral guilt over the undeserved advantages and privileges that the accident of their race afforded them. By emphasizing the tension between the destructive impact of racial segregation upon black character and culture, and the nobility of America's professed ideals of liberty, justice, and equality, Myrdal's book provided essential tactical support for undermining the doctrine of "separate but equal." n36

-Footnotes-

n36. Davis & Clark, supra note 7, at 138.

- - - - -End Footnotes- - - - -

Marshall's reliance on Myrdal's work proved to be an inspired decision. Chief Justice Warren's unanimous opinion in Brown v. Board of Education n37 held that racial segregation in the public schools was unconstitutional. And the decision cited An American Dilemma for the proposition that separate schools are inherently unequal. n38 As Richard Kluger has written in Simple Justice, Brown was "nothing short of a reconsecration of American ideals." n39

- - - - -Footnotes- - - - -

n37. 347 U.S. 483 (1954).

n38. Id. at 495 n.11.

n39. Kluger, supra note 16, at 710.

- - - - -End Footnotes- - - - -

Surely Brown v. Board of Education was the crowning achievement of Marshall's career - either before his service on the Supreme Court or after. Had his legal career ended at that point, Marshall would have earned an important place in American history. Already he had done more than perhaps any other citizen - with the towering exception of Abraham Lincoln - to address the American dilemma of relations between the races. But Marshall went on to serve with distinction as a member of the United States Court of Appeals for the Second Circuit, as Solicitor General of the United States, and for twenty-four years as a Justice of the United States Supreme Court. n40

- - - - -Footnotes- - - - -

n40. Marshall served on the Second Circuit Court of Appeals from 1961 to 1965, as Solicitor General from 1965 to 1967, and on the Supreme Court from 1967 to 1991.

- - - - -End Footnotes- - - - -

Marshall came to prominence at a moment when the explosion of new media of communications had fueled American society's growing preoccupation with fame. Marshall's strength of character was such that he never confused fame - or, for that matter, money - with achievement. The [*1495] desire "to live in the minds of others," as Samuel Johnson said, has always been intense, but it was most particularly television that confused celebrity with authority and made it possible for a person to become, in Daniel J. Boorstin's phrase, "known for his well-knownness," rather than for accomplishments that warrant enduring recognition. n41

- - - - -Footnotes- - - - -

n41. Daniel J. Boorstin, The Image: A Guide to Pseudo-Events in America 57 (1964).

- - - - -End Footnotes- - - - -

It is important to observe that Thurgood Marshall's remarkable achievements and professional eminence came, in large part, precisely because he had no desire to be famous for the sake of being famous. At one time, he was perhaps the most famous lawyer in the United States. His picture appeared on the cover of Time magazine. n42 The press called him "Mr. Civil Rights." n43 Yet Marshall's fame neither went to his head nor deflected his vision. He knew that neither fame nor fortune could provide nourishment sufficient to sustain his idealism.

-Footnotes-

n42. Time, Sept. 19, 1955.

n43. Janet Alexander Cooper, TM, 44 Stan. L. Rev. 1229 (1992).

-End Footnotes-

Marshall's commitment was to the public profession of the law, not to the acquisition of wealth. When President Kennedy nominated him to the Court of Appeals in 1961, his salary at the Legal Defense Fund was \$ 18,000. When President Johnson nominated him as Solicitor General in 1965, he accepted a reduction in salary, from \$ 33,000 to \$ 28,500, and, perhaps more importantly, relinquished the life tenure of a federal judge. n44 The financial risks he took were not insignificant ones for a man concerned with supporting properly a wife and two young sons.

-Footnotes-

n44. Id. at 244-45.

-End Footnotes-

If President Johnson regarded service as Solicitor General as preparation for an eventual appointment as the first black Justice of the Supreme Court, Marshall himself had no direct knowledge of Johnson's intentions. And he surely appreciated that the vagaries of history and politics might prevent Johnson from carrying through on any intention he may then have had to name him to the Court. Despite the loss of life tenure and a reduction in salary, Marshall accepted appointment as Solicitor General because his sense of responsibility to the President - and perhaps of historical destiny - outweighed his interest in personal security. Less than two years later, President Johnson, on June 13, 1967, nominated Marshall to the Supreme Court. n45 In making the historic announcement, Johnson said: "I believe it is the right thing to do, the right time to do it, the right man and [*1496] the right place." n46

-Footnotes-

n45. Id. at 265.

n46. Id. at 266.

-End Footnotes-

Justice Marshall brought unique qualifications to the Court. He was its only member who had specialized in the practice of criminal law, let alone defended dozens of men for murder and other capital crimes. He was its only member who had personally faced racial discrimination, let alone experienced the fear of being lynched when trying cases in small Southern towns. He was its only member who had successfully argued dozens of cases before the Court, let alone achieved landmark victories that expanded the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

These unique qualifications, which helped to define Marshall's character, often found compassionate expression in his constitutional views. As Professor Carol Steiker of Harvard Law School has said of Marshall, "He naturally understood the position of the outsider, the underdog, and the silenced, and he gave that position his powerful voice." n47 Justice Marshall carved out a special place on the Court as a resolute defender of the constitutional rights of minorities, women, criminal defendants, the poor, the disenfranchised, the powerless.

-Footnotes-

n47. Carol Steiker, Speech at the Tribute to Thurgood Marshall at Faneuil Hall, Boston, Massachusetts (Feb. 22, 1993).

-End Footnotes-

Thus, when the Court held, in United States v. Kras, n48 that pauper debtors had to pay a fifty-dollar fee to file for relief in bankruptcy, Marshall took angry exception to the assertion that such debtors could save up the fee by forgoing a weekly movie or giving up two packs of cigarettes each week. n49 "It may be easy for some people to think that weekly savings of less than \$ 2 are no burden," Marshall wrote, "but no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are." n50

-Footnotes-

n48. 409 U.S. 434 (1973).

n49. Id. at 458-61 (Marshall, J., dissenting).

n50. Id. at 460 (Marshall, J., dissenting).

-End Footnotes-

I do not breach a law clerk's obligation of confidentiality in recounting here a story, more than thirty years after the fact, that describes one of the most powerful lessons that Judge Marshall taught me. In drafting a factual statement in a case in which an injured longshoreman had sued the owner of a cargo ship for unseaworthiness, I quoted from the plaintiff's halting testimony at trial. Because the testimony was ungrammatical, I followed the law review practice of placing the diacritical word "[sic]" after several [*1497] sentences. Judge Marshall took me to task. The use of the word "[sic]," he said sternly, might seem a useful bit of scholarly apparatus to a precocious law clerk, but it was a refined form of insult to the unlettered plaintiff and served no decisional purpose whatsoever. What was the point of that gratuitous

put-down? Of course, he was right.

Justice Marshall brought to the United States Supreme Court a special - indeed, a unique - perspective. He never forgot the mean realities of life at the street level. Alone among the Justices, as Paul Gerwitz wrote, Justice Marshall "knew what police stations were like, what rural Southern life was like, what the streets of New York were like, what the trial courts were like, what death sentences were like, what being black in America was like - and he knew what it felt like to be at risk as a human being." n51 In the crucible of poverty, physical danger, injustice, and racial discrimination that taught him these mean realities, Marshall's character had been forged. The concerns of the outsider were the concerns of his lifetime. He was a public interest lawyer before that term came into popular use.

-Footnotes-

n51. Paul Gerwitz, Thurgood Marshall, 101 Yale L.J. 13, 14 (1991).

-End Footnotes-

Conversely, Marshall understood the opportunities he could give to minority lawyers by virtue of his position as a Justice of the Supreme Court. True to his character, as he rose, he never failed to lift others. During his twenty-four years of service, Marshall chose more black and minority law clerks than any other Justice, and many of these men and women now serve on the faculties of the nation's leading law schools.

He also brought to the Court a special brand of sardonic, often ironic, wit. Marshall's humor was a serious manifestation of his personality and inseparable from his strength of character. His humor was, among other things, a coping strategy; rather than a means of denying the bleakness of reality, it was a way of dealing with it. Justice William J. Brennan, Jr., Marshall's closest friend on the Court, clearly recognized that Marshall's personal stories caused his colleagues to "confront walks of life we had never known." n52

-Footnotes-

n52. Roger Goldman & David Gallen, Thurgood Marshall: Justice For All 20 (1992).

-End Footnotes-

Thus, he would resist a law clerk's assertion that he had to agree to a particular position by responding, "[Boy, t]here are only two things I have to do: stay black and die." n53 Similarly, he delighted in telling and retelling the story of his response to a cantankerous Southern judge who asked him, "What do you want from this court?" Said Marshall, "Anything I can get, your honor."

-Footnotes-

n53. Kagan, supra note 11, at 1128.

-End Footnotes-

One of the most poignant aspects of Justice Marshall's character was the maturity with which he negotiated periods of profound disappointment as they alternated with periods of sublime satisfaction. For example, the years leading up to Brown v. Board of Education must have been ones of accelerating, if cautious, anticipation. Although he and his colleagues knew that the constitutional abolition of "separate but equal" was not inevitable, they also must have sensed that it was, at that time, more likely to occur than ever previously had been the case.

Marshall could look back on his days as head of the NAACP's legal effort and see a long string of landmark victories. In Missouri ex rel. Gaines v. Canada, n54 the Supreme Court ordered the integration of the University of Missouri Law School. In Morgan v. Virginia, n55 the Court outlawed segregation on interstate buses. In Shelley v. Kraemer, n56 the Court barred judicial enforcement of private restrictive covenants intended to prevent the sale of houses to blacks, Jews, or members of other minority groups. And in Sweatt v. Painter n57 and McLaurin v. Oklahoma State Regents, n58 the Court began the process of chipping away at the doctrine of "separate but equal."

-Footnotes-

- n54. 305 U.S. 337 (1938).
- n55. 328 U.S. 373 (1946).
- n56. 334 U.S. 1 (1948).
- n57. 339 U.S. 629 (1950).
- n58. 339 U.S. 637 (1950).

-End Footnotes-

Although Marshall appreciated that Brown v. Board of Education was a decision of surpassing historic significance, he often stated that the decision in Smith v. Allwright, n59 which held unconstitutional the Democratic white primary in Texas, addressed a related and perhaps equally important issue: the right to vote. Because of his deep commitment to the democratic process, Marshall placed a high value on securing for blacks the right to vote. Although the Fifteenth Amendment had given black males the right to vote in 1870, n60 no Southern blacks had in fact been permitted to vote before 1920, and as late as the 1940 presidential election, only 2.5 percent of eligible black voters voted in the South. n61 When poll taxes, literacy tests, and grandfather clauses did not stop blacks from voting, threats and other forms of intimidation usually did. "Without the ballot," Marshall said, "you have no citizenship, no status, no power in this country."

-Footnotes-

- n59. 321 U.S. 649 (1944).
- n60. U.S. Const. amend. XV.
- n61. Davis & Clark, supra note 7, at 112.

- - - - -End Footnotes- - - - -

Marshall's efforts, and those of William H. Hastie (who would later [*1499] become the first African-American appointed to a federal appeals court), n62 to secure the voting rights of blacks forever changed the profile of city halls, state capitols, and governors' mansions. By 1993, more than 8,000 African-Americans held elected positions in the United States - including those of Governor, United States Senator, and United States Representative - compared with approximately 1,500 in 1970.

- - - - -Footnotes- - - - -

n62. Id. at 224.

- - - - -End Footnotes- - - - -

On May 17, 1954, Marshall experienced the rare satisfaction of prevailing in perhaps the most momentous case of the century. However, the heady exhilaration of winning Brown was followed, during the next several years, by the discouraging necessity of litigating the meaning of the Court's pronouncement that its ruling be effectuated "with all deliberate speed." n63 The massive resistance mounted by large cities and rural communities alike, with the demagogic support of Southern governors, was tremendously dispiriting. n64

- - - - -Footnotes- - - - -

n63. Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955).

n64. Kluger, supra note 16, at 710-11.

- - - - -End Footnotes- - - - -

A similar pattern occurred in Justice Marshall's tenure on the Supreme Court. The Court that Marshall joined, it seems clear in retrospect, was an especially distinguished one. During his early years, he served with colleagues who were his intellectual and professional equals. The Court's senior members were among the most respected justices in American history - Earl Warren, Hugo L. Black, William O. Douglas, John Marshall Harlan, and William J. Brennan, Jr. Those were the years in which Marshall was able to take gratification from his unparalleled capacity for craftsmanship. Like another great judge, Learned Hand, he had long ago learned that "it is as craftsmen that we get our satisfactions and our pay." n65 Those were also the years in which many of the views he had long held became the law of the land. Those were his halcyon days.

- - - - -Footnotes- - - - -

n65. Learned Hand, The Bill of Rights 77 (1958).

- - - - -End Footnotes- - - - -

That sense of professional gratification changed with the election of President Nixon in 1968 and the appointment in the years that followed of a number of Justices - including two Chief Justices, Warren E. Burger and William H. Rehnquist - whose views were opposed to Marshall's in virtually every area that mattered to him most. As the membership of the Court became more

conservative, he found himself increasingly in dissent, especially on issues such as a woman's right to privacy, which he supported, and capital punishment, which he opposed.

Still, with the steady purpose of a man of character devoted to causes he [*1500] regarded as proper in principle, he persevered. Following the appointments of Antonin Scalia in 1986 and Anthony Kennedy in 1988, Marshall's despair at the direction the Court was taking deepened. It became more painful with the retirement in 1990 of Justice Brennan, Marshall's closest ally and dearest friend.

Gradually, Marshall had become accustomed to - but not contented with - writing dissents. n66 He often said that the first question he asked prospective law clerks was whether they would be satisfied with writing dissents. "I agree with that old saying," he said, "that 'I love peace but I adore a riot.' You've got to be angry to write a dissent."

-Footnotes-

n66. Davis & Clark, supra note 7, at 7.

-End Footnotes-

Marshall saw the unanimous and resounding decisions such as Brown give way to innumerable five-to-four and six-to-three decisions, in which he often was in the minority. For example, the Court's consensus on school integration broke down in Milliken v. Bradley, n67 which rejected, by a vote of five-to-four, a multidistrict integration plan that covered not only Detroit but its predominantly white suburban communities as well. In a compelling dissent, Marshall argued that "the Court today takes a giant step backwards.... Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together." n68 He continued:

-Footnotes-

n67. 418 U.S. 717 (1974).

n68. Id. at 782, 783 (Marshall, J., dissenting).

-End Footnotes-

Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. n69

-Footnotes-

n69. Id. at 814 (Marshall, J., dissenting).

-End Footnotes-

In City of Mobile v. Bolton, n70 the Court upheld, by a vote of six-to-three, an at-large system for electing city commissioners - a system that diluted black voting strength and had the practical result of electing only whites. Marshall dissented, arguing that the discriminatory impact alone of [*1501] the new voting system was sufficient to violate the Constitution. n71 He warned: "If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination,' ... it cannot expect the victims of discrimination to respect political channels of seeking redress." n72

-Footnotes-

n70. 446 U.S. 55 (1980).

n71. Id. at 103-41 (Marshall, J., dissenting).

n72. Id. at 141 (citation omitted).

-End Footnotes-

Marshall's deepest convictions were aroused in cases involving the constitutionality of capital punishment. In Gregg v. Georgia, n73 the Court held, by a vote of seven-to-two, that the death penalty did not constitute cruel and unusual punishment under the Eighth Amendment. Only Justice Brennan shared Marshall's view that the death penalty was cruel and unusual punishment per se and, therefore, always unconstitutional. n74 In opinion after opinion, Marshall noted that death is irrevocable n75 and makes rehabilitation impossible. n76 The question, he said, "is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment." n77 He could find no such evidence. He wrote, "At times a cry is heard that morality requires vengeance to evidence society's abhorrence of [a criminal] act. But the Eighth Amendment is our insulation from our baser selves." n78

-Footnotes-

n73. 428 U.S. 153 (1976).

n74. Id. at 231 (Marshall, J., dissenting); id. at 230-31 (Brennan, J., dissenting).

n75. Furman v. Georgia, 408 U.S. 238, 346 (1972) (Marshall, J., concurring); Holtzman v. Schlesinger, 414 U.S. 1316, 1319 (1973).

n76. Furman, 408 U.S. at 346 (Marshall, J., concurring).

n77. Id. at 346-47 (Marshall, J., concurring).

n78. Id. at 344-45 (Marshall, J., concurring).

- - - - -End Footnotes-

The rise of "reverse discrimination" cases was hardly less frustrating. When the Court issued its decision in Regents of the University of California v. Bakke, n79 permitting a state university to consider race among other factors in making admissions decisions, Marshall concurred in the result; but he did not accept that part of the Court's reasoning that held unconstitutional a separate admissions program for disadvantaged minorities. n80 He wrote:

- - - - -Footnotes-

n79. 438 U.S. 265 (1978).

n80. Id. at 387 (Marshall, J., concurring in part and dissenting in part).

- - - - -End Footnotes-

It must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier. n81

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n81. Id.

- - - - -End Footnotes-

[*1502]

The acuteness of Marshall's pain and frustration comes through poignantly in his opinion in Bakke. Marshall continued:

The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot. n82

- - - - -Footnotes-

n82. Bakke, 438 U.S. at 400-01 (Marshall, J., concurring in part and dissenting in part).

- - - - -End Footnotes-

More than sixty years after Marshall had begun his legal career, that statement remains, alas, painfully true.

One notes with aching sadness how large a proportion of Justice Marshall's twenty-four years on the Supreme Court was devoted to dissenting on the issues of greatest moment to him. Only the support of Justice Brennan consistently provided him ideological comfort - and the hopeful glimmer of eventual vindication by history - against the wrong-headed direction he believed the Court was taking.

In a moving tribute to Justice Marshall upon his retirement, Justice Sandra Day O'Connor described once asking him how he avoided being despondent, given all the injustices he had witnessed during his lifetime. n83 He told her the story of how he and Charles Houston had traveled to Loudon County, Virginia, to represent a black man accused of murdering a wealthy white woman and her white maid. n84 After Marshall and Houston unsuccessfully challenged the exclusion of blacks from the jury, the man was convicted of murder by the all-white jury and sentenced to life in prison. n85 "You know something is wrong with the government's case," Justice Marshall told O'Connor, "when a Negro only gets life for murdering a white woman." n86 Marshall added, "I just don't believe that guy got a fair shake. But what are you going to do? ... There are only two choices in life: stop and go on. You tell me, what would you pick?" n87

- - - - -Footnotes- - - - -

n83. O'Connor, supra note 32, at 1219.

n84. Id. at 1219-20.

n85. Id. at 1220.

n86. Id.

n87. Id.

- - - - -End Footnotes- - - - -

He once told a reunion of his law clerks, in a moment I will remember for the rest of my life,

The goal of a true democracy such as ours, explained simply, is that any baby born in these United States, even if he is born to the blackest, most [*1503] illiterate, most unprivileged Negro in Mississippi, is, merely by being born and drawing his first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller.

Of course it's not true. Of course it never will be true. But I challenge anybody to tell me that it isn't the type of goal we should try to get to as fast as we can. n88

- - - - -Footnotes- - - - -

n88. Thurgood Marshall, Address at the Annual Second Circuit Judicial Conference (Sept. 5, 1986), in 115 F.R.D. 349, 354 (1987).

- - - - -End Footnotes- - - - -

His remarks reflected his sober skepticism, held until the very end of his life, about whether American society was yet prepared to grant equal rights and equal opportunity to minorities. While he retained a deep faith in the guarantees of the Constitution and in the ideals of the Declaration of Independence, he also held serious doubts about the nation's commitment to attaining those guarantees and ideals.

In 1987, as the nation was celebrating the bicentennial of the United States Constitution, Justice Marshall spoke to the annual seminar of the San Francisco Patent and Trademark Law Association. n89 He reminded his audience that the Constitution "was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today." n90 He bluntly addressed the hypocrisy of the first three words of the preamble, "We the People." n91 The compromise in Philadelphia, he said, created an unprincipled "contradiction between guaranteeing liberty and justice to all, and denying both to Negroes." n92 Moreover, "women did not gain the right to vote for over a hundred and thirty years." n93

- - - - -Footnotes- - - - -

n89. Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, Address at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), in 101 Harv. L. Rev. 1 (1987) [hereinafter Reflections].

n90. Id. at 2.

n91. Id. at 4-5.

n92. Id. at 4.

n93. Id. at 2.

- - - - -End Footnotes- - - - -

Although he refused to celebrate the wisdom and sense of justice of the Framers, Justice Marshall praised the evolutionary manner in which the Constitution has remained a living document, especially by virtue of the adoption of the Fourteenth Amendment. n94 He pointed out the striking role that legal principles have played in "determining the condition of Negroes" who "were enslaved by law, emancipated by law, disenfranchised and [*1504] segregated by law; and, finally, they have begun to win equality by law." n95 The progress that blacks have achieved was not the result of the Founding Fathers, Marshall said, but of those men and women who came later. "'We the People' no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and

"equality,' and who strived to better them." n96 For himself, Marshall said, "I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights." n97

- - - - -Footnotes- - - - -

n94. Id. at 2, 5.

n95. Reflections, supra note 89, at 5.

n96. Id.

n97. Id.

- - - - -End Footnotes- - - - -

These sober reflections were doubtless not what his audience had expected, but Marshall's candor reflected the experience of a lifetime, as well as his unyielding faith that the Constitution could be made into a better document than the one framed by the Founding Fathers. By calling attention to the Constitution's defects at a time of often uncritical celebration of its virtues, Marshall made a case that virtually no contemporary had thought to make - perhaps because none possessed the strength of character that he did, and none had reflected upon it so profoundly as he had.

As the end of his life drew near, Justice Marshall's faith in the power of the Court to achieve racial and economic justice continued to falter. On July 4, 1992, six months before his death, Justice Marshall was given the Philadelphia Liberty Medal, which carried a prize of \$ 100,000, in recognition of his contributions in the pursuit of liberty of conscience and freedom from oppression and deprivation. n98 His speech that day, delivered at Independence Hall, was a ringing assertion and reaffirmation of the views of a lifetime:

- - - - -Footnotes- - - - -

n98. Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 452 (1993).

- - - - -End Footnotes- - - - -

I wish I could say that racism and prejudice were only distant memories ... and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity.

But as I look around, I see not a nation of unity but of division - Afro and white, indigenous and immigrant, rich and poor, educated and illiterate. Even many educated whites and successful Negroes have given up on integration and lost hope in equality....

We cannot play ostrich. Democracy cannot flourish amid fear. Liberty [*1505] cannot bloom amid hate. Justice cannot take root amid rage... We must go against the prevailing wind. We must dissent from the indifference. We must

dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a government that has left its young without jobs, education, or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better. n99

-Footnotes-

n99. Id. at 453-54.

-End Footnotes-

With his health failing, Justice Marshall's last days were sad ones. Yet Marshall's tenacity and his determination to defend his view of the Constitution - especially on such issues as capital punishment, privacy and abortion, and the rights of minorities and the poor - did not falter. He frequently told friends, "I was appointed for life, and I intend to serve out my term." n100 But advancing age finally caused him to step down in June of 1991. When asked how he wanted to be remembered, Marshall said, "He did the best he could with what he had." n101

-Footnotes-

n100. See Davis & Clark, supra note 7, at 3.

n101. Rowan, supra note 98, at 392.

-End Footnotes-

Justice Marshall died on January 24, 1993. He was eighty-four. The public response to his death - measured most dramatically by the eighteen thousand persons, of all races and all backgrounds, who paid their final respects to him in the Great Hall of the Supreme Court - is testimony to the depth of his impact on the lives of ordinary Americans. At Justice Marshall's funeral, held in Washington's National Cathedral, it was, to my mind, William T. Coleman, Jr. who best captured Marshall's legacy. "History will ultimately record," Coleman said, "that Mr. Justice Marshall gave the cloth and linen to the work that Lincoln's untimely death left undone." n102

-Footnotes-

n102. Stephen Labalon, Thousands Fill Cathedral to Pay Tribute to Marshall, N.Y. Times, Jan. 29, 1993, at A16.

-End Footnotes-

As a result of his historic achievements, Thurgood Marshall changed the face of America. Although the changes have not been so swift in recent years as they were at the height of Marshall's career, progress will continue and the direction is certain. In the end, that progress toward the achievement of equality for all will be Thurgood Marshall's greatest legacy.

Thurgood Marshall's life was a unique conjunction of person and place, of talent and destiny. He was an American original, a man of character whose contributions to the Republic redeemed its most cherished values.

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ARTICLE: EXPLORING THE DARK MATTER OF JUDICIAL REVIEW: A CONSTITUTIONAL CENSUS OF THE 1990S

Seth F. Kreimer*

-----Footnotes-----

* Professor, University of Pennsylvania School of Law. This Article could not have been written without the dedicated efforts, above and beyond the call of duty, of my research assistant Jason Hoffman. It has benefitted, as well, from the generous comments of my colleagues Matt Adler, Frank Goodman, Howard Lesnick, Ned Spaeth, and Barbara Woodhouse. Each of these individuals is entitled to public acknowledgement and deep thanks; none of them bears responsibility for any errors or misapprehensions that may remain.

-----End Footnotes-----

SUMMARY:

... Most debate about the power of judicial review proceeds as if courts primarily invoke the Constitution against the considered judgment of elected legislatures; most constitutional commentary focusses on confrontations between the United States Supreme Court and state or federal legislatures. ... In some ways the trial court sample mirrors the view of judicial review reflected in conventional, Supreme Court oriented commentary: confrontations with legislatures focus on free speech and equal protection issues. ... Individual prisoner claims involving damage actions were rejected in more than two-thirds of the cases in the sample, and claims seeking injunctive relief failed in more than three-quarters of the cases. ... A generation ago, when the Warren Court laid the foundations for the constitutional damage action, Justice Harlan recognized that "for a variety of reasons, the remedy may not often be sought" and that judicially constructed immunities were likely often to preclude recovery. ... The cases in the Supreme Court sample were taken from the Supreme Court's 1990, 1991, 1992, 1993, 1994, and 1995 Terms, using the Lexis search, "Constitutional right or unconstitutional or constitutional violation or violate constitution or First Amendment or Fourth Amendment or Fifth Amendment or Eighth Amendment or due process or cruel unusual or equal protection or Commerce Clause or Takings Clause or obligation of contract and syllabus (held)." ...

TEXT: [*427]

Most debate about the power of judicial review proceeds as if courts primarily invoke the Constitution against the considered judgment of elected legislatures; most constitutional commentary focusses on confrontations

between the United States Supreme Court and state or federal legislatures. In fact, the federal courts most often enforce constitutional norms against administrative agencies and street-level bureaucrats, and the norms are enforced not by the Supreme Court but by the federal trial courts. In this Article, Professor Kreimer surveys this "dark matter" of our constitutional universe.

The Article compares the 292 cases involving constitutional claims decided by the Supreme Court during its 1990-1995 Terms with 431 cases which comprise a one-in-ten sample of the reported constitutional cases decided by federal trial courts in 1994. In some ways the trial court sample mirrors the view of judicial review reflected in conventional, Supreme Court oriented commentary: confrontations with legislatures focus on free speech and equal protection issues. In other ways, trial courts and the Supreme Court differ: dormant Commerce Clause cases, like issues of federalism and separation of powers which bulk large in the Supreme Court, are largely absent at the trial level. The most striking finding of this review, however, is that even in the Supreme Court, legislative cases constitute a minority of the occasions for the exercise of judicial review, and that minority shrinks to a barely cognizable fraction at the trial court level. The rights invoked in the bulk of constitutional cases are not the stuff of sophisticated doctrinal elaboration. Rather, the Supreme Court articulates basic standards of physical dignity and fairness and empowers the lower federal judiciary to act as field agents dispensing minimal federal justice.

The Article concludes by examining the implications of these observations for the role of judicial review as it is actually practiced. It argues that the federal trial courts are well-adapted to the role of enforcing demands of minimal decency against street-level bureaucrats, that this enforcement raises few of the problems of the "countermajoritarian difficulty," and that the enforcement is crucial to preserving the ideals of our nation as a civilized society.

[*429]

Introduction

The big gun of the "least dangerous branch" is the power of judicial review, and it appears to be pointed at the heartland of democracy. For decades, most debate about that power has proceeded as if all judicial review takes place in the manner of Marbury v. Madison, n1 Lochner v. New York, n2 Brown v. Board of Education, n3 or Roe v. Wade n4 : as a confrontation between substantive positions adopted by an elected legislative body and the commands of the Constitution as interpreted by the Supreme Court.

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n1 5 U.S. (1 Cranch) 137 (1803).

n2 198 U.S. 45 (1905).

n3 347 U.S. 483 (1954).

n4 410 U.S. 113 (1973).

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In that debate, commentators develop theories to describe and channel exercise of that power by examining the Court's practice in confrontations with legislatures. They may construct their theories inductively, use deductive claims to criticize practices or instances of judicial review, or do both. But invariably the touchstone is the confrontation of a legislature and the Supreme Court.

As my colleague Matt Adler recently emphasized, n5 a little reflection should lead us to understand that most governmental decisions are not adopted by a clear legislative mandate. n6 Common law incremental decisionmaking by courts, adjudication and rulemaking by agencies, and discretionary decisions by street-level bureaucrats fill much more of our legal world than the considered (or ill-considered) legislative decisions that trace their pedigree to a directly elected legislature.

-Footnotes-

n5 Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759 (1997).

n6 Adler, of course, is not the first commentator to raise this issue. Charles Black's criticism of Alexander Bickel and Learned Hand highlighted elegantly the ways in which "the accuracy of our perceptions of the nature of the confrontations found in judicial review . . . has been dulled by the intellectual and political fascination of the question posed and answered in *Marbury v. Madison*." Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 70 (1969). For more recent explorations, see, for example, Barry Friedman, *Dialogue and Judicial Review*, 91 Mich L. Rev. 577, 630-34 (1993); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter Majoritarian Difficulty*, 94 Mich L. Rev. 245, 246 n.7 (1995).

-End Footnotes-

Nor are most instances in which the Constitution is invoked by the judiciary legal confrontations between the political branches and the highest court in the land. The vast bulk of legal disputes are not brought to court at all; of those that are, most are resolved at the trial court level, often by settlements "in the shadow of the law." The voice in which the judiciary speaks the Constitution to most of the population is not the sonorous pronouncements of the Supreme Court's explications, but the somewhat terse and often hurried tones of the trial judge denying or granting motions for summary judgment or suppression of evidence. Thus, just as astronomers are beginning to speculate that the gravitational force that keeps the universe together is provided by "dark matter" invisible to conventional telescopes, the bulk of the claims invoking the power of judicial review is invisible to much of constitutional theory. n7

-Footnotes-

n7 The point is not entirely ignored in the literature. See, e.g., Michael Perry, *The Constitution in the Courts: Law or Politics?* 3, 15-16 (1994) (suggesting an approach to constitutional interpretation that the Supreme Court and lower courts should follow); J.M. Balkin & Sanford Levinson,

Constitutional Grammar, 72 Tex. L. Rev. 1771, 1786 n.50 (1994) (suggesting an examination of practices of lower federal courts and state courts in constructing constitutional grammar); Frank H. Easterbrook, The Demand for Judicial Review, 88 Nw. U. L. Rev. 372, 379 (1993) ("The relevant body of cases for a study such as this must be those filed in the district court. That is the only place where the parties get to choose and where we learn about their hopes and strategies."); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 925 n.108 (1996) (observing that trial courts are, "as a practical matter, the courts of last resort for most citizens").

Having acknowledged the existence of the trial courts, most commentators nevertheless proceed to focus on the Supreme Court. The one exception I have found is Professor Levinson's brief account of what he regards as the exclusively positivistic doctrinalist posture adopted by lower court judges in constitutional cases. Sanford Levinson, On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation, 25 Conn. L. Rev. 843 (1993).

- - - - -End Footnotes- - - - -

If we are to develop realistic conceptions of constitutional practice, we should examine these unexplored phenomena. Such attention is imperative if our theories involve either inductive descriptions of judicial practices or normative critiques of the actual functioning of judicial review. Yet, although accounts of the Supreme Court's legislative confrontations are legion, few commentators survey the landscape outside of the "high practice" of constitutional confrontation between legislature and judiciary at the Supreme Court level, n8 and law review literature is virtually devoid of informed discussion of the realities of the ways in which the Constitution is used by trial courts. n9

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n8 William N. Eskridge Jr. & Phillip P. Frickey, Law as Equilibrium, 108 Harv. L. Rev. 27 (1994), is something of an exception. Eskridge and Frickey expanded their focus for the 1993 Term from legislative confrontation in the constitutional area to the exercise of judicial power vis a vis legislatures in statutory interpretation. Also, Nicholas S. Zeppos, Deference to Political Decision-Makers and the Preferred Scope of Judicial Review, 88 Nw. U. L. Rev. 296 (1993), surveys the Supreme Court's use, between 1938 and 1992, of constitutional norms to limit federal legislative power both by directly invalidating and by narrowly construing legislation. Professor Zeppos addresses, as well, the Court's use of statutory construction to invalidate federal agency actions.

n9 Thus Professor Schauer articulated the acute insight that although "the lower courts are the repository of a vast corpus of constitutional adjudication," they are slighted by constitutional theory. See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 401 n.6 (1985). His constitutional theory, however, focuses resolutely on Supreme Court practice.

Professor Barry Friedman, whose admirable efforts to dissolve the countermajoritarian difficulty by "describing what courts actually do and how they actually operate in our constitutional system" also focuses almost exclusively on confrontations between the Supreme Court and state or federal

legislators. Barry Friedman, Dialogue and Judicial Review, 91 Mich L. Rev. 577, 581 (1993). Professor Friedman hints that his legislative focus is an effort to justify the actions of courts at their allegedly "countermajoritarian worst" and asserts that "the vast majority of judicial overruling of government activity is concerned not with statutes . . . but with the work of administrative officials." Id. at 630, 634. His focus on the Supreme Court, however, is steadfast. Professor Friedman's contention that judicial review is in fact less problematically countermajoritarian than conventional theory suggests is bolstered by the more particularized results of my explorations.

- - - - -End Footnotes- - - - -

This Article begins the process of coming to grips with these realities by examining a sample of constitutional practice in the last decade of the twentieth century. In it, I examine both the Supreme Court's invocations of the Constitution in the 1990-1995 Terms and the uses to which the Constitution was put in reported decisions in the federal trial courts during the 1994 calendar year. Some of the findings are unsurprising. As one might predict from reading the literature on judicial review, when the Court assesses the handiwork of Congress, activism focuses on issues of governmental structure and free speech; in confronting state legislatures, the grounds of contention tend to be the negative Commerce Clause, free speech, and equal protection. n10 The Court is more likely to invalidate local ordinances and less likely to strike down the handiwork of Congress. Legislative review by the trial courts tracks the Supreme Court's docket; there is no evidence that trial courts are administering a constitutional order that differs substantially from the one that most Court watchers seek to explain and debate.

- - - - -Footnotes- - - - -

n10 It is worth noting, however, that despite their prominence in scholarly debate, at both the trial and Supreme Court levels judicial review under the property clauses (takings and due process) and substantive due process protections of individual autonomy is quite rare.

- - - - -End Footnotes- - - - -

Nonetheless, legislative confrontation constitutes a minority of the constitutional business of the Supreme Court and an even smaller percentage of [*432] the business of the trial courts. The Constitution in action at the trial court level most frequently involves damage actions seeking to invoke protections of minimal civil decency against street-level bureaucrats who exercise delegated discretion. Here legal claims are neither normatively esoteric nor legally sophisticated, and they are more often substantive than procedural. Claimants invoke fact-bound norms of common perception: "probable cause," "deliberate indifference," "unreasonable force," and "arbitrary administration." Federal courts most frequently exercise a role that is both less grand and less theoretically ramified than the image contained in most constitutional theory. Their role is neither the countermajoritarian specter feared by conservatives nor the moral prophecy idealized by some liberals. The federal courts, for the most part, do not administer the "high" constitutional law that seeks to structure the way we govern ourselves on the basis of moral or political theory. Rather, the "low" constitutional law that constitutes the dockets of the trials courts begins with common commitments to political decency and seeks to apply those commitments to controverted factual narratives. The

federal courts' role is to manifest--albeit episodically--the American belief in the ultimate equality of the governors and the governed by demonstrating that citizens who are treated shabbily by government officials should have their day in court. n11

-Footnotes-

n11 I thus would amend Professor Klarman's assertion in Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 4 (1996), that the federal courts do not and cannot engage in "countermajoritarian heroics." Although it is true that federal courts in the 1990s rarely "play the role of Galahad," id. at 4, against overweening national sentiment for repression, they can and do provide at least occasional "havens of refuge for those who . . . are helpless, weak, or outnumbered," id. at 6 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)) against public officials who would physically abuse citizens in ways that are ultimately at odds with our common moral aspirations.

-End Footnotes-

I. The Classical Core of Judicial Review in the 1990s

A. The Supreme Court and the Legislatures: The 1990-1995 Terms

1. Overview

No one reading the newspapers during the Supreme Court's latest Terms could harbor the illusion that Marbury is dead. Last Term, to great eclat, the Court struck down the Brady Gun Control Act as inconsistent with the Tenth Amendment, n12 federal regulation of the Internet under the Communications Decency Act as a violation of the First Amendment, n13 and the Religious Freedom Restoration Act as a congressional overreaching under Section 5 of the Fourteenth Amendment. n14 In the 1995 Term, the Court invalidated or cast doubt on federal statutes under the Eleventh Amendment, n15 the First Amendment, n16 and the Export Clause. n17

-Footnotes-

n12 Printz v. United States, 117 S. Ct. 2365 (1997).

n13 Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997).

n14 City of Boerne v. Flores, 117 S. Ct. 2157 (1997). In a lower profile case, Babbitt v. Youpee, 117 S. Ct. 727 (1997), the Court also invalidated a statute regulating the inheritance of Indian tribal land as an unconstitutional taking of property without just compensation.

n15 Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (holding that Congress cannot authorize suits in federal courts against unconsenting states when legislating under preEleventh Amendment constitutional powers).

n16 Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (upholding provision of the federal Cable Television Consumer Protection and Competition Act that allows cable operators to block indecent programming on leased access channels but holding that a provision that allowed operators to

ban indecent programming on public access channels violated the First Amendment); Colorado Republican Fed. Election Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (holding that expenditure limits on uncoordinated federal election campaign expenditures violate the First Amendment).

n17 United States v. IBM, 116 S. Ct. 1793 (1996) (holding that the Export Clause prohibits assessment of nondiscriminatory federal taxes on goods in export transit) (citing U.S. Const. art. I, <sect> 9, cl. 5). Cf. United States v. Winstar Corp., 116 S. Ct. 2432 (1996) (construing statute narrowly in light of retroactivity and takings concerns).

- - - - -End Footnotes- - - - -

At the state level, the Court confronted legislatures in high profile cases concerning gay rights and racially conscious redistricting, n18 and, less famously, concerning commercial speech, drug testing, taxation of local and foreign corporations, and standards for criminal punishment. n19

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n18 Bush v. Vera, 116 S. Ct. 1941 (1996) (invalidating, on equal protection grounds, a racially gerrymandered electoral district); Shaw v. Hunt, 116 S. Ct. 1894 (1996) (same); Romer v. Evans, 116 S. Ct. 1620 (1996) (invalidating, on equal protection grounds, a state constitutional amendment preventing the state and local governments from protecting persons against discrimination on the basis of sexual orientation).

n19 Camps Newfound/Owatonna Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (invalidating, on Commerce Clause grounds, a denial of a tax exemption to camps which served out-of-state clients); Chandler v. Miller, 117 S. Ct. 1295 (1997) (invalidating, on Fourth Amendment search and seizure grounds, a statutory requirement that candidates for state office submit to drug testing); Lynce v. Mathis, 117 S. Ct. 891 (1997) (invalidating, under the Ex Post Facto Clause, a statute reducing prisoners' early release credits); 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) (invalidating, on First Amendment grounds, a ban on advertisement of liquor prices); Cooper v. Oklahoma, 116 S. Ct. 1373 (1996) (invalidating, on due process grounds, a statute requiring criminal defendants to prove by clear and convincing evidence that they are incompetent to stand trial); Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996) (invalidating a state's intangibles tax as an unconstitutional burden on interstate commerce).

The Court dealt obliquely with constitutional challenges to state abortion limitations in Leavitt v. Jane L., 116 S. Ct. 2068 (1996) (per curiam) (limiting the effect of the lower court's invalidation of portions of Utah's restrictive abortion statute and reversing the lower court on the issue of severability) and Dalton v. Little Rock Family Planning, 116 S. Ct. 1063 (1996) (upholding the lower court's invalidation of refusal to fund abortions in accord with federal entitlement, but limiting relief).

- - - - -End Footnotes- - - - -

[*434]

Although during the last three Terms the Court played a particularly activist role with regard to federal statutes, n20 the classical image of

confrontation between the Court and legislatures is a constant and substantial part of the Supreme Court caseload during the 1990s. n21 Claims of constitutional violations appeared in 292 of the 595 cases in which the Court rendered opinions during the 1990-1995 Terms, 120 of which reviewed legislative handiwork. n22 At the same time, given the vast tapestry of rules that legislatures have adopted at the federal, state, and local levels, the Court's average of ten invalidations per year, combined with three cases a year in which constitutional challenges remained viable on remand, hardly suggest a Court bent on using judicial review to wrest control of the legal system away from democratically elected legislatures. n23

[SEE TABLES IN ORIGINAL]

-Footnotes-

n20 The Court's invalidation of parts of 13 federal statutes during the last three Terms compares with only three total invalidations during the preceding four Terms.

The Court also has construed federal statutes in light of possible violations 11 times during the 1990-1995 Terms. Professor Zeppos, in reviewing the period 1938-1992, found 69 invalidations of federal statutes and 86 narrow constructions in light of constitutional values. Nicholas S. Zeppos, Deference to Political Decisionmakers and the Preferred Scope of Judicial Review, 88 Nw. U. L. Rev. 296 (1993). Thus some part of the greater likelihood of the Supreme Court invalidating state statutes is accounted for by the fact that the Court can avoid constitutional issues more easily in construing federal statutes.

n21 The data for this section were gathered in accordance with methodology described in the appendix. See infra Appendix. The tables do not include Supreme Court cases from the 1996 Term, but the trends identified in the 1990-1995 Terms are consistent with the most recent Term.

n22 See infra Tables 1 and 2. Table 1 lists 149 claims, because some of the cases raised more than one constitutional claim. A similar effect applies to all of the tables which list the claims raised in trial court and Supreme Court samples.

n23 The figures here are derived from Table 1, adjusted for the fact that three claims that were "sustained" and four that were "possible" nonetheless resulted in no relief for the plaintiffs for procedural or other reasons. Claims are classified as "rejected," "possible," or "sustained," depending on the Court's self-proclaimed resolution of the issues. Thus, for example, a case in which the claimants challenged a statute on both due process and equal protection grounds, but the Court invalidated the statute on equal protection grounds without addressing the due process claim, would be coded as a sustained equal protection claim and a possible due process claim.

In some cases, a single statutory invalidation may cast doubts on other cognate statutes. Thus, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), sounded the death knell for a range of other term limitation efforts in other states, and Miller v. Johnson, 115 S. Ct. 2475 (1995), portended invalidation of race-conscious districts in states outside of Georgia. Even so, the work of the Court is--and indeed must be--more a tailoring of the edges

than a reweaving of the statutory fabric.

-----End Footnotes-----
[*435] [*436] [*437]

Judicial review of statutes during the 1990-1995 Terms followed the outline of a classical constitutional law course and the flow of conventional constitutional commentary. Just as Marbury, Brown, and the evolution from Schenck n24 to Brandenburg n25 form the relatively uncontroversial core of modern judicial review, the Court's activism vis a vis legislatures in recent years, for the most part, focused in three areas: protection of the structures of governance established by the Constitution, protection of rights of association and communication under the First Amendment, and protection against discrimination involving "suspect classifications" under the Equal Protection Clause and its cognates. n26 Combined, these claims appear in more than [*438] two-thirds (83/119) of cases challenging legislative action in the Supreme Court, and more than three-fourths (46/60) of successful challenges. Each of the areas is relatively uncontroversial as a basis for judicial review; commentators may differ regarding appropriate methodology, but each of the areas is conceded to be an appropriate field for judicial endeavor under the constitutional text. n27

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n24 Schenck v. United States, 249 U.S. 47 (1919).

n25 Brandenburg v. Ohio, 395 U.S. 444 (1969).

n26 First amendment free expression cases account for the largest segment of these decisions (28 free speech, commercial speech, press, or association cases, of which 16 involve statutory invalidations). Free expression cases cluster in five areas:

(1) Criminal prohibitions on disruptive speech (5): McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995); City of Ladue v. Gilleo, 512 U.S. 43 (1994); NOW v. Scheidler, 510 U.S. 249 (1994); Wisconsin v. Mitchell, 508 U.S. 476 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

(2) Media regulation (6): Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); United States v. Edge Broad. Co., 509 U.S. 418 (1993); Leathers v. Medlock 499 U.S. 439 (1991).

(3) Access to the Political Process (4): Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996); Burdick v. Takushi, 504 U.S. 428 (1992); Norman v. Reed, 502 U.S. 279 (1992); Renne v. Geary, 501 U.S. 312 (1991).

(4) Erotica (3): United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Barnes v. Glen Theatre Inc., 501 U.S. 560 (1991); Alexander v. United States, 509 U.S. 544 (1993).

(5) Commercial Speech (3): 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Rubin v. Coors Brewing Co., 115 S. Ct. 1595 (1995); Cincinnati v.

Discovery Network, Inc., 507 U.S. 410 (1993).

The next most frequent areas involve structures of governance: (1) Dormant Commerce Clause challenges (18 cases with 11 statutory invalidations); (2) separation of powers (12 cases with four invalidations); (3) federal structure (nine cases, all of which sustained the challenger's claims).

Finally, the other major individual rights claims are equal protection (17 cases, six statutory invalidations) and civil procedural due process (12 cases, six statutory invalidations).

Thus, the lament, e.g., Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1754-55 (1994), that standard discussions of constitutional theory which focus on equal protection, substantive due process and the First Amendment operate as a "bait and switch" ploy, see also Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 254 (asserting that constitutional scholarship focuses on a small corner of American public policy), is inaccurate if we limit our view to the exercise of legislative review by the Supreme Court (and--as we shall see--the lower courts).

n27 Although it embodies all of the characteristics of "substantive due process," the debate concerning scrutiny of federal enactments for discrimination has really never caught hold in academia and has never been questioned seriously by the modern Court.

Professor Choper's call to abandon structural review in federalism cases, Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980), which was followed in Perry, supra note 7, at 109 (advocating judicial review in rights and liberties cases but not in cases involving separation of powers and federalism issues), has fallen on deaf ears. Indeed, half of the cases in which the Supreme Court has invalidated federal legislation in the 1990s have involved separation of powers or federalism issues. Similarly, although Justice Scalia has campaigned to limit review of state statutes under the Commerce Clause, which accounts for the highest number of statutory invalidations during the 1990-1995 Terms, even he has not challenged the legitimacy of the basic endeavor. But see Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590 (1997) (Thomas, J., dissenting) (suggesting that the dormant Commerce Clause doctrine is "overbroad and unnecessary").

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By contrast, it is worth attending to the silence of several doctrinal dogs which were not barking at the Supreme Court in recent years. In the much mooted area of property rights, takings cases combined with substantive due process challenges on behalf of property owners comprise barely one-tenth of the legislative caseload (13/119) and less than two percent of the successful challenges to legislation (1/60). n28 The disputed "fundamental rights" element of substantive due process has accounted for only two cases before the Court in the 1990-1995 Terms, n29 though admittedly the echoes of one [*439] of those cases have rung through two presidential elections.

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n28 The sole case in which the Court invalidated legislation during the 1990-1995 Terms, Allied Signal v. Dept. of Taxation, 504 U.S. 768 (1992), invoked notions of territorial limits to taxation that are, at least arguably, as much a function of federalism as of property rights. Last Term, in Babbitt v. Youpee, 117 S. Ct. 727 (1997), however, the Court decided for the plaintiff in a second Takings Clause case, invalidating a federal statute which prohibited the devise of fragmentary interests in Indian tribal lands.

The protection of innocent property owners subject to civil forfeiture which the Court read into the federal forfeiture statute in United States v. A Parcel of Land, 507 U.S. 111 (1993), appears in light of two recent cases to be a matter that can be overridden by determined legislatures. See U.S. v. Ursery, 116 S. Ct. 2135 (1996) (holding that civil in rem forfeitures are not a form of punishment subject to the protection against double jeopardy); Bennis v. Michigan, 116 S. Ct. 994 (1996) (holding that the forfeiture of property jointly owned by a husband and wife is not an unconstitutional taking even though the wife was innocent of any violation of the law).

n29 Leavitt v. Jane L., 116 S. Ct. 2068 (1996); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

Last Term, although the Court's docket saw an upsurge in substantive due process cases, in none of them did the Court sustain a challenge. Three substantive due process claims drew full opinions. In Vacco v. Quill, 117 S. Ct. 2293 (1997), and Washington v. Glucksberg, 117 S. Ct. 2259 (1997), the Court unanimously sustained prohibitions on assisted suicide against substantive due process challenges. In Kansas v. Hendricks, 117 S. Ct. 2072 (1997), the Court was again unanimous in rejecting a substantive due process attack on a statute providing for the civil commitment of sexually violent predators. Two other cases resulted in per curiam rejections of challenges to abortion regulations. Mazurek v. Armstrong, 117 S. Ct. 1865 (1997) (per curiam) (upholding a statute restricting the performance of abortions to licensed physicians); Lambert v. Wicklund, 117 S. Ct. 1169 (1997) (per curiam) (upholding a statute requiring parental notification for minors seeking abortions).

- - - - -End Footnotes- - - - -

Challenges to legislative action fall into a common remedial pattern. In most cases, the relief sought would be granted primarily through an injunction and occasionally by reversal of criminal liability or regulatory actions. n30 They were likely to be resolved on the merits at the Supreme Court level, rather than remanded. n31

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n30 Fifty-seven cases involved injunctive relief, 10 involved reversal of regulatory action, 25 involved criminal dismissal or habeas, and seven involved damage actions.

n31 Injunctive cases (57) were successful in 56% of the claims and were possible only in 8.7%. Efforts to reverse regulatory actions (10) were successful in 60% of the claims, with no "possible" claims. Challenges to convictions (25) succeeded in 24% of the claims and were possible in 12%. The small category of damage actions (7) present a different picture: 57% were sustained, and claims were possible in 28%.

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Some recent commentary suggests that the Court's exercise of judicial review in recent Terms has tilted toward the interests of business and property. n32 In challenges to legislation, the record during the 1990-1995 Terms gives some weight to this assertion, despite the absence of successful claims directly invoking property rights. Of the 120 legislative review cases, a large proportion (51) involved claimants that were businesses, business groups, landowners, or taxpayers. Cases brought by these groups accounted for a similar proportion of the cases in which legislative enactments were invalidated (25/57). By contrast, of the forty-three cases brought by individuals outside of these groups, only twelve resulted in statutory invalidations.

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n32 Cf. Zeppos, supra note 8, at 313 (noting that business associations have prevailed before the Court in challenges to federal statutes at a heightened rate since 1971); Eskridge & Frickey, supra note 8, at 44, 50 (asserting that the Court is "prone to expand protection of property rights").

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The proportionately most successful, albeit less frequent, challengers to legislative enactments were neither property owners nor individuals but plaintiffs who in some sense represented public interests. The Supreme Court found a constitutional violation in eighteen of the twenty-two legislative challenges brought by class action or nonprofit entities. On balance, therefore, the Court's activism on behalf of property owners and public [*440] plaintiffs is comparable. n33

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n33 This result accords with Professor Zeppos's suggestion that the "demand for judicial review" is distributed among both "powerful" and "powerless" groups. Zeppos, supra note 8, at 312-14.

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2. Review of Legislation and Federal-State Comparisons

Both positive and normative reasons support the expectation that the Supreme Court will treat determinations by state and federal legislatures differently. On one hand, the case for aggressively reviewing the work product of a coordinate branch of government for constitutional conformity is weaker than the case for policing the actions of subordinate state or local legislatures. n34 A federal legislative determination carries with it the democratic imprimatur of a national electorate; it claims to embody national values. A Congressional judgment does not threaten national unity, and there is no explicit constitutional basis for judicial supremacy over the legislative branch.

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n34 Thus, even James Bradley Thayer, the godfather of modern hostility to aggressive judicial review, advocated less deference to state legislatures

than to Congress. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 154 (1893) (maintaining that in reviewing state laws, "courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a coordinate department").

- - - - -End Footnotes- - - - -

By contrast, for those who worry about such things, the explicit command of the Supremacy Clause n35 gives a textual warrant for judicial review of state determinations that was absent in *Marbury v. Madison*. State and local legislatures represent parochial rather than national judgments. At a more practical level, commentators have long noted that the federal bench is likely to draw on the same sources of policy that nourish the federal legislature, n36 and Congress is a more formidable political antagonist than the state or local legislature.

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n35 U.S. Const. art. VI, <sect> 2.

n36 E.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957).

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In fact, during the 1990s, the Court's behavior in reviewing legislation tracks the rationale for judicial review as guardian of national political democracy: much of its work at all levels focuses on protection of the political process and national governance structures. The Court is most deferential to legislative enactments that can claim the broadest democratic pedigree. n37 [*441] Challenges to federal and state statutes are equally likely to be rejected; challenges to state statutes are more likely to succeed than challenges to federal statutes; and challenges to the enactments of local legislatures are substantially more likely to succeed and less likely to be rejected than challenges to more broadly based enactments. n38

[SEE TABLES IN ORIGINAL]

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n37 The difference between the state and federal invalidations is at least in part a function of the greater ability to interpret federal statutes in light of constitutional norms. Another way of reading this tendency is suggested by Eskridge and Frickey: the Court is more willing "to invalidate state legislation . . . because state legislatures cannot hurt the Court the way Congress can." Eskridge & Frickey, *supra* note 8, at 44. But if this is so, then why the still greater willingness to invalidate local legislation?

n38 Challenges to federal statutes account for 55 claims (49% rejected, 22% succeeded); to state statutes, 85 (48% rejected, 45% succeeded). Of the nine challenges to local legislation, only one was rejected, and seven were sustained.

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[*442] [*443] [*444] [*445]

a. Federal Legislation

In confrontations with the federal legislature, the Court has behaved in a way that would gladden the hearts of cautious "representation reinforcement" theorists. The Court invalidated fourteen federal statutes in six years, with nine more subject to possible modification. n39 Judicial scrutiny focused on claims under the First Amendment, federal structure and separation of powers, and procedural due process. n40 Judged by this record, judicial review is hardly a story of constant confrontation with Congressional policy; we are not in the midst of a swell of judicial activism that threatens to overwhelm popular democracy at the national level. n41 Announcement of a principle in one area may have implications in a number of others, and some legislation may never be adopted because of anticipated judicial disapproval. Nonetheless, the principles the Court invokes for the most part do not stand in the way of a Congressional majority accomplishing its chosen substantive goals; they concern means rather than ends. n42 The one area in which the Court regularly intervenes against federal legislation in a fashion that constrains substantive policy is the protection of speech, and even then, at the federal level, many instances of actual invalidation are marginal to national policy. n43

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n39 For technical reasons, Table 3 does not include *Lujan v. Defenders of Wildlife*, 504 U.S. 55 (1992), and *Plaut v. Spendthrift Farms, Inc.*, 115 S. Ct. 1447 (1995). In both of these cases, the Court invalidated federal legislation as violative of separation of powers, and I have included them in the textual discussion.

n40 See Table 3.

n41 Unlike many other areas, there are reasons to expect that the Supreme Court's docket will comprehensively represent activism vis-a-vis the federal legislature. See H.W. Perry, Jr., *Deciding to Decide* 245 (1991) (noting that the Supreme Court almost always grants certiorari to cases in which a lower court declared a federal statute unconstitutional).

n42 E.g., *Printz v. United States*, 117 S. Ct. 2365 (1997) (invalidating a requirement that local law enforcement officials check criminal records of handgun purchasers, but leaving open the possibility that federal requirements could be directly enforced by federal officials); *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (invalidating the particular Congressionally provided statutory enforcement mechanism of a suit against but apparently leaving open the possibility of judicial enforcement through an action against state officials); *United States v. Lopez*, 115 S. Ct. 1624 (1995) (defining a series of findings that Congress must make regarding "commercial nexus" rather than a limitation on the scope of Congressional power).

Last Term, however, the Court did move toward putting an area of regulation entirely outside of Congressional regulatory authority in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act as exceeding Congressional authority under Section 5 of the Fourteenth

Amendment). Whether Congress can craft protections of religious minorities within the Court's emerging parameters remains to be seen.

n43 E.g., Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (invalidating a two-generations-old statute which was virtually without contemporary justification); United States v. National Treasury Employees Union, 513 U.S. 454 (1995) (interfering only marginally with federal efforts to prevent conflicts of interest of certain governmental employees).

On the other hand, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996), and Reno v. ACLU, 117 S. Ct. 2329 (1997), may mark the beginning of a First Amendment confrontation with Congress in the area of telecommunications. But cf. Turner Broadcasting Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997) (upholding "must carry" requirements for cable systems after previous constitutional doubts suggested in Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622 (1994)). Moreover, in the 1995 Term, the Court, in Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996), reentered the contested terrain of campaign financing.

The enthusiasm for speech protection at the federal level is a modern innovation. Cf. Dahl, supra note 36, at 292 ("In the entire history of the Court there is not one case arising under the First Amendment in which the Court has held federal legislation unconstitutional.").

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[*446]

On the other hand, the Court hardly has foresworn judicial review. As an arbiter of federal structure, a defender of judicial process, and a protector of free speech against political overreaching, the Court's actions in the 1990-1995 Terms accord reasonably well with a theory that its interventions should protect the structure of democratic decisionmaking. In the past six years, the Court rarely has confronted federal legislative policies with openended claims of normative justice. n44

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n44 The only controversial and successful normative claim in the 1990s that the Court sustained against federal legislation outside of the First Amendment area is the remand of the equal protection claim in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). Although the decision potentially had broad effect, it is far from clear that it flouted a contemporary political consensus.

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b. State and Local Legislation

Confrontations with state and local legislatures encompass an array of issues different from challenges to national legislative mandates. n45 The Court's activism is somewhat greater in confronting state legislative choices; its action in support of contestable constitutional values is somewhat more intrusive.

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n45 Review of local legislation, although rarer, was more likely to be successful than review of state legislation; the Court rejected only one of the nine local claims in the past six years. Except for one Commerce Clause case, the issues concentrated on civil rights and civil liberties: free speech, equal protection, free exercise, commercial speech, and takings. See supra Table 5.

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The defense of nationalized trade marks the Court's most assertive clash with state and local legislatures. Eleven of the seventeen cases involving the dormant Commerce Clause n46 resulted in invalidation, rendering it the Court's primary vehicle for protecting national decisionmaking. Unlike the [*447] separation-of-powers cases at the national level, Commerce Clause review places some policies entirely outside of the states' control. Nonetheless, Congressional authorization can reverse judicial invalidations. Like most structural decisions, Commerce Clause activism ultimately transfers authority from one democratically accountable body to another, rather than substantively displacing majoritarian norms. n47

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n46 U.S. Const. art. I, <sect> 8, cl. 3.

n47 Similarly, the immunity from state taxation of federal retirement benefits invoked in Reich v. Collins, 513 U.S. 106 (1994), and Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993), could be lifted by affirmative federal authorization. The only structural invalidation of state or local legislation in the sample that was not reversible by federal legislation was U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

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Successful free speech challenges are almost as frequent as Commerce Clause challenges, but generally are not subject to Congressional override. Although Commerce Clause interventions directly benefit business interests, the Court's free speech activism has occurred predominantly at the behest of political outsiders and is largely defensible in classic terms of protecting access of dissident voices to the public arena. n48

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n48 See McIntyre v. Ohio Elections Comm., 115 S. Ct. 1511 (1995) (anonymous individual political speech); City of Ladue v. Gilleo, 512 U.S. 43 (1994) (right of an individual to criticize government policy on her property); R.A.V. v. City of St. Paul 505 U.S. 377 (1992) (racist speech by a juvenile); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (parade by white supremacist fringe group); Norman v. Reed, 502 U.S. 279 (1992) (minority political party); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (speech of convicted criminal).

Thus, the full array of state legislative cases casts some doubt on assertions that the Court's emerging First Amendment jurisprudence primarily benefits established interests. E.g., Mary Becker, Conservative Free Speech

and the Uneasy Case for Judicial Review, 64 U. Colo. L. Rev. 975 (1993); Morton J. Horwitz, The Constitution of Change: Legal Fundamentalism Without Fundamentalism, 107 Harv. L. Rev. 30, 10916 (1993); see also infra n. 77 (discussing similar First Amendment claims at the lower court level). Only in 44 LiquorMart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996), and City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), did the court sustain First Amendment challenges to state and local legislation which primarily benefited established interests.

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The demands of procedural due process have invalidated state and local legislative enactments almost as often as the mandates of the First Amendment. The Court's procedural due process activism, however, does not interfere so much with the achievement of popular goals in the name of open-ended claims of substantive justice as channel the means by which the goals may be achieved. n49

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n49 The cases invalidating statutory schemes as violating procedural due process in the civil context involved a variety of state substantive initiatives. See Reich, 513 U.S. 106 (system for providing remedies for illegal tax assessments); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) (system for adjudicating punitive damage claims); Harper, 509 U.S. 86 (system for providing remedies for illegal tax assessments); Foucha v. Louisiana, 504 U.S. 71 (1992) (system of civil commitment); Wyatt v. Cole, 504 U.S. 158 (1992) (prejudgment attachment); Connecticut v. Doehr, 501 U.S. 1 (1991) (same). In none of the cases do the constitutionally required procedures substantially impede the state's substantive objective.

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The Equal Protection Clause, which provoked Justice Scalia's recent fulminations against judicial overreaching, n50 provides the primary forum in which open-ended federal norms confront state legislative value choices. As the Court recently noted, n51 every piece of legislation involves a decision to treat certain persons differently, and thus every legislative choice carries some potential demand for justification under equal protection review. In response to most equal protection claims, however, in recent years, the Court generally has deferred to state choices with regard to substantive values. n52 In recent school desegregation cases, as in voting rights cases seeking to vindicate the claims of minorities, the Court has not been aggressive in reviewing state legislative decisions; indeed, the Court's primary intervention has been to trim the relief granted by lower courts. n53

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n50 United States v. Virginia, 116 S. Ct. 2264, 2291-309 (1996) (Scalia, J. dissenting); Romer v. Evans, 116 S. Ct. 1620, 1629-37 (1996) (Scalia, J. dissenting).

n51 Romer, 116 S. Ct. at 1627 ("Most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

n52 E.g., *Heller v. Doe*, 509 U.S. 312 (1993) (rejecting a disability discrimination claim); *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (rejecting a challenge to discrimination against new property owners); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648 (1992) (rejecting a challenge to discrimination against out-of-state corporations); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (rejecting an age discrimination claim); *Leathers v. Medlock*, 499 U.S. 439 (1991) (rejecting a challenge to discrimination among media entities).

n53 Desegregation cases include *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995); *United States v. Fordice*, 505 U.S. 717 (1992); *Freeman v. Pitts*, 503 U.S. 467 (1992); and *Board of Educ. v. Dowell*, 498 U.S. 237 (1991). The only voting rights case directly invoking equal protection on behalf of minorities is *Grove v. Emison*, 507 U.S. 25 (1993).

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The Court has engaged in open confrontation with the values adopted by state legislatures in three areas during the 1990-1995 Terms. First, its efforts to implement a vision of color-blind equality in the face of contrary state and local legislative judgments have brought the Court into regular confrontation with conflicting local priorities. n54 This conflict shows no sign of [449] abating. Second, although the Court has heard only one full-fledged challenge to legislative action based on reproductive autonomy during the 1990-1995 Terms, that case was an important one. In *Planned Parenthood v. Casey*, n55 the Court reaffirmed the protection for abortion it established in *Roe v. Wade*; n56 the opinion seemed to contemplate an open-ended judicial review of both the legitimacy of legislative motivations and the degree of burden associated with abortion limitations. The Court, however, has declined to entertain any plenary substantive due process cases in the abortion area since *Casey*. n57 And last Term, although it entertained three substantive due process challenges based on claims of fundamental rights, the Court [*450] rejected each unanimously. n58 Finally, in *Romer v. Evans*, n59 the Court invalidated a broad exclusion of gays and lesbians from protection against discrimination, branding popular animosity toward gays and lesbians an illegitimate state interest. n60 Whether this seed bears fruit depends on whether *Evans* turned on the peculiarly broad and gratuitous character of Colorado's Amendment 2.

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n54 The challenges to voting district boundaries drawn to maximize the political power of racial minorities commenced in *Shaw v. Reno*, 509 U.S. 630 (1993), and litigation has continued apace. See *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

In the area of government contracting, the Court pursued color blindness in confrontation with minority set-asides in *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993) (challenging city ordinance according preferential treatment to certain minority-owned contractors), and *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (challenging federal highway contract program).

The Court's other activist stance during the last six years in the equal protection area has been in implementing principles of color-blindness in jury selection by invalidating the use of peremptory challenges to exclude jury

members on the basis of race. See Georgia v. McCollum, 505 U.S. 42 (1992); Trevino v. Texas, 503 U.S. 562 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991); Ford v. Georgia, 498 U.S. 411 (1991); see also J.E.B. v. Alabama, 511 U.S. 127 (1994) (extending the principle to peremptory strikes exercised to exclude women from the jury). But c.f. Hernandez v. New York, 500 U.S. 352 (1991) (upholding the exclusion of bilingual jurors).

n55 505 U.S. 833 (1992) (upholding Roe v. Wade, 410 U.S. 959 (1973), and holding that an undue burden test would be applied in evaluating pre-viability abortion restrictions).

n56 410 U.S. 959 (1973).

n57 E.g. Janklow v. Planned Parenthood, 116 S. Ct. 1582 (1996) (denying certiorari); Edwards v. Hope Medical Group for Women, 115 S. Ct. 1 (1995) (denying request for stay); Casey, 510 U.S. 1309 (1994) (denying request for stay); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993) (denying request for stay).

In two per curiam cases, the Court declined to overturn invalidations of restrictive statutes but reduced the relief granted to the plaintiffs. See Leavitt v. Jane L., 116 S. Ct. 2068 (1996) (per curiam) (reversing lower court on severability of unconstitutional provision in anti-abortion statute); Dalton v. Little Rock Family Planning Servs., 116 S. Ct. 1063 (1996) (per curiam) (reversing trial court on the scope of injunction implementing a federal Medicaid entitlement). Last Term, in two other per curiam opinions, the Court rejected challenges to abortion regulations. Mazurek v. Armstrong, 117 S. Ct. 1865 (1997) (per curiam) (upholding a statute restricting the performance of abortions to licensed physicians); Lambert v. Wicklund, 117 S. Ct. 1169 (1997) (per curiam) (upholding a statute requiring parental notification for minors seeking abortions).

Lower courts have been circumspect in applying Casey outside of the area of abortion. Cf. Sandra Lynne Tholen & Lisa Baird, Note & Comment, Con Law is as Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts, 28 Loy. L.A. L. Rev. 971 (1995).

n58 Vacco v. Quill, 117 S. Ct. 2293 (1997) (rejecting a challenge to a prohibition on assisted suicide); Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (same); Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (rejecting a substantive due process challenge to commitment of sexually violent predators).

n59 116 S. Ct. 1620 (1996).

n60 Id. at 1629.

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B. The View from the District Courts: The Constitution and the Legislatures in 1994

The Supreme Court's use of legislative review might not reflect trial courts' exercise of judicial power. Selection effects may skim off some sets of cases into settlements, and the Supreme Court's discretion in granting

certiorari may mask a very different array of trial and appellate litigation. n61 Commentators periodically have noted the problem n62 but rarely investigated the reality.

-Footnotes-

n61 For a discussion of selection effects of settlement that might cause the cases decided by final judgment to differ from those initially filed, see, for example, Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. Legal Stud. 337 (1990); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 339, 367 (1991); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984). For a discussion of certiorari filters, see, for example, Perry, supra note 7, at 245-60.

n62 E.g., Easterbrook, supra note 7, at 379-80; Balkin & Levinson, supra note 7, at 1786 n.50; Schauer, supra note 9, at 401 n.6; Frederick Schauer, Judging in a Corner of the Law, 61 S. Cal. L. Rev. 1717, 1722 (1988) (arguing that appellate adjudication occupies a small and skewed portion of the "universe of law"); Kathleen M. Sullivan, The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 110-11 (1992) (noting that the impact of doctrines can be determined crucially by the way in which lower courts apply them).

-End Footnotes-

It is easy enough to observe the Supreme Court's exercise of judicial review. In a docket of approximately one hundred cases a year, a six-year sample of constitutional objections addressed by the Court in published opinions yielded only 292 cases invoking the Constitution. By contrast, in federal district courts, annual filings for the 1990s hovered around the onequarter million mark, with a yearly average of more than twenty thousand civil rights cases and more than fifty thousand prisoner cases. n63

-Footnotes-

n63 See Leonidas Ralph Mecham, Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 1995 Report of the Director 141-43 tbl. C-2A (civil cases), 207-09 tbl. D-2 (criminal cases) (1995).

Not all of these cases, of course, involve an exercise of judicial review. Of the 27,655 civil rights cases filed in 1993, for example, 12,962 were "employment cases" and 13,776 were "other civil rights cases." Id. at tbl. C-2A. Only a portion of the cases involved constitutional claims. See Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641, 670 tbl. V (1987) [hereinafter Eisenberg & Schwab, Reality of Constitutional Tort Litigation] (citing a 1980-1981 sample in the Los Angeles federal district court finding that 70% of "other civil rights" cases and 20% of employment civil rights cases involved constitutional claims); see also Theodore Eisenberg & Stewart J. Schwab, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 725 tbl. I (1988) [hereinafter Eisenberg & Schwab, Explaining Constitutional Tort Litigation] (noting that in a larger sample, 74% of "other civil rights" cases involved constitutional tort actions, and 18.7% of the cases concerning employment). Using these ratios, roughly 12,000

affirmative requests for constitutional review were filed nationwide in 1993. Similarly, of the 53,451 prisoner cases, 13,054 were habeas cases, and 33,933 were civil rights cases. Eisenberg and Schwab estimated in 1980 that nonprisoner constitutional tort cases represented 8.9% of the federal civil docket, and prisoner cases represented 17% of the docket. Id. at 725.

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[*451]

Clearly, within the constraints of reasonable expenditures of energy, a review of every case for even a single year is impossible. It is no wonder, therefore, that there is no recent comprehensive survey of the constitutional caseload of the federal district courts. n64 In the summer of 1995, I examined a one in ten sample of 1994 federal district court opinions available on Lexis, a sample that yielded 667 constitutional claims in 431 cases. n65 Rough calculations suggest that federal trial judges confronted constitutional claims in more than twenty-five thousand published opinions during the six years in which the Supreme Court addressed 292 cases raising constitutional issues. n66

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n64 An effort to compile a database of cases brought against state and local governments in the federal courts was aborted when federal budget reductions eliminated the entity which undertook the project. See Advisory Committee on Intergovernmental Relations, Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994 (1995) (identifying 2095 opinions filed in Section 1983 cases brought against state and local governments in the trial and appellate federal courts in 1994).

n65 For a discussion of the way in which the sample was drawn and the various limitations on the generalizability of the results, see *infra* Appendix.

n66 Six hundred sixty-seven claims are in the sample, included in 431 published opinions, in a year in which 20,136 Lexis-reported cases were filed. If this represents 4300 cases raising constitutional claims out of a total of 20,136 during 1994, this yields a rate of 21%. Between June 1990 and June 1996, 121,986 Lexis-reported cases were filed in the district courts. If 21% of these involved constitutional issues, the total constitutional universe among published opinions would be 25,600.

Even rougher calculations suggest that more than 250,000 cases filed in the federal trial courts involved constitutional claims. Administrative Office statistics suggest that between 1991 and 1995, plaintiffs commenced 171,481 prisoner civil rights cases; 66,213 prisoner habeas cases; 68,848 other civil rights cases; and 67,127 employment civil rights cases. Mecham, *supra* note 63, at 141-43 tbl. C-2A. Eisenberg and Schwab find that roughly 80% of "other civil rights" cases and 20% of employment cases raised constitutional claims. Eisenberg & Schwab, *Reality of Constitutional Tort Litigation*, *supra* note 63, at 670 tbl. V.

----- -End Footnotes- -----
[*452]

The cases in my sample suggest that the subjects on which trial courts confront legislatures substantially mirror patterns in the Supreme Court. The main difference between Supreme Court and trial court activism in the legislative area is the relative absence of cases invoking concerns of constitutional structure or federalism at the trial court level. Judicial review of legislation, however, constitutes a smaller portion of the trial courts' dockets than that of the Supreme Court.

1. The Incidence of Judicial Review of Legislation

At the Supreme Court level, the classical confrontation between the Court and legislatures predominated. Legislative actions are at issue in two of five cases decided by the Supreme Court. In the district court, the Marbury/Brown scenario is rare; in the sample, only thirty-three cases (7.6%) involved challenges to legislative action.

At the trial court level, not only were published court pronouncements less likely to involve challenges to legislative action, but the challenges were less likely to be successful. In the Supreme Court, exercises of review over legislation led to a finding of constitutional violations in almost half of the cases (48%). By contrast, at the trial court level, challenges were sustained at only half that rate (24%). n67

-Footnotes-

n67 The overall rate at which claims of constitutional violation were rejected in legislative cases, however, is similar (36% of trial court cases and 38% of Supreme Court cases).

-End Footnotes-

It could be argued that this is an artifact of the opinions sampled; published trial court opinions involve both interlocutory and final judgments. Disposition of a discovery request or denial of summary judgment for the defendant could appear as a "possible" plaintiff's victory, even though a final judgment appealed to the Supreme Court might appear as a case in which the plaintiff prevailed. Because the sample excluded cases in which the trial court filed no opinion, it may undercount the number of statutory invalidations.

This result is unlikely. One would expect that most trial judges who invalidate statutes would file opinions. n68 And it turns out that interlocutory [*453] opinions leaving constitutional issues open do not usually result in subsequent published invalidations. When I reviewed the history of the thirteen cases in the 1994 sample listed as possible legislative invalidations, I found that only one resulted in a subsequent published statutory invalidation, and eight resulted in victories for defendants. Thus, the level of judicial activism in the lower courts vis-a-vis legislatures is quite modest. In reviewing federal, state, and local legislation combined, assuming my sample is representative, less than one hundred federal cases in 1994 invalidated any portion of any legislation in reported federal cases. The sample, moreover, contained only two instances of invalidations resting on anything but the most routine of legal applications. n69

-Footnotes-

n68 Judgments which invalidate statutes seem more likely to be published than opinions rejecting challenges. A trial judge is unlikely to invalidate a legislative action without regarding the occasion as worthy of being noted, while rejecting a garden-variety challenge to a statute on settled precedent might well be deemed unworthy of publication. The published trial court opinions may, therefore, overstate the success rate. A discovery ruling on the way to an ultimate rejection of a claim would also appear as a "possible" claim.

n69 In the eight successful legislative challenges, two raised federal preemption claims against state statutes, one challenged a local occupation tax applied to federal judges, three challenged local ordinances on First Amendment grounds, and one read a federal sentencing statute narrowly in light of minimum rationality concerns.

Of the eight cases, only two called on the courts to engage in anything approaching a creative application of existing doctrine. In *United States v. Davis*, 864 F. Supp. 1303 (N.D. Ga. 1994), the court refused to apply an enhancement of federal sentences for crack cocaine to sales of cocaine base on the ground that such an enhancement would be irrational. In *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 1994 WL 86689 (E.D. La., Mar. 10, 1994), *aff'd*, 42 F.3d 1483 (5th Cir.), *cert. denied*, 115 S. Ct. 2583 (1995), the court enjoined the city from investigating the membership of private clubs in enforcing a local human rights ordinance.

- - - - -End Footnotes- - - - -

Within their smaller universe of legislative review, trial courts are less likely than the Supreme Court to deploy judicial review against the federal or state legislatures and more likely to review local ordinances. n70 At all governmental levels, the challenged legislation is less likely to survive constitutional scrutiny in the lower courts. n71

[SEE TABLE IN ORIGINAL]

- - - - -Footnotes- - - - -

n70 Legislative Cases

[SEE CHART IN ORIGINAL]

n71 Constitutional Challenges to Legislation Sustained

[SEE CHART IN ORIGINAL]

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[*454] [*455]

2. Patterns of Judicial Activism

In this diminished "classical core," the distribution of issues differed from the Supreme Court primarily in the relative absence of challenges under the structural provisions of the Constitution. More than one-quarter of the constitutional claims presented to the Supreme Court involved separation of powers, federal structure, or the dormant Commerce Clause, and these

provisions accounted for almost forty percent of the successful legislative challenges. n72 By contrast, the trial court sample contains no efforts to attack statutes on federalism or separation-of-powers grounds; only three of sixtyone claims invoke the dormant Commerce Clause, and none of the three resulted in a statutory invalidation; four more invoked federal supremacy or preemption claims with substantial success. n73 The great issues of federalism and inter-branch comity rarely impinge directly on the consciousness of the trial courts as they exercise judicial review.

-Footnotes-

n72 See supra Table 1.

n73 Comparing the total of actual and "possible" invalidations, however, the potential success rate of Commerce Clause claims at the trial court (2/3; 66%) matched the rate at the Supreme Court (12/18; 66%). One reader of this Article, struck by the disproportion between the role of the negative Commerce Clause in the Supreme Court and the lower courts, suggested that Commerce Clause cases may be adjudicated at the trial level by state rather than federal courts. This hypothesis does not seem to be supported by the facts. When I took a 1-in-20 case sample of Lexis-reported constitutional opinions in the lower state courts in 1994, I could identify only 2 of 290 cases raising Commerce Clause challenges.

At the district court level, the category "other" contains four Supremacy Clause claims (1 rejected; 2 successful), three right to travel claims (2 rejected), and one federal tax claim (sustained).

-End Footnotes-

In other dimensions, the profile of trial court legislative cases is quite similar to the Supreme Court's caseload. First Amendment speech and association cases, the most prevalent area of challenge to legislative enactments in the Supreme Court, accounted for twenty-three percent of the Court's legislative caseload. The trial court sample contained a comparable proportion of First Amendment cases challenging legislation (33%) with comparable rates of success. n74 Although First Amendment challenges to legislation in the Supreme Court often dealt with issues of high constitutional policy involving allegations of state or national efforts to criminally punish unconventional speech, structure national media, or regulate the political process, n75 the trial courts' legislative docket was preoccupied with local ordinances administering access to local public forums. Trial courts protected [*456] unconventional speech, but the threats they confronted were more likely to be matters of administration n76 than threats of wholesale censorial suppression. Judicial review by the trial courts does not seem to be so much an opportunity to shape public consciousness by dramatizing the overarching importance of free expression as a quotidian effort to patrol the boundaries of access to the public arena on behalf of the dispossessed. n77

-Footnotes-

n74 At the Supreme Court level, 16 of the 45 First Amendment challenges to legislative action were rejected (35%); in the District Court sample, 4 out of 11 (36%).

n75 See, e.g., cases cited supra note 16.

n76 Of the 11 legislative First Amendment cases, five involved municipal "time, place, and manner" regulations of expressive activity. These accounted for four out of seven potentially successful claims. One case involved a ballot access claim, and another involved a First Amendment challenge to the military's "don't ask, don't tell" policy. Both were potentially successful.

n77 Those concerned that judicial review in the First Amendment area primarily benefits the powerful, see, e.g., Becker, supra note 48, at 976-77 (challenging the case for binding judicial review from the perspective of women); Horwitz, supra note 48, at 108-12 (addressing the question of whether free speech protections benefit entrenched interests), may be comforted by the array of plaintiffs in the trial court sample. Potentially successful plaintiffs included three minor political parties, gay members of the military, a fringe pro-life group, and a religious sect. The only arguably entrenched group to challenge a legislative enactment successfully at the trial court level was the Louisiana Debating and Literary Association. See Louisiana Debating and Literary Ass'n v. City of New Orleans, 1994 WL 86689 (E.D. La., Mar. 10, 1994) (enjoining the city from investigating the membership of private clubs in enforcing a local human rights ordinance), aff'd, 42 F.3d 1483 (5th Cir.), cert.denied, 115 S. Ct. 2583 (1995). In the sample, a similar challenge to a human rights statute by the Elks was rebuffed in Benevolent and Protective Order of the Elks v. Reynolds, 863 F. Supp. 529 (W.D. Mich. 1994).

Among nonlegislative claims at the trial court, the results are similar. Prisoners and dissident public employees asserted more than half of the First Amendment claims. Other potentially successful claimants included those claiming retaliatory arrests. The only establishment claimants were the media, who invoked the First Amendment in two cases. See infra note 114.

- - - - -End Footnotes- - - - -

Equal protection challenges were much more common within the trial courts' legislative docket than at the Supreme Court. Cases raising these claims constituted approximately fourteen percent (17/120) of the Supreme Court's legislative caseload and appeared in forty-two percent (14/33) of the legislative challenges in trial courts. n78 The distribution of the activism, however, was quite similar.

- - - - -Footnotes- - - - -

n78 Equal protection challenges to legislation, however, were less likely to succeed before the trial courts (none sustained, 50% possible, 50% rejected by the trial courts; 47% sustained, 35% rejected by the Supreme Court).

- - - - -End Footnotes- - - - -

In the Supreme Court, successful equal protection challenges to legislation were found almost exclusively in the half of the equal protection docket which dealt with racial classifications. Two cases involved remedies for previously adjudicated claims against segregated educational systems brought on behalf of African-American plaintiffs; n79 six comprised challeng- [*457] es by white plaintiffs to racially conscious legislation aimed at benefiting minorities. n80 By contrast, efforts by businesses to challenge legislation as irrational were

uniformly unsuccessful, as were challenges by disabled plaintiffs, aged plaintiffs, and criminal defendants to legislative line drawing. n81 Only in Romer was a plaintiff successful in an equal protection challenge to legislation outside of the area of race. n82

-Footnotes-

n79 Missouri v. Jenkins, 115 S. Ct. 2038 (1995); United States v. Fordice, 505 U.S. 717 (1991).

n80 Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996); Miller v. Johnson, 115 S. Ct. 2475 (1995); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Shaw v. Reno 509 U.S. 630 (1993); Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993).

n81 See, e.g., cases cited supra note 58.

n82 Romer v. Evans, 116 S.Ct. 1620 (1996) (invalidating a broad exclusion of gays and lesbians from protection against discrimination).

-End Footnotes-

The trial court profile was similar. Two challenges by African-American plaintiffs to allegedly racially invidious legislation survived initial judicial scrutiny, while the single affirmative action challenge by a white plaintiff was rejected. n83 One of the five efforts by businesses to challenge regulatory legislation n84 and two of the five challenges by nonracial minorities n85 survived judicial scrutiny.

-Footnotes-

n83 Because the sample of cases here largely preceded the Supreme Court's recent surge of activism against racially conscious government legislation which seeks to benefit minorities, the incidence of affirmative action challenges in my sample may underrepresent such litigation.

n84 Two cases were rejected on the merits, and two were dismissed on procedural grounds.

n85 Trial courts rejected equal protection challenges by disabled plaintiffs, homeless plaintiffs, and criminal defendants. Challenges by a gay plaintiff and by a treatment center for alcoholics survived initial scrutiny.

-End Footnotes-

Challenges to legislative regulation of property under takings or substantive due process theories were somewhat more prevalent but no more successful in the trial courts than in the Supreme Court. n86 In the trial courts, substantive due process claims raising fundamental rights complaints, which occupied only two of the 120 legislative cases considered by the Supreme Court, accounted for five of the thirty-three cases on the trial court legislative docket, with only two of those claims surviving initial judicial scrutiny. n87

-Footnotes-

n86 The Supreme Court decided 13 property cases, which constituted 10.8% of its legislative caseload. Of the 13, one was successful and three were potentially successful. Property cases constituted 22% of the trial courts' legislative caseload. Three cases in which claims are listed as "potentially successful" in supra Table 1 nonetheless were dismissed for procedural reasons, so of the eight cases, two were potentially successful. Thus, the concern that recent Supreme Court precedent "delegates to the lower federal courts, stocked plentifully with Reagan and Bush appointees" the ability to use the Takings Clause to block regulation (see, e.g., Sullivan, supra note 62, at 111) seems to have proven excessive. Cf. infra text accompanying note 118 (indicating that lower court property cases involving nonlegislative decisionmakers have a somewhat higher success rate).

n87 Both potentially successful cases involve challenges to exclusions of rape and incest survivors from state medicaid programs. Plaintiffs prevailed in each case on federal statutory grounds. The court rejected substantive due process challenges by gay soldiers, operators of nude bars, and dissident public employees.

-End Footnotes-

3. Who Wins?

The relative tendency to vindicate business and property claimants was absent in legislative challenges at the trial court level. At the Supreme Court, businesses, taxpayers, and property holders accounted for almost half of the constitutional activism against legislative determinations; public plaintiffs, although much more successful, brought only one-sixth of these cases. In contrast, at the trial court level class actions and public groups brought forty percent of the legislative challenges (13/33), and the receptivity of the courts was greater than that in the thirty-six percent (12/33) of legislative claims brought by business, taxpayers, and property holders. n88 Likewise, the rate of success and rejection for nonbusiness individuals in the trial court was comparable to the business success rate. n89 Women appeared as plaintiffs in legislative cases at both the trial court and Supreme Court levels less than a third the number times men appeared, though their success rates are comparable. n90

-Footnotes-

n88 The Court rejected four (30%) of the 13 public/class action legislative cases; claimants prevailed in four (30%), and the Court left open the possibility of victory in the remaining five cases (38%). The Court rejected the claims in three (25%) of the twelve business/property/taxpayer legislative cases; claimants won (2/12) or retained the possibility of winning (4/12) in half the cases. Claimants lost five (55%) of the nine individual (nonbusiness) legislative cases, won two (22%), and retained the possibility of a victory in the other two (22%).

n89 See supra note 88.

n90 At the trial court level, two of the 33 legislative challenges involved female claimants, with half losing; nine of the 33 legislative challenges were

brought by male claimants, with 44% losing. Before the Supreme Court, ten of the 119 legislative challenges involved female claimants, and the Court rejected half of their claims; 37 of the 119 legislative challenges were brought by men, and 54% failed.

- - - - -End Footnotes- - - - -

II. The "Dark Matter" of Constitutional Review: Nonlegislative Decisionmakers

A. The View from the Supreme Court

Although the paradigm of Marbury and Brown accounts for 120 cases (149 claims) before the Court during the early 1990s, almost one-and-a-half [*459] times that number of constitutional review cases do not involve challenges to decisions made by legislative bodies. Of these 172 cases, 83 challenged judicial actions, 45 challenged an action by an administrative body, 30 involve a decision by individual administrative officials, and 24 challenged police decisions.

These decisions fall outside of standard discussions of judicial review. The colorful claim that federal judicial review represents an illegitimate coup d'etat n91 rests on the image of courts confronting Congress or perhaps state or local legislatures. Much of the constitutional business of the Supreme Court, however, involves the actions of officials whose claims to represent the will of the people are at least as diffuse as the mandate of the judiciary. Whether the issue is democratic responsiveness or fidelity to national values, there is no strong reason to believe that the judgment of a state judge, a local prison warden, or a police officer on the beat is preferable to that of the Supreme Court. n92 The Court's decisions periodically allude to this distinction, n93 but usually it passes unnoticed.

- - - - -Footnotes- - - - -

n91 E.g. Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 6 (1971) (asserting that the nonoriginalist Court is a "perpetrator of limited coups d'etat" and that the only possible response for a citizen who does not share the Court's moral and political views is to "ignore the Court whenever he can get away with it and overthrow it if he can").

n92 Cf. Friedman, supra note 6, at 634-35 (asserting that when judges review the work of administrative officials, "making the countermajoritarian difficulty stick is extremely difficult").

The rate at which defendants prevail in the Supreme Court sample has some relationship to the level of government reviewed, but no consistent relation to the presence or absence of direct democratic mandate:

Governmental Defendants' Success Rate in Constitutional Cases Before the Supreme Court and Total Number of Cases Decided

[SEE CHART IN ORIGINAL]

n93 BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1604-07 (1996) (Breyer, J., concurring) (discussing the lack of legal constraints on juries'

determination of punitive damages); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 455-57 (1993) (Stevens, J.) (comparing the rationality standard for legislatures and juries given the different safeguards that are available in the different processes).

- - - - -End Footnotes- - - - -

Conversely, much review of nonlegislative decisions cannot be justified by some of the most popular defenses of the practice of judicial review. In the nonlegislative arena, the Court feels relatively free to administer norms not directly linked to text or history; these norms cast the Court not as a guardian of democratic politics or constitutional structure but of the citizenry's rights against physical oppression and arbitrary treatment.

[SEE TABLE IN ORIGINAL]
[*460] [*461]

As Table 7 indicates, claims based on federal structure and separation of powers are virtually absent outside the legislative realm. Issues of free speech and equal protection are less prevalent, though somewhat more likely to succeed. Free speech and equal protection issues in these cases generally address local administration of government property or court procedure rather than broad political or structural concerns. n94

- - - - -Footnotes- - - - -

n94 In the First Amendment arena, issues of allegedly impermissible employment decisions and rules governing access to public fora predominated the nonlegislative docket, followed by local police regulations regarding professional advertising.

The seven public forum cases are: Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (challenging denial of university funds to a Christian student publication); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (seeking an injunction requiring the advisory board to issue a permit for the erection of a Latin cross in plaza next to the state capitol); Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995) (alleging that a group's exclusion of a gay organization from its St. Patrick's Day parade violated Massachusetts' public accommodation law); Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) (alleging that Amtrak's rejection of an artist's lease of billboard space because his display was political violated the First Amendment); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (alleging that a school district violated a religious organization's constitutional rights by refusing its request to use school facilities for a religious film series); International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (challenging a port authority's restrictions on distribution of literature and solicitation of contributions in airport terminals); Burson v. Freeman, 504 U.S. 191 (1992) (seeking to enjoin enforcement of Tennessee statutes prohibiting solicitation of votes and display of campaign materials within 100 feet of entrances to polling places on election days).

The five government employee cases are: O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996) (challenging a contractor's removal from a city's rotation list of available towing service contractors); Board of County

Comm'rs. v. Umbehr, 116 S. Ct. 2342 (1996) (alleging that a county board terminated a government contract in retaliation for the contractor's criticism of the county and the board); Waters v. Churchill, 511 U.S. 661 (1994) (alleging that the plaintiff's discharge because of criticism violated the First Amendment); Hafer v. Melo, 502 U.S. 21 (1991) (involving discharged state employees who brought suit claiming they had been discharged because of their political affiliation); Lehnert v. Ferris Faculty Assn., 500 U.S. 507 (1991) (involving dissenting employees' claim that the collection and use of service fees in an agency shop violated their First and Fourteenth Amendment rights).

The three local advertising cases are: Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (challenging the constitutionality of state bar rules which prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident); Ibanez v. Florida Dept. of Bus. & Prof. Regulation, 512 U.S. 136 (1994) (appealing a decision of a state agency reprimanding the plaintiff for referring to her C.P.A. license in advertising); Edenfield v. Fane, 507 U.S. 761 (1993) (challenging a state's ban on in-person solicitations by C.P.A.'s).

A smaller segment of the nonlegislative First Amendment confrontations involved matters of high policy (see, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (challenging regulations prohibiting abortion counseling, referrals, and activities promoting abortion as a method of family planning)), efforts to punish speech directly (see Madsen v. Women's Health Center, 512 U.S. 753 (1994) (challenging an injunction against antiabortion protesters); Dawson v. Delaware, 503 U.S. 159 (1992) (holding that it was an error to admit a stipulation of the defendant's membership in a white, racist prison gang because that evidence was not relevant to any issue being decided at the punishment phase); Gentile v. State Bar, 501 U.S. 1030 (1991) (holding that the "substantial likelihood of material prejudice" test satisfies the First Amendment)), and the freedom of the press (see, e.g., Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (involving an action to recover for breach of contract and misrepresentation after publishers revealed the identity of a confidential source); Masson v. New Yorker Magazine Inc., 501 U.S. 496 (1991) (involving a libel claim based on altered quotations published in magazine articles and a book)).

Among the equal protection cases, nonlegislative claims focused on challenges to allegedly impermissible peremptory challenges in jury selection and school desegregation. For jury cases, see Powers v. Ohio, 499 U.S. 400 (1991) (holding that under the Equal Protection Clause, the criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror are of the same race); Georgia v. McCollum, 505 U.S. 42 (1992) (holding that the Equal Protection Clause prohibits a criminal defendant from engaging in purposeful race-based exclusion of jurors); Trevino v. Texas, 503 U.S. 562 (1992) (holding that the defendant adequately preserved his claim that the state's use of peremptory challenges violated the Equal Protection Clause); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) (holding that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race because it would violate the challenged jurors' equal protection rights); Ford v. Georgia, 498 U.S. 411 (1991) (rejecting a state's procedural rule barring consideration of constitutional issues involving challenges to jury selections). See also J.E.B. v. Alabama, 511 U.S. 127 (1994) (extending equal protection prohibitions to peremptory strikes exercised to exclude women from the jury). But c.f. Hernandez v. New York, 500 U.S. 352

(1991) (upholding exclusion of bilingual jurors)).

For school desegregation cases, see Freeman v. Pitts, 503 U.S. 467 (1992) (holding that a district court has the authority to relinquish supervision and control over a school district in incremental stages before full compliance with judicial desegregation decree has been achieved in every area of school operations); Board of Educ. v. Dowell, 498 U.S. 237 (1991) (holding that in determining whether to dissolve a desegregation decree, a trial court should consider whether the school district complied in good faith with the decree and whether vestiges of past discrimination have been eliminated to the extent practicable).

The 1995 Term had the potential to begin an exception to this trend in the equal protection area, but it did not. United States v. Virginia, 116 S. Ct. 2264 (1996) (challenging a state military school's male-only admissions policy), involved a local controversy on gender equity. Both United States v. Armstrong, 116 S. Ct. 1480 (1996) (rejecting a claim of selective prosecution based on race because of lack of credible evidence that similarly situated defendants of other races could have been prosecuted but were not), and Wisconsin v. New York 116 S. Ct. 1091 (1996) (holding that a state decision not to statistically adjust census figures was not subject to heightened scrutiny), had potentially sweeping implications regarding the administration of justice and the census. In each case, the Court upheld the challenged federal actions.

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[*462] [*463]

Outside the legislative arena, the basis for a perception of emerging constitutional activism on behalf of property fades. Challenges to regulatory measures based on doctrines that directly protect property rights were raised in only six of the 172 nonlegislative cases, and were successful in only two. n95 Business, taxpayer, and property plaintiffs account for barely ten percent of the Supreme Court's nonlegislative constitutional caseload. The Court sustained only six (31%) of the constitutional claims in the nineteen cases involving taxpayers, businesses, or landowners and sustained thirtyfour (26%) of the 124 constitutional cases involving nonbusiness individuals, including criminal defendants.

- - - - -Footnotes- - - - -

n95 BMW of North America, Inc., 116 S. Ct. 1589; Dolan v. City of Tigard, 512 U.S. 374 (1994). One might suggest that Dolan is a case of such moment that a 1994 trial court sample could not adequately capture its impact. Accordingly, in January 1997 I sought to identify all 1996 district court cases which implemented Dolan. Only two cases cited Dolan; only one concerned an alleged regulatory taking, and the plaintiff lost. Marshall v. Board of County Commissioners, 912 F. Supp. 1456 (D. Wyo. 1996) (dismissing a damage action against land use regulators because of governmental immunity).

- - - - -End Footnotes- - - - -

In cases in which legislative action is not at issue, the Court often is preoccupied with the control of forcible government coercion, criminal justice, and administrative overreaching. The claims here do not arise from the