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Cover Page Footnote

Sho Sato Professor of Law, University of California at Berkeley. Peter Maybarduk provided valuable research. I would like to thank Dick Buxbaum, Goodwin Liu, and Adam Samaha for comments on an earlier draft, as well as workshop participants at William Mitchell Lalw School.

PANEL VI: EQUAL PROTECTION

BACKWARD-LOOKING LAWS AND EQUAL PROTECTION: THE CASE OF BLACK REPARATIONS

*Daniel A. Farber**

This Article explores two seemingly unrelated topics, proposals for black reparations and the unitary approach to the Equal Protection clause championed by Justice John Paul Stevens. As it turns out, the two have surprisingly deep connections. The unitary approach, as exemplified by Justice Stevens's equal protection jurisprudence, provides a valuable lens for examining reparations. In turn, the reparations issue highlights important features of the unitary approach.

Although his remarks on the subject have been largely forgotten by constitutional scholars, Justice Stevens did have occasion to discuss the issue of reparations only a few years after he joined the U.S. Supreme Court.[1] Admittedly, linking black reparations with the Stevens approach to equal protection may seem paradoxical, particularly with respect to his early years on the Court. In those early years, Justice Stevens appeared to be no friend of affirmative action: In *Regents of the University of California v. Bakke*, he authored an opinion that would have outlawed affirmative action in education on statutory grounds.[2] In *Fullilove v. Klutznick*, he sharply rejected a federal affirmative action plan, going so far as to quote extensively from the Nazi Nuremberg laws as a comparison point.[3] His dissent was all the more noteworthy because Justices Warren Burger, Byron White, and Lewis Powell—none of whom are exactly famed for liberalism—provided the key votes to uphold the affirmative action statute in question. Surely then, Justice Stevens would have been no fan of an idea that is in many ways farther reaching than affirmative action.

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1. Fullilove v. Klutznick, 448 U.S. 448, 547 (1980) (Stevens, J., dissenting).

2. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *Fullilove* involved a federal public works statute that set aside ten percent of the funds for minority-owned businesses. 448 U.S. at 453. Dissenting from a six-Justice majority, Justice Stevens voted to strike down the law. *Id.* at 553-54 (Stevens, J., dissenting).

3. *Fullilove*, 448 U.S. at 533 n.5 (Stevens, J., dissenting).

And yet, in the same *Fullilove* opinion that rejected a limited minority set-aside for government contracts, Justice Stevens also expressed support for black reparations.[4] Although he found the set-aside scheme in *Fullilove* unsupportable, it was not because he opposed recompense to African Americans. Justice Stevens was acutely aware of the "tragic class-based discrimination against Negroes that is an indelible part of America's history."[5] In response to this history, he said, a sweeping program of reparations could be warranted. As he put it, "the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class."[6] That such compensation would not be token was implied by his further remark that he was unsure "[w]hether our resources are adequate to support a fair remedy of that character."[7]

In an opinion that otherwise takes a grudging view of affirmative action, perhaps these remarks might be dismissed as a peculiar aberration. Still, it is striking that an apparently conservative opinion converges with some of the proposals made by progressives today.[8] This Article explores the implications of this convergence, in terms of Justice Stevens's approach to equal protection and in terms of the normative case for reparations.

Admittedly, one might question whether the convergence was anything more than a momentary, glancing encounter. After all, Justice Stevens rejected the reparation justification for the statute that was before the Court in *Fullilove*.[9] Later, when his opinions became more favorable to affirmative action, they were notable for their emphasis on the forward-looking justifications for race conscious programs.[10] One might infer, then, that the offhand reference to reparations was overtaken by changes in his approach to affirmative action. One might also suspect that, as a general matter, he may have rejected retrospective justifications for statutory classifications. This may or may not be correct, as a biographical matter. For present purposes, however, the biographical question of the Justice's current personal attitude toward reparations (if any) is not critical. What is important is the conceptual question of how reparations fit into his unitary approach to equal protection.

The unitary approach to equal protection turns out to provide an illuminating perspective on reparations. As we will see in later equal protection cases, Justice Stevens was not at all unwilling to accept backward-looking justifications for other kinds of classifications—most notably, for statutes providing assorted benefits to veterans in gratitude for

4. *Id.* at 537.
5. *Id.*
6. *Id.*
7. *Id.*
8. An excellent overview of the current debate can be found in Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DePaul L. Rev. 1181 (2004).
9. *See infra* notes 34-36 and accompanying text.
10. *See infra* Part I.B.

their past service.[11] A scheme that provided benefits to the "veterans" of slavery is consistent with the themes addressed in these later opinions, though Justice Stevens has also explored some of the pitfalls of backward-looking statutes.[12]

Part I begins this inquiry by examining Justice Stevens's proposed unitary theory of equal protection and by briefly reviewing his application of that theory to affirmative action. Part II then focuses on a specific aspect of reparations—their retrospective character—and examines how Justice Stevens has approached other statutes with backward-looking justifications. Part III analyzes the reparations issue within the unitary equal protection framework, while Part IV considers how this analysis can enrich our understanding of the unitary approach. The Article closes with some reflection on impartiality as a goal for the legal system, as exemplified in equal protection doctrine in particular and judicial reasoning in general.

Two points should be made at the outset regarding the Article's discussion of the reparations issue. First, this Article does not address the political prospects or policy merits of reparations. The reparations idea may not be politically viable or may be a less promising strategy for African Americans than forward-looking reforms. Moreover, designing an appropriate and effective mechanism for reparations would be far from straightforward. The question addressed in the Article is merely whether such programs would necessarily violate our constitutional idea of equality—and even that question is addressed from only one of the possible perspectives.

Second, conservative readers may think that any link between Justice Stevens and the concept of reparations shows only that he is even more liberal than they feared. But Justice Stevens's remarks in *Fullilove* did not stem from an embrace of social transformation. Rather, they reflected a more general perspective on equal protection: in particular, his view that the role of judges is to assure the impartiality of government actions rather than their wisdom.

Moreover, although conservatives may or may not support reparations,[13] the concerns that animate reparation proposals have wide resonance across the political spectrum. President George W. Bush, speaking in the aftermath of Hurricane Katrina in New Orleans, gave voice to some of these concerns. He observed that poverty of so many in the region "has roots in a history of racial discrimination, which cut off generations from the opportunity of America."[14] He added, "We have a duty to confront this

11. *See infra* Part II.A.

12. Backward orientation is of course a hallmark of reparations. *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 692 (2003).

13. Conservative scholars such as Professors Posner and Vermeule are more sympathetic than one might expect to such claims. *See id.*

14. Elisabeth Bumiller, *Bush Pledges Federal Role in Rebuilding Gulf Coast*, N.Y. Times, Sept. 16, 2005, at A1.

poverty with bold action."[15] Reparations advocates could not have said it better.[16]

Thus, Justice Stevens's past expression of support for reparations does not necessarily reflect a distinctive ideological stance. The underlying normative position is widely shared. What makes Justice Stevens unusual is not his politics but his ability to dispassionately address such a controversial issue. His enduring contribution to American jurisprudence does not lie in his past or current views of reparations, nor even in his unitary approach to equal protection laws. Rather, it lies in his effort to embody a vision of legal impartiality in judicial decisions. This norm of impartiality underlies both the unitary approach and Justice Stevens's efforts to apply that approach to controversial issues such as racial justice.

I. THE STEVENS PERSPECTIVE ON EQUAL PROTECTION

Justice Stevens's approach to equal protection subjects all statutes to a uniform standard, thereby encouraging a judge to separate political and social controversies from legal analysis. In his thirty years on the Court, Justice Stevens has espoused this unitary approach to equal protection with remarkable consistency. This section begins by sketching his approach and then examines how he has applied it to the specific issue of affirmative action.

A. *Equality and the Impartial Sovereign*

The Supreme Court's current approach to equal protection features the well-known three-tiered system of review.[17] Statutes based on certain kinds of classifications, most notably race, are subject to strict scrutiny. Such statutes are unconstitutional unless the government can prove them necessary to achieve a compelling government purpose.[18] Other classifications, with the leading example being gender, are subject to middle-tier scrutiny: To be valid, these classifications must be substantially related to an important government purpose.[19] All remaining statutory classifications are subject to rational basis review: They need only be rationally related to a legitimate governmental interest. In practice, this often means that they require only the most tenuous justification.[20]

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15. *Id.*

16. It is also worth noting that President Ronald Reagan signed the legislation providing reparations to Japanese-American victims of the World War II internment. *See* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. Rev. 429, 451 (1998).

17. Current doctrine is explained and critiqued in Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481 (2004).

18. Ironically, this approach was first articulated in two cases upholding racial discrimination. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

19. Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

20. Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

Justice Stevens has famously resisted this approach. His concurrence in *Craig v. Boren*, in which the Court expanded the number of tiers from two to three, provides perhaps the most notable statement of his view:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.[21]

Justice Stevens continued in *Craig* by questioning whether the "tiers" actually explained how the Court reached decisions or were even key factors motivating those decisions.[22]

His criticism of the three-tier approach is not without foundation. It is not hard to find purportedly rational basis cases where the Court has actually probed the statute more deeply,[23] middle-tier cases where the actual degree of scrutiny seems higher[24] or lower than the articulated test,[25] and compelling interest cases that in reality fail to apply that test.[26] In practice, then, the Court's analytical scheme has an uncertain relationship with its actual decision making.

In place of the three-tiered test, Justice Stevens proposes a unified approach. The key to this inquiry is the attempt to determine whether a statute can plausibly be attributed to the action of an impartial sovereign:

> In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[27]

A survey of Justice Stevens's equal protection jurisprudence as of 1987 concluded that he had followed this approach with great, though not

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21. *Craig*, 429 U.S. at 211-12 (Stevens, J., concurring).

22. *Id.* at 211-14.

23. *See* Romer v. Evans, 517 U.S. 620 (1996) (striking down as irrational a state constitutional restriction on the inclusion of gays and lesbians within civil rights statutes); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (finding a restriction on a group home for the mentally disabled to be impermissible under the rational basis test).

24. Notably, *United States v. Virginia*, 518 U.S. 515 (1996), seems to verge on strict scrutiny.

25. *See* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (upholding a gender distinction in a statutory rape prohibition with little serious scrutiny).

26. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding affirmative action while implausibly purporting to apply the same strict scrutiny that would have been used if the defendant had instead been discriminating against racial minorities).

27. *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

complete, consistency.[28] The same consistency is evidenced by his decisions in the nearly twenty years since then.[29]

Rather than applying three varying standards for different categories of cases, Justice Stevens's analysis asks the same three questions in every case: "What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?"[30] In considering how these questions might be answered in the context of black reparations, we must begin by seeing how Justice Stevens has addressed them in affirmative action cases.

B. *Affirmative Action*

Since the 1970s, some of the most contentious equal protection cases have involved affirmative action.[31] *Fullilove* gave Justice Stevens his first opportunity to discuss the constitutional dimension of affirmative action.[32] *Fullilove* involved a federal public works statute that set aside ten percent of funding for minority-owned businesses.[33] Dissenting from a six-Justice majority, Justice Stevens voted to strike down the law.[34]

The flavor of the dissent can be gauged from the opening sentence, which characterizes the set-aside as "creat[ing] monopoly privileges in a $400 million market for a class of investors defined solely by racial characteristics."[35] One of Justice Stevens's key criticisms of the set-aside was that Congress had never explained its definition of the class, which included "citizens of the United States who are Negroes, Spanish-speaking,

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28. *See* Note, *Justice Stevens's Equal Protection Jurisprudence*, 100 Harv. L. Rev. 1146 (1987). Based on my review of all of Justice Stevens's equal protection opinions since that time, I see no signs of a deviation from this approach.

29. Demonstrating this proposition would require a discussion of nearly two decades worth of opinions, but no exceptions are apparent.

30. *Cleburne*, 473 U.S. at 453.

31. It has also been a focal point of much important scholarship. On the question of color-blindness, see, for example, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Colum. L. Rev. 1060 (1991); Laurence H. Tribe, *"In What Vision of the Constitution Must the Law be Color-Blind?,"* 20 J. Marshall L. Rev. 201 (1986); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979). For discussion of possible justifications for affirmative action, see Akhil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA L. Rev. 1745 (1996); Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195 (2002); Girardeau Spann, *The Dark Side of* Grutter, 21 Const. Comment. 221 (2004).

32. The Court's deliberations in *Fullilove* are discussed in Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 Wm. & Mary L. Rev. 473, 538 (1995). Tushnet observes, "Chief Justice Burger's instinct in *Fullilove* was right: It is better to write a diffuse opinion reaching a result on which all agreed than to attempt a false precision that divided the majority." *Id.*

33. Some troubling aspects of the statute and the legislative process are discussed by the civil rights lawyer who successfully defended the statute before the Court, in Drew S. Days, III, *Fullilove*, 96 Yale L.J. 453 (1987).

34. Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting).

35. *Id.*

Orientals, Indians, Eskimos, and Aleuts."[36] Justice Stevens found none of the four purported justifications for the statutory scheme to be supportable.

For present purposes, the most important of these justifications was that the set-aside was "a form of reparation for past injuries to the entire membership of the class."[37] As noted earlier, Justice Stevens found a basis for such reparations for African Americans, but not for the entire class of beneficiaries. "Racial classifications," he said, require "the most exact connection between justification and classification," and "[q]uite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians."[38] Even if all of the included groups were entitled to some form of reparations for past harm, there was no reason to assume that they suffered the same magnitude of harm.[39] Although admitting the existence of a history of discrimination regarding these groups, he found it insufficient to justify the statute: "[I]f that history can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme, it will serve not merely as a basis for remedial legislation, but rather as a permanent source of justification for grants of special privileges."[40] Without a

> duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a 'piece of the action' for its members.[41]

Justice Stevens proceeded to dismiss the government's other three arguments for the validity of the set-aside. He found no reason to think that judicial remedies provided insufficient redress for firms that had been injured in the past by discrimination.[42] He also rejected the argument that minority representatives were entitled to favor constituencies that had been excluded from previous patronage—a sort of "equal access to pork" argument.[43] Another justification—"facilitating and encouraging the participation by minority business enterprises"—he viewed as "unquestionably legitimate."[44] But the statute was not "designed to remove any barriers to entry"; "[n]or does its sparse legislative history detail any insuperable or even significant obstacles to entry into the competitive market."[45] Thus, Justice Stevens had little difficulty in concluding that the federal set-aside was invalid.

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36. *Id.* at 535 (internal quotation omitted).
37. *Id.* at 536.
38. *Id.* at 537.
39. *Id.* at 538.
40. *Id.* at 539.
41. *Id.*
42. *Id.* at 541.
43. *Id.* at 542.
44. *Id.* at 542-43.
45. *Id.* at 543.

Almost a decade later, a city ordinance based on the federal statute upheld in *Fullilove* came before the Court. Not surprisingly, Justice Stevens voted to strike down the ordinance, this time as part of the majority. In Justice Stevens's discussion of this state-law reincarnation of *Fullilove*, however, the reparation rationale received scant attention. Instead, Justice Stevens distanced himself from the view that affirmative action must be remedial in character. He proclaimed that "the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future."[46] On close examination, he found the city's version of the *Fullilove* set-aside ill considered, and indeed, a product of "the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause."[47]

Two intervening decisions had indicated that, despite these adverse outcomes, Stevens was not implacably hostile to affirmative action. In *United States v. Paradise*,[48] he voted to uphold a judicial decree ordering a police department to promote blacks and whites in a one-to-one ratio. In his view, because the city had "been found guilty of repeated and persistent violations of the law," it had the burden of demonstrating that "the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.'"[49] In *Wygant v. Jackson Board of Education*,[50] he dissented when the Court struck down a layoff provision that required parity between white and minority layoffs in a school district. His analysis was encapsulated in the opening paragraph of his *Wygant* dissent:

> In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future. If so, I believe that we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.[51]

With its emphasis on forward-looking justifications for affirmative action, the *Wygant* dissent set the stage for Justice Stevens's later jurisprudence on the subject.

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46. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 511 (1989) (Stevens, J., concurring).

47. *Id.* at 515.

48. 480 U.S. 149 (1987).

49. *Id.* at 193 (Stevens, J., concurring). This concurrence indicates a preference for judicial over legislative remedies for past misconduct. Presumably, Justice Stevens would find a judicial award of reparations to blacks to be less in need of careful examination than statutory reparations.

50. 476 U.S. 267 (1986).

51. *Id.* at 313 (Stevens, J., dissenting).

A year after he rejected the municipal version of the *Fullilove* set-aside, Stevens again embraced a forward-looking justification. He joined an opinion for the Court upholding a minority preference in FCC licensing as an instrument for achieving diversity.[52] He endorsed the Court's "focus on the future benefit, rather than the remedial justification, of such decisions."[53] Justice Stevens dissented strongly from a later overruling of that decision.[54] He was particularly caustic in his later dissent about the Court's application of strict scrutiny to affirmative action: "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."[55]

The tone of Justice Stevens's affirmative action opinions has certainly shifted since *Fullillove*. One can hardly imagine him including a comparison to the Nuremberg laws in an affirmative action opinion today. Moreover, he has not voted to strike down an affirmative action plan since the municipal set-aside case. He has been equally opposed to the Court's crusade against race conscious redistricting designed to increase minority representation.[56]

The shift in rhetoric and outcomes is apparent. The shift in legal analysis may not have been as drastic. Justice Stevens's recent opinions on race-based redistricting are entirely consistent with his views about redistricting before he was even a member of the Court.[57] The more recent affirmative action statutes have been better designed and more carefully justified than the *Fullilove* set-aside. For that reason, Stevens could legitimately have found them distinguishable even if he continued to adhere to his *Fullilove* dissent. Still, it seems plain that he has moved over time toward greater acceptance of affirmative action.[58]

Justice Stevens's increasing focus on future-oriented justifications for affirmative action may raise questions about his earlier willingness to consider backward-looking justifications for affirmative action. His later opinions do not expressly repudiate his endorsement of the concept of black reparations in *Fullilove*, but neither has he repeated it. Logically, however, the proposition that forward-looking justifications are stronger than backward-looking ones does not mean that the latter are always insufficient. Thus, his later affirmative action opinions do not directly address the reparations rationale and leave it unclear whether he continues to support it. He may well be less favorable to backward-looking justifications in race cases than he was when *Fullilove* was decided. Clearly, it would be a

52. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).
53. *Id.* at 601 (Stevens, J., concurring).
54. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
55. *Id.* at 243 (Stevens, J., dissenting).
56. *See* Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).
57. *See* Pamela S. Karlan, Cousins' *Kin: Justice Stevens and Voting Rights*, 27 Rutgers L.J. 521 (1996).
58. John Paul Stevens, *Learning on the Job*, 74 Fordham L. Rev. 1561 (2006).

mistake to take his observation in *Fullilove* as a mature judgment about the application of the unitary approach to reparations.

Given Justice Stevens's view of the unity of equal protection jurisprudence, however, we should not analyze the reparations issue simply by looking at race cases. Instead, we need to consider how he has viewed backward-looking justifications in other equal protection settings, both before and after *Fullilove*. Under his unitary approach, the legitimacy of backward-looking justifications for statutes should not depend solely on the type of classification. Rather, we should be sensitive to the ways that backward-looking justifications raise similar issues, even if the specific contexts ultimately require different outcomes.

The point of this analysis is not to speculate about how Justice Stevens would decide the reparations issue if it came before him today. Rather, if we take his approach to equal protection seriously, we must decouple it from his personal views on specific issues. The important question is how the unitary approach to equal protection fares when presented with a novel and recondite issue, not how one specific Justice would vote. Examining the rest of Justice Stevens's jurisprudence is necessary to see whether the unitary approach provides coherent guidance to the reparation issue.

II. BACKWARD-LOOKING STATUTES AND THE IMPARTIAL SOVEREIGN

Although Justice Stevens may favor prospective justifications for laws, he has not hesitated to accept retrospective ones under appropriate circumstances. He has, however, been quite concerned about the correct design of schemes providing compensation or rewards for past events. Examining these cases provides important lessons about how to apply the unitary approach to backward-looking statutes such as reparations.

A. *The Propriety of Retrospective Justifications: The Veterans Cases*

Justice Stevens's willingness to countenance retrospective justifications is best illustrated by a trio of cases involving benefits for veterans. The first of these cases, and the only one that is generally known today, was decided a year before *Fullilove*. In *Personnel Administrator of Massachusetts v. Feeney*,[59] the plaintiffs challenged the state's heavy-handed preference for veterans in public employment. This case illustrates the serious consequences of veterans' preferences and also their acceptability to Justice Stevens based on backward-looking justifications.

In *Feeney*, state law gave a preference to any veteran with an honorable discharge who served at least one day during "wartime."[60] The preference was absolute: A nonveteran could be hired only if there was no qualified veteran to fill a position.[61] When the litigation began, over ninety-eight

59. 442 U.S. 256 (1979).

60. *Id.* at 262.

61. *Id.* This is much stronger than any affirmative action plan for minorities is likely to be.

percent of the veterans in the state were male.[62] The effect was to exclude women from civil service jobs unless the jobs were too undesirable to attract male applicants. The asserted purposes of the preference were: (1) to ease the transition of veterans to civilian status (which seemed unrelated to the grant of a lifetime preference); (2) to encourage enlistment (which seemed unlikely since the statute covered draftees and also applied only to previous wars); and (3) to reward veterans (which the statute certainly did, by favoring them over better qualified nonveterans).[63]

The majority opinion by Justice Potter Stewart found no intent to discriminate against women and hence no occasion for heightened scrutiny.[64] Justice Stevens added a brief concurrence, saying that any implication of intentional gender discrimination was rebutted by the large number of men disadvantaged by the statute.[65] Notably, Justice Stevens did not raise any question about the rationality of the statute, despite the tenuousness of the forward-looking justifications and the substantial harm to women. Moreover, his conclusion regarding the gender issue—emphasizing that the statute was not "intended to benefit males as a class over females as a class"[66]—should not necessarily have been dispositive for him, given that he had previously warned against an overemphasis on legislative motivation in equal protection cases.[67] But apparently either he viewed the question before the Court as limited to gender discrimination or he did not find the statute in *Feeney* questionable enough in other respects to require sustained inquiry. As two later cases make clear, the backward-looking justification for veterans' preferences was one that Stevens could wholeheartedly accept.

Six years after *Feeney*, the Court decided another veterans' preference case, *Hooper v. Bernalillo County Assessor*.[68] A New Mexico statute created a curious property tax exemption for certain veterans. Qualifying veterans received a two thousand dollar exemption (in perpetuity) from the taxable value of their property.[69] To qualify, a veteran had to have been honorably discharged, served on active duty for at least ninety continuous days during the Vietnam War (which for some reason the state found superior to two stints of eighty-nine days each), and have become a New

62. *Id.* at 270.
63. *Id.* at 265; *see also id.* at 286-87 (Marshall, J., dissenting).
64. *Id.* at 280-81.
65. *Id.* at 281 (Stevens, J., concurring).
66. *Id.*
67. *See* Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) ("[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."). For fuller discussion of the distinction between disparate impact and discriminatory intent, and their roles in Justice Stevens's thought, see George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 Fordham L. Rev. 2313 (2006).
68. 472 U.S. 612 (1985).
69. *Id.* at 614.

Mexico resident before May 8, 1976.[70] The plaintiff had met all of the requirements but the third, having moved to New Mexico five years after the cut-off date, but two years before the statute was passed.[71]

This statute seemed to have been designed to test the outer limits of rational basis review, and it failed to pass. Chief Justice Burger's opinion for the Court rejected the state's two purported justifications for the requirement of pre-1976 residency.[72] The first justification was that the provision was designed to encourage Vietnam veterans to move to New Mexico. But statutes passed after the fact could hardly have motivated veterans to move to New Mexico some years earlier.[73]

The other alleged purpose of the law was to reward veterans who had resided in the state during the Vietnam period.[74] The purported justification was that "those veterans who left their homes in New Mexico to fight in Vietnam, as well as those who settled in the State within the few years after the war ended, deserve to be treated differently from veterans who make New Mexico their home after May 8, 1976"; that is, the "legislature is said to have decided it owed a special responsibility to these 'established' veterans."[75] Burger rejected this justification on two grounds: First, it was irrational because it required no connection between prior residence and military service—a soldier who had been in New Mexico only as an infant would qualify.[76] Second, it illegitimately created two tiers of residents, discriminating on the basis of how long they had lived in the state, in violation of precedents prohibiting favoritism toward long-time residents.[77]

Justice Stevens, however, found a greater degree of rationality in this retrospective benefit scheme. Apart from the interest in easing the disruption caused by military service, he said, the government had a valid interest in rewarding veterans for past conduct:

> [T]he simple interest in expressing the majority's gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation.[78]

This statement is strikingly parallel to the assertion several years earlier in *Fullilove* that contrition for past harm to blacks would be an adequate justification for providing them with a tangible token of contrition. The fact

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70. The cut-off date was another peculiarity, since it was a full year after the last day of the Vietnam Era as proclaimed by President Ford, *id.* at 625 n.2 (Stevens, J., dissenting), and even longer after the actual withdrawal of all U.S. troops.

71. *Id.* at 614 n.2. The statute had been enacted first in 1973 in limited form, but then expanded in 1975, 1981, and 1983.

72. *Id.* at 622-23.

73. *Id.* at 619.

74. *Id.* at 620.

75. *Id.* at 621.

76. *Id.* at 622.

77. *Id.* at 622-23.

78. *Id.* at 626 (Stevens, J., dissenting).

that the tangible token was in the form of a continuing benefit rather than a one-time reward was irrelevant.[79] Indeed, the "perennial character of its tax exemption may have been especially important in the minds of New Mexico's legislators if their objective was to provide a symbolic expression of New Mexico's invitation to rejoin the community on a long-term basis."[80] Moreover, the state could reasonably conclude that "Vietnam veterans who arrived in that State more than a year after the end of the Vietnam epoch had successfully readjusted to civilian life in a sister State prior to migrating to New Mexico."[81]

For our purposes, the most important aspect of this dissent is the insistence that reward for past sacrifices is an entirely sound justification for a retroactive lifetime benefit. Justice Stevens reemphasized this point in a follow-up case a year later. In *New York v. Soto-Lopez*,[82] the Court considered a New York provision giving civil service preference to certain veterans. To qualify for the preference—additional points added to exam scores for government jobs—a veteran had to have been honorably discharged, served during time of war, and have been a resident of New York when entering military service.[83]

A fractured Court struck down the provision. Justice William Brennan, joined by Justices Thurgood Marshall, Harry Blackmun, and Lewis Powell, found that the provision violated the right to travel by discriminating against newcomers to the state.[84] Chief Justice Burger once again found a violation of the rational basis test.[85] And Justice Stevens once again dissented.[86] He thought the residence requirement even more defensible than the one in *Hooper*:

> If a State should grant a special bonus to fighter pilots who are residents at the time of enlistment, to those who fought in the Battle of Midway, or perhaps just to the few who received the Congressional Medal of Honor—would it violate the Equal Protection Clause to deny bonuses to

79. *Id.* at 628.

80. *Id.*

81. *Id.* at 631. The logic of this observation is obscure. One could assume with equal justification that moving between states was a sign that a particular veteran had not yet fully settled into civilian life and therefore was especially in need of state assistance. The statute also seems a poor fit in other respects. It provides assistance only to the best-off veterans, those who are able to purchase real estate. It also fails to distinguish between those who saw combat and those with stateside desk jobs, while ignoring those individuals such as Peace Corps volunteers who made other sacrifices for the national interest. The assumption that all veterans during a given period made great sacrifices for their country, and that no nonveteran was similarly self-sacrificing, could be regarded as an example of habitual, stereotyped thinking.

82. 476 U.S. 898 (1986).

83. *Id.* at 900.

84. *Id.* at 911.

85. *Id.* at 913 (Burger, C.J., concurring).

86. *See id.* at 916 (Stevens, J., dissenting).

> comparable veterans who moved into the State after the end of the War? I think not . . . .[87]

He also joined Justice Sandra Day O'Connor's dissent.[88] She found it

> hard to credit the idea that the Equal Protection Clause requires New York to reward the sacrifices of all those who joined the Armed Forces from other States and came to reside in New York if it wishes to reward the service of those who represented New York in the Armed Forces.[89]

This line of cases about "affirmative action for veterans" establishes three points about how the unitary approach to equal protection has worked in Justice Stevens's hands. First, the state may award benefits to individuals purely on the basis of past events, rather than in order to create an incentive for future conduct. Second, the state may make relatively fine distinctions in doing so (as between veterans who were state residents when drafted or who lived in the state within a few years after the end of the war, versus all other veterans of the same war). Third, the benefits need relate only loosely, if at all, to the past events. Medals, monuments, cash payments, preference over more qualified applicants for government jobs, and lower real estate taxes are equally acceptable "tangible tokens."

This is not to say, however, that the state can be completely arbitrary in structuring backward-looking statutes, even outside the racial context of *Fullilove*. Rather, in applying the unitary approach to equal protection, Justice Stevens has scrutinized such benefit schemes for rationality, and he has sometimes found them wanting for reasons that warrant our attention. The issues of benefit design bear significantly on the permissibility of black reparations schemes.

B. *Flawed Benefit Design*

Within his first five years on the Court, Justice Stevens confronted two cases involving unintended legislative omissions from benefit schemes. He voted to uphold one scheme and strike down the other. Interestingly enough, Justice Brennan took precisely the opposite position in each case, highlighting the nonideological nature of the issues.

In *Delaware Tribal Business Committee v. Weeks*,[90] the omission from the statutory scheme seems to have been entirely accidental. The case stemmed from misconduct by the United States government against the Delaware Indians in the mid-nineteenth century.[91] A court later concluded

87. *Id.* at 918.

88. *See id.* (O'Connor, J., dissenting).

89. *Id.* at 925. Although he might retain the same view of the equal protection issue, Justice Stevens might vote today to strike down the laws in *Hooper* and *Soto-Lopez* as violations of the Fourteenth Amendment's "privileges or immunities" clause. *See* Saenz v. Roe, 526 U.S. 489 (1999) (holding that the clause prohibits states from discriminating between its citizens on the basis of length of residency in the context of welfare benefits).

90. 430 U.S. 73 (1977).

91. *Id.* at 75-76.

that the government had acted unlawfully, and Congress appropriated money to satisfy the judgment.[92] The problem was that in the century between the violation and the court decree, the tribe had split into several groups. One group joined the Cherokees but later reformed itself as a separate tribe. Another group migrated to Oklahoma. Finally, there were the plaintiffs—descendants of Indians who left the tribe after the government's wrongdoing and had remained in Kansas.[93] When they left the tribe, the government promised them their "just proportion" of the tribe's assets held in trust by the United States.[94] The majority speculated about various reasons that conceivably might have led Congress to exclude this group from their promised fair share of the assets, and it then upheld the statute under the rational basis test.[95]

Justice Stevens took a different view. He emphasized that the Indian Claims Commission had specified that any recovery must be "for the benefit of all of the descendents of the Delaware Nation as constituted in 1829 and 1854."[96] The plaintiffs were members of that class, and the evidence was clear that Congress simply excluded them by accident, with no awareness of their existence or their claim to recovery.[97] For four reasons, he concluded that the statute was unconstitutional:

> First, the members of the class whose rights were adjudicated by the Indian Claims Commission have more than an ordinary interest in equal treatment. Second, there is no need for any discrimination at all within this class of litigants; this, therefore, is not a case in which the need to draw *some* line may justify the otherwise arbitrary character of the particular line which has been drawn. Third, no principled justification for the particular discrimination against the Kansas Delawares has been identified. And fourth, there is no reason to believe that the discrimination is the product of an actual legislative choice. Under these circumstances, I conclude that there has been a deprivation of property without the "due process of lawmaking" that the Fifth Amendment guarantees.[98]

Three years later, the Court was confronted with another instance of unintentional legislative exclusion, this time through special interest machinations rather than pure oversight. *United States Railroad Retirement Board v. Fritz*[99] involved a revision to the Railroad Retirement Act. Under the original statute, individuals who worked for a railroad and who also spent part of their careers in nonrailroad work could collect both social security and railroad retirement pay.[100] This dual payment could be

92. *Id.* at 90.
93. *Id.* at 78.
94. *Id.*
95. *Id.* at 89-90.
96. *Id.* at 91 (Stevens, J., dissenting).
97. *Id.* at 92-94.
98. *Id.* at 97-98 (citations omitted).
99. 449 U.S. 166 (1980).
100. *Id.* at 168.

considered a windfall, because these two-career employees could receive more retirement income than individuals who spent their entire career in the railroad industry.[101] On the view that these dual payments endangered the financial stability of the railroad retirement system, Congress eliminated them prospectively but grandfathered employees whose retirement benefits had already vested.[102] So far, this seems perfectly reasonable.

Unfortunately, when the legislation was actually drafted by the union and industry, the grandfather provision had a subtle flaw. In drafting the provision, the union and industry excluded workers that neither of them cared about: workers who had qualified for the dual benefits but were no longer connected with the railroad industry in 1974.[103] Naturally, the union was less interested in those workers than in those who remained active members at the time. The industry also had little reason to care about workers who had moved into other fields. Congress seems to have been entirely unaware that it was stripping these workers of vested retirement rights.

In a fairly brusque opinion by then-Justice Rehnquist, the Court upheld the statute. In the majority's view,

> Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits.[104]

Justice Brennan dissented, joined by Justice Marshall.[105] He emphasized the special interest nature of the drafting process and the apparent intent of Congress to preserve all vested benefits.[106] Whatever the abstract equities of the dual benefits, workers had been given every reason to think that they could rely on these vested benefits in planning their careers.

Justice Stevens concurred in the judgment on the basis that Congress needed to draw some line among beneficiaries and that current employment status was an "impartial method" of drawing that line.[107] Apparently, the need for line drawing, plus the absence of any prior adjudication of rights, was enough to distinguish *Fritz* from *Delaware Tribal* for Stevens.

In the two cases we have just considered, Congress inadvertently excluded a subclass from a benefit. These cases bear on Justice Stevens's concern in *Fullilove* about the careless choice of beneficiaries and benefit levels. *Fullilove* also reflects a concern about entrenching permanent hierarchies of favored classes, and this concern, too, found expression in a later case.

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101. *Id.*
102. *Id.* at 169-70.
103. *Id.* at 172.
104. *Id.* at 178.
105. *See id.* at 182 (Brennan, J., dissenting).
106. *Id.* at 185-90.
107. *Id.* at 182 (Stevens, J., concurring).

In *Nordlinger v. Hahn*,[108] the Court upheld the constitutionality of California's Proposition 13. Proposition 13 freezes property tax assessments until property is resold (except for a small inflation adjustment).[109] The result is that two owners of identical homes may pay vastly different taxes, so that new owners bear a much higher share of the tax burden than long-time residents.[110] The Court fairly easily upheld this provision under the rational basis test as serving two purposes: the state's interest in preventing excessive property turnover and the greater reliance interest of more established owners.[111]

Justice Stevens filed a fervent dissent. He referred to the notorious inflation of California property values, which made California real estate investors "among the most fortunate capitalists in the world."[112] Proposition 13 had given these investors a tremendous windfall, and Justice Stevens said that for that reason he would refer to them in the dissent as the "Squires."[113] As a result of Proposition 13, he observed, "some homeowners pay 17 times as much in taxes as their neighbors with comparable property."[114]

Justice Stevens particularly objected to another provision of Proposition 13, which allows transfer of property to children without reassessment: "This exemption can be invoked repeatedly and indefinitely, allowing the Proposition 13 windfall to be passed from generation to generation."[115] He characterized this provision as establishing "a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage."[116] Because this benefit was not linked to any specific need of these later generations, it represented nothing more than a hereditary privilege akin to medieval nobility.

C. *The Reparations Argument and the* Fullilove *Dissent Revisited*

This examination of other equal protection opinions by Justice Stevens confirms that his treatment of the reparations argument in *Fullilove* was not an aberration. In terms of the legitimacy of the goal of reparations, he now clearly prefers forward-looking rationales for affirmative action over remedial ones, and he might vote against reparations on that basis.

But the unitary approach could support a more welcoming approach to reparations. As shown in particular by the veterans' benefit cases and *Delaware Tribal*, the unitary approach to equal protection does leave room

108. 505 U.S. 1 (1992).
109. *Id.* at 5-6.
110. *Id.* at 6.
111. *Id.* at 17.
112. *Id.* at 28 (Stevens, J., dissenting).
113. *Id.* at 29.
114. *Id.*
115. *Id.*
116. *Id.* at 30.

for backward-looking justifications: The state sometimes can legitimately compensate for past burdens borne by its citizens, particularly when the government had a direct hand in creating those burdens. Indeed, no Justice has ever rejected this principle, even when faced with such an unreasonable preference as the one upheld in *Feeney*. When veterans preferences have been struck down, it has been because of lines drawn between veterans, not because they favored veterans over other citizens. If it is permissible to compensate veterans for the burdens they have borne, why should it be per se impermissible to compensate the benefits of slavery and discrimination for their burdens?

Yet, the concerns about statutory design expressed in *Fullilove* are also well grounded in the unitary approach to equal protection. The "due process of lawmaking" argument in *Delaware Tribal* highlights the importance of careful deliberation in designing compensatory statutes. The pointed dissent in *Nordlinger* also reflects a concern that was very much present in *Fullilove* about permanently entrenching legal hierarchies in the guise of responding to social equities.

Thus, within the context of the unitary approach developed by Justice Stevens, the discussion of reparations in *Fullilove* is consistent with an overall vision of government impartiality. That vision does not require the government to ignore past injustices, particularly those it helped to create. But it does require that any effort to redress those injustices be calibrated to the equities, tied to ascertainable disadvantages, and crafted so as to avoid the creation of new hierarchies of favored citizens.

III. BLACK REPARATIONS AND EQUAL PROTECTION

With these other equal protection opinions in mind, we return to the question of reparations that Justice Stevens raised in *Fullilove*. The reparation issue has begun to reemerge today, and deserves continued attention if only for that reason.[117] We begin by reviewing the current state of the reparations debate and then consider the constitutional issues.

A. *The Reparations Issue*

The reparations issue has given rise to vigorous scholarly debate.[118] Some of the debate concerns the application of private law theories of

117. The reparations issue may or may not turn out to have genuine political or legal traction (a question which is discussed in Part III.A). But the reparations issue is worth considering regardless of its practical prospects. The deeper questions are: How have our current social problems been shaped by our bitter racial history and how should we respond to that heritage. Those are questions that we cannot afford to ignore.

118. For a sampling of viewpoints, see Brophy, *supra* note 8; Hanoch Dagan et al., *Symposium: The Jurisprudence of Slavery Reparations*, 84 B.U. L. Rev. 1135 (2004); Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. Rev. 1177 (2004); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. Third World L.J. 157 (2004); Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 Vand. J. Transnat'l L. 1235 (2002).

liability in this setting. More attention, however, has been given to the broader policy issues. The argument for reparations is at heart a simple one. We recognize today that slavery was one of the great crimes of history, followed by a long and shameful legacy of legalized discrimination. These wrongs have never been fully acknowledged—not even in the form of an explicit apology—nor has recompense been made. This legacy, reparation advocates say, must be confronted and overcome if the current plight of African Americans is to be addressed seriously.[119]

Opponents of reparations do not question the injustice of slavery and Jim Crow. They do question whether reparation is a sensible response. They see reparations as deeply divisive, increasing, rather than healing, racial divisions. Opponents also fear that reparations will undermine the ability of African Americans to take the initiative, and assume responsibility for their own futures. And the critics raise a host of questions about how to calculate the damages for this past misconduct and to distribute those damages to current generations of African Americans.[120]

The most glaring question is whether reparations are too impractical to be worth serious analysis. It may seem, in Saul Levmore's words, that "African American reparations are unlikely to materialize, and are perhaps as unlikely as a renegotiation with current American Indians regarding the purchase of Manhattan Island long ago or as a recovery from present Southerners for the firing on Fort Sumter."[121] This observation gains force from public opinion polls showing that only four percent of whites would support payment of compensation for slavery (as opposed to two-thirds of blacks who support such payments).[122]

Dismissing reparations as a hopeless pipe dream may be a mistake. There are significant international precedents. For example, Australia has returned almost a hundred thousand square miles of land to Aborigines.[123] Turning to the United States, Florida paid survivors of the 1923 Rosewood Massacre $150,000 each and made substantial payments to the descendants of others.[124] The United States also paid roughly $800 million to Native

119. Some of the key arguments for reparations are made in Roy L. Brooks, Atonement and Forgiveness: A New Model for Black Reparations 119-63 (2004); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 Geo. Wash. L. Rev. 959 (2000); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in Reparations Debate in America*, 38 Harv. C.R.-C.L. L. Rev. 279 (2003); Westley, *supra* note 16.

120. These objections are discussed in Brophy, *supra* note 8; Epstein, *supra* note 118; and Massey, *supra* note 118. Adrian Vermeule cogently responds to the concerns about ascertaining the amount of reparations in a forthcoming paper, pointing out the critics would in effect set the level of reparations at zero, which is even less justifiable than any specific higher number. *See* Adrian Vermeule, *Reparations of Rough Justice* (Univ. of Chi. Law & Econ., Olin Working Paper No. 260, 2005), *available at* http://ssrn.com/abstract_id=813086.

121. Saul Levmore, *Privatizing Reparations*, 84 B.U. L. Rev. 1291, 1292 (2004).

122. Brophy, *supra* note 8, at 1184. Another poll showed the level of white support to be somewhat higher, at eleven percent. *See* Levmore, *supra* note 121, at 1293 n.10.

123. Lyons, *supra* note 118, at 1241.

124. *Id.* at 1243. For background on the Massacre, see Remembering Rosewood, http://www.displaysforschools.com/history.html (last visited Nov. 20, 2005).

Americans for wrongfully seized land as early as 1946, as well as $1.65 billion to wrongfully interned Japanese Americans more recently.[125] So reparations are not an untouchable political subject in other settings.

Moreover, there are at least faint signs of support for black reparations. The federal government paid $9 million to African Americans who were denied treatment for syphilis as part of the infamous Tuskegee experiments.[126] In another gesture of political support, California passed a statute requiring insurance companies to submit records of slaveholder insurance policies to a central registry.[127] Thus, at least a glimmer of hope may exist for ultimate public support for some kind of reparations program, at least enough so that consideration of the issue is not completely without practical significance.[128]

In addition, some of the resistance to reparations might be muted through creative benefit systems. Dean Levmore himself proposes a privatized reparations scheme that might avoid some of the political objections. The scheme involves incentives for private financing of funds to compensate black World War II veterans for wartime discrimination and to encourage high school graduation, for a total of around $10 billion.[129] No doubt this is only one of a number of possible innovative mechanisms that could be identified if support for reparations was sufficient.

B. *The Constitutional Legitimacy of Reparations*

However a reparation mechanism might be designed, the first question remains whether the goal of black reparations is itself constitutional. Arguably, under the current affirmative action doctrine, reparation might be considered an effort to remedy "societal discrimination" and therefore illegitimate. At best, if reparations were considered to be a race-based remedy, strict scrutiny would be used to determine whether the reparation scheme was justified by a compelling state interest. Whether a reparation scheme could survive such scrutiny is unclear.[130] Japanese-American reparations did survive strict scrutiny, on the theory that the government had a compelling interest in making recompense for past wrongs.[131] To the

125. Levmore, *supra* note 121, at 1303 n.50.

126. *Id.*

127. Lyons, *supra* note 118, at 1264.

128. Charles Ogletree also cites two other examples: an Oklahoma statute and a Chicago city ordinance. *See* Ogletree, *supra* note 119, at 280-81. Moreover, as he points out, Congress waived the statute of limitations in a suit involving discrimination by the Department of Agriculture against black farmers in the South. *Id.* at 303.

129. Levmore, *supra* note 121, at 1300-01.

130. Arguably, because the burden for reparations would rest with taxpayers generally, rather than harming a discrete class of whites, reparations would be more likely than affirmative action to survive judicial review. *See* Posner & Vermeule, *supra* note 12, at 714-23.

131. Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992). The court ducked the question of what level of scrutiny to apply, concluding that the statute would past strict scrutiny:

> In enacting the Civil Liberties Act, Congress sought to remedy "a grave injustice" and "fundamental violations" of "basic civil liberties and constitutional

extent they can be linked persuasively with governmental misconduct rather than private bias, the harms created by slavery and *de jure* discrimination might also be recognized. Therefore, black reparations might survive judicial review, even if subjected to strict scrutiny, so long as they did not fall victim to a per se rule against remedies based on societal discrimination.

Regardless, reparations might also escape strict scrutiny on formalistic grounds. A decent argument exists that payments to the descendants of slaves would not be technically race based.[132] Arguably, being a descendant of slaves is no more inherently racial than being able to become pregnant is gender related—and the Supreme Court has solemnly pronounced pregnancy and gender unrelated.[133] For similar reasons, being an identified victim of Jim Crow or the descendant of such a victim might not be considered a race-based category. Just as with pregnancy and gender, one might argue that the government's purpose is not to distinguish between people because of their race even though this is an inevitable result of reparations. Depending on whether this argument was accepted and on whether remedying widespread past discrimination was considered a legitimate basis under the appropriate standard of review, black reparations might be held per se illegitimate, subject to strict scrutiny, or subject only to rational basis review.

One clear sign of the intellectual vacuity of current equal protection doctrine is its inability to provide clear guidance on such a basic issue as reparations.[134] As two leading theorists observe about one aspect of the constitutional analysis, "the twisting course of the Court's jurisprudence in this area suggests that any abstract pronouncement should be eyed skeptically until the Court cashes it out in an actual holding."[135]

> rights." In particular, Congress found that the Japanese internment policies "were carried out without adequate security reasons" and "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." "The Government unquestionably has a compelling interest in remedying past . . . discrimination by a state actor," especially discrimination as ugly as the policies endorsed by the government in *Korematsu v. United States*. Unless Mr. Jacobs can show that he, like the children of Japanese descent, was interned because of racial prejudice, then it seems obvious that the remedy Congress chose in the Civil Liberties Act (compensating children of Japanese but not German descent) is substantially related to the ends of the Act (compensating those who were interned because of racial prejudice). The remedy, in fact, would represent a "perfect fit between means and ends."

Id. at 319 (citations omitted) (omission in original).

132. *See* Massey, *supra* note 118, at 172.

133. Not, as you might be thinking, in jest. *See* Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974).

134. In theory at least, certain members of the Court should be interested in evidence of the original understanding as it bears on this issue. In this regard, the Southern Homestead Act of 1866 should be relevant. That statute gave freedmen a limited period to purchase lands in eighty-acre plots. *See* Westley, *supra* note 16, at 460. Whether the originalists on the Court would pay any heed to history that so strongly conflicts with their predilections is anyone's guess.

135. Posner & Vermeule, *supra* note 12, at 717.

The unitary approach to equal protection provides a firmer basis for analysis. If the United States can properly compensate Indian tribes for injuries incurred a century or more ago, there seems no reason to view such compensation as inherently objectionable when the recipients are the descendents of West African tribal people kidnapped from their homeland. Indeed, in *Delaware Tribal*, Justice Stevens argued that it would be unconstitutional to deny compensation even to descendants of individuals who had left the tribe after the wrong was done.[136]

It is true that such reparations would have a racial correlation. But this was also true with the Japanese-American reparations. If society deliberately harms a specific racial group, compensation will necessarily have a racial connection. However, it would be horribly ironic to enslave people because of their race, and then to refuse to compensate them because to do so would be race based.

If reparation had been made during Reconstruction, it would have been impossible to argue that the payments to ex-slaves were impermissibly based on race. It would have been obvious that payment was not based on any stereotyping or racial bias, but simply on the individual experience of involuntary servitude. Similarly, if a Southern state had agreed to make recompense to citizens who had been previously forced to attend all-black schools, a serious constitutional challenge would be hard to imagine. What makes reparations seem more normatively problematic today is that so much time has passed. But this concern is better seen as a challenge to designing an acceptable reparation scheme than as a fundamental normative objection.

C. *Design Issues*

Because the linkage issue has been identified as the most fundamental problem with reparations,[137] it is a good place to start. In *Fullilove*, Justice Stevens suggested that a reparation scheme needed to make at least a serious effort to link harms and beneficiaries.[138] This requirement is entirely consistent with his views regarding other backward-looking statutes, notably *Delaware Tribal*, although *Fritz* indicates that some of the line drawing may justifiably be imprecise.

One way of establishing linkage would be to identify smaller classes of beneficiaries linked with specific historic wrongs—for example, a reparation bill for the heirs of victims of lynchings. A more general reparation remedy would require at least statistical proof of ongoing harm from past events. Clearly, not everything that ails present-day blacks can be traced (except in the most general terms) to slave or even Jim Crow

136. Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 94 (1977) (Stevens, J., dissenting).

137. *See, e.g.*, Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. Ann. Surv. Am. L. 615, 621 (2003) (noting that the inability to link is the "most difficult challenge" for litigation-based reparation, so that the main use of reparation rationale is as a political argument for affirmative action).

138. *See* Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting).

times. Many aspects of black-white comparison have changed in the past fifty years, often for better but sometimes for worse.

One particularly stubborn measure of inequality, however, has been net wealth. As two commentators recently observed,

> The average African-American family's net worth is about twelve percent of the average white family's net worth. And that huge disparity is not explained by factors like earnings rates, education, or savings rates. More than 25% of of [sic] black households have no positive wealth, while just 14% of white households are in that situation.[139]

Exclusion from housing markets may have had a particularly sharp effect on black wealth, especially given the run-up in housing values in recent decades.[140] It may well be possible to provide both theoretical and empirical economic arguments for the long-term persistence of such inequalities.[141] This would support linkage between low measures of wealth for blacks today and historic wrongs.[142] Thus, measures designed to promote capital accumulation by blacks may well be justified as redress for the long-term effects of past discrimination.

Another important design question concerns the type of benefits. If the veterans benefits cases are any guide, the type of benefit does not necessarily need to be linked in any precise way with the type of harm. Nevertheless, under Justice Stevens's equal protection analysis, the benefit must respond in some way to the historic injustice. For example, if low intergenerational transmission of net wealth (due partially to past

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139. *See* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 Geo. L.J. 1, 172 (2004). The remainder of this paragraph is also worth repeating:

> Those born into an African-American family are three times more likely to find themselves living below the poverty line than are those born into a white family.... Similarly, those born into single parent households are three times more likely to find themselves living in poverty than are those born to two-parent households. Those who happen to be born in Mississippi are more than twice as likely to find themselves starting off in poverty than are those lucky enough to be born in Connecticut. And those who are born into poverty tend to end up far poorer than those born into wealth, with concomitantly lower levels of overall health, occupational opportunities, consumption patterns, and life-expectancies.

Id. at 171-72 (citations omitted).

140. Note, *Bridging the Color Line: The Power of African American Reparations to Redirect America's Future*, 115 Harv. L. Rev. 1689, 1700-03 (2002).

141. Having less wealth to act as a cushion during labor market fluctuations, blacks may have had a more fragile position in labor markets. *See id.* at 1703. This in turn might have affected labor market choices, making blacks more risk averse in career choices (and thus predictably lowering expected future incomes in exchange for reduced risk).

142. For further discussion of racial wealth disparities and their implications, see Emma Coleman Jordan & Angela P. Harris, Economic Justice: Race, Gender, Identity and Economics 473-90, 501 (2005). These arguments might be bolstered by a showing that the federal measures that helped expand the white middle class after World War II were designed, at the insistence of Southern legislators, to avoid any threat to segregation. For a discussion of the historical record, see Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 113-41 (2005) (focusing on the G.I. Bill).

discrimination in home-buying opportunities, for example) is identified as a legacy of historic injustices, then the remedies should be geared to providing increased savings or otherwise improving intergenerational capital transfers for blacks.

In addition, as Justice Stevens has insisted both in *Fullilove* and in the Proposition 13 case, we must be wary of permanently carving into stone any division between the beneficiaries of special government treatment and others. This suggests that relief should have a strict time span (for example, by setting up a trust that must expend its assets by a fixed date). The goal should be to deliver complete relief within that time span. Our society does not need to recreate another hierarchy based on ancestry.

The veterans' benefits cases highlight some other potential pitfalls of retrospective benefit schemes. No doubt the Court was right that the statute in *Feeney* unintentionally disadvantaged women. The fact remains, however, that the statute did impose a significant barrier against women in public sector employment and sharply limit their ability to participate in the shaping of public policy in the state. Moreover, it deprived the citizens of the state of their input and of the services of highly qualified people. A reparation scheme must be shaped with care lest it create similar negative side effects.

The other veterans cases and the Proposition 13 case illustrate another pitfall: the ease with which benefit schemes can become unmoored, captured on the one hand by parochial interests (such as favoring longtime residents over newcomers), and on the other hand creating perpetual benefits (such as tax exemptions) with no particular connection to any past burden. These defects would be even more serious when tied to racial divisions. Vigilance will be required to keep a reparation scheme firmly on track.

The appropriate institution for establishing a reparation scheme may well vary with the class of beneficiaries and the type of benefit. Where the stringent requirements of liability can be overcome, a judicial remedy may be appropriate. States might provide at least limited reparations based on their own individual histories, as Florida has done with the Rosewood Massacre. In the end, however, Congress seems to be the most appropriate body, as the voice speaking for the nation as a whole.

Whether reparations are a wise policy is not something addressed here. Even a serious attempt to pursue reparations could have serious political costs in dividing blacks from other minority groups and in increasing polarization with whites. Designing an acceptable scheme may simply not be feasible. Whether the benefits of the effort would be worth the costs, even if a victory seemed politically feasible, is beyond the scope of this Article.

Instead, the question has been posed here in the terms established by the unitary approach to equal protection: Could an impartial sovereign have plausible grounds to enact such a scheme, taking into account its effects on all classes of citizens? The problems of design are certainly not trivial.

Nevertheless, Justice Stevens's observation in *Fullilove* seems to be correct, in terms of the fundamental defensibility of reparations.

IV. CONCLUDING THOUGHTS: OF IMPARTIAL JUSTICE AND IMPARTIAL JUSTICES

Impartiality is a virtue that figures in Justice Stevens's thinking in several different ways. As we have seen, the "impartial sovereign" is the touchstone of his equal protection analysis. Although Justice Stevens has not done so, this vision of impartiality could well be supplied with deep philosophical roots in liberal theories of justice. Certainly, the notion of the impartial sovereign has at least a family resemblance to the views of philosophers such as John Rawls, who posited that just decisions (at least of fundamental kinds) should be made behind a "veil of ignorance" about how they affect us.[143] Similarly, Ronald Dworkin's emphasis on the government's obligation to give "equal concern and respect" to each citizen resonates with Justice Stevens's approach to equal protection.[144]

Impartiality provides an appealing grounding for equal protection law for several reasons. First, unlike equal protection norms that focus on the protection of specific groups, impartiality can be embraced without first passing judgment on the current social and political order. Such judgments may be necessary at some point in applying any approach to equal protection, but it seems more prudent not to elevate these judgments to fundamental postulates. Second, impartiality resonates with basic moral and legal norms. Favoritism and bias are not appealing bases for decisions. Essentially, impartiality rules them out of order as justifications for laws. Third, in contentious cases like affirmative action, a focus on impartiality helps draw judges away from reliance on their policy preferences. To say that an action is necessitated by a compelling government interest is in effect to endorse its wisdom; to say that the same decision could plausibly have been made by an impartial decision maker requires no commitment to its validity. Finally, in a highly diverse democratic society, the least that groups can expect is some plausible, impartial explanation for actions that harm them. Anything less treats their interests as unworthy of consideration by the government.

Impartiality also responds to an aspiration regarding the judicial role. Justice Stevens's rejection of the three-tiered approach and his call for a unitary analysis is partly a demand for even-handed judicial treatment of all classificatory schemes and all affected groups. If, in the end, certain classifications or groups receive less favorable outcomes in equal protection

143. *See* John Rawls, A Theory of Justice (rev. ed. 1999).

144. Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled,* 59 U. Chi. L. Rev. 381, 382 (1992) ("[T]he Bill of Rights orders nothing less than that government treat everyone subject to its dominion with equal concern and respect . . . ."). Stevens's views also seem to have some resonance with the theory articulated in Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

cases, the reason is not that they hold a different status in the eyes of law, but simply because the same factors play out differently for them. Whether something is currently a favored social cause—such as affirmative action in some circles or color-blindness in others—should not affect the analysis. Indefensible injustice on the basis of race may be more common than indefensible injustice on more mundane bases, but in Stevens's eyes, an injustice is an injustice is an injustice.

Although the unitary approach to equal protection focuses on impartiality, it might be criticized for creating another kind of inequality because of the lack of a more structured standard of review. The risk of unpredictable outcomes is the most obvious criticism of the unitary approach to equal protection, as opposed to the conventional three-tier analysis. Such unpredictability not only raises concerns about the Court's ability to give guidance for the future, but risks the creation of arbitrary distinctions between similar cases as a result of ad hoc rulings.

Viewing the unitary approach as ad hoc and unpredictable seems natural, especially since we have become so accustomed in recent decades to elaborate multi-prong legal tests.[145] As the issue of black reparations illustrates, however, this criticism may be weaker than it seems. The predictability of the three-tier approach seems somewhat illusory in the reparations setting, given the potential for manipulating both the characterization of the classifications and the level of justification demanded by the Court. In contrast, by placing reparations in a broader, less politicized context—that of backward-looking statutory schemes—the unitary approach seems to point toward a fairly clear acceptance of reparations in principle, though with significant concerns about implementation. Thus, in dealing with reparations or other politically charged issues, the unitary scheme may hold up surprisingly well against the competition in terms of predictability, despite the theoretical benefits of a more rule-oriented approach.[146]

Justice Stevens has been criticized for favoring incremental decisions at the expense of sweeping rulings that would decide many future disputes in one fell swoop:

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145. The classic critique of this now-popular approach to constitutional law is Robert F. Nagel, *The Formulaic Constitution*, 84 Mich. L. Rev. 165 (1985). As Nagel points out, the effect of this approach is that "[t]he 'constitution' has become an ambitious political and social agenda; the courts have become a kind of elevated bureaucracy, busily crafting formulae that will bend the nation's affairs toward various visions dignified by constitutional status." *Id.* at 211. Nagel questions the wisdom of this endeavor, but one might also question its efficacy. At the end of the day the Court is an adjudicatory body and whatever general formula it produces are only effective to the extent that they constrain future decisions. As the travails of the three-prong test indicate, the operational effectiveness of formulaic constraints may be questionable.

146. The three-tier equal protection methodology is part of a general effort to lay down clear rules in decisions, with the expectation that later decisions will fall in line. For a critique of this approach to the use of precedent, see Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 Minn. L. Rev. (forthcoming May 2006).

> The question then is whether and when some slight diminution of decisional confidence for issues not yet before the Court in the strictest sense is a price worth paying in order to take more seriously the Court's role as guider of the constitutional decisions of others. For Justice Stevens, the answer seems to be, "almost never," while for others, including me, it is perhaps closer to, "more often than we think." When an issue arises as to which of the virtues of guidance outweigh the vices of premature decision, it may turn out, surprisingly, that bigger really is better.[147]

This dichotomy may rest on a false assumption. "Large" opinions, purporting to announce broad yet precise rules, may not settle as much as they seem to. Despite their apparent precision, the rules may not provide as much certainty in fact as they promise in theory. As the reparations dispute illustrates, the seemingly clear-cut mandate for strict scrutiny in race cases may not be especially determinate outside of the paradigmatic situation of Jim Crow discrimination. And "small" opinions, based on careful attention to the facts of each case, may provide a matrix of principles that provide considerable guidance in future cases. For example, the gradual accretion of small-scale rulings on backward-looking statutes turns out to provide considerable guidance in thinking about the difficult issues of black reparations. No doubt large opinions have their place, but there is also a virtue—even in terms of providing predictable guidance—in thinking small.

Certainly, for Justice Stevens himself, "thinking small" has not been motivated by a desire to use ad hoc decisions to implement personal values. It is hard to read his opinions without perceiving a strenuous effort at judicial impartiality, at insulating decisions from personal values. The conventional approach seeks impartiality by entangling the judge in a web of objective standards. Yet in practice, the standards often prove subject to manipulation, and the very choice of standards seems to involve highly politicized views about issues of race and gender. Rather than seeking external constraints on the judge, the unitary approach promotes an internal

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147. Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 Rutgers L.J. 543, 561 (1996). Schauer elaborates,

> If legions of constitutional decisionmakers outside of the Supreme Court understand the Constitution, or constitutional law, as being primarily what the Supreme Court says it is, then what the Supreme Court says takes on a different function. From this perspective, the Supreme Court is not only in the business of deciding cases, but is also in the business of telling other courts, as well as other officials and other institutions, how to decide them. Yet if this is one of the Court's goals, then it is not necessarily the case that smaller is better, and it is not necessarily the case that making decisions maximally sensitive to the circumstances of each case is the decision-making posture best designed to serve this guidance function. From the perspective of the guidance function, the idea of delaying decisions in order to maximize the likelihood of getting them right turns out to be quite costly. A decision delayed, if unnecessary to the case at hand, may have no costs in that case. By delaying the decision, however, an area of uncertainty is created, and those who seek to be guided by Supreme Court decisions will in fact receive little guidance.

Id. at 560.

discipline. In a sense, the unitary scheme of equal protection is a form of self-discipline. It draws the judge away from a visceral reaction to a particular type of statute and demands comparisons with quite different applications of legislative authority.

Such impartiality is not an unmixed blessing. It may have the drawback of distracting attention from truly unique features of particular issues, such as race. Moreover, it is impossible to obtain such impartiality completely. Judges are human beings and necessarily bring their own past experiences to bear when they consider legal issues. Impartiality does not consist in extirpating the influence of personal experience and values. Rather, judges must interrogate their responses to particular cases for consistency with their general principles and their reasoning in other cases. This process disciplines, but cannot eliminate, the personal element in judging. For example Justice Stevens's opinions regarding veterans benefits could well have been influenced by his own experiences as a member of the World War II generation.

Nevertheless, in an era where judging is too often considered a purely political exercise, this effort at impartiality deserves our admiration. It does not take a belief in the immaculate conception of judicial decisions to affirm that judges should strive for impartiality. In particular, while judges must be attuned to social trends, they must not slavishly reflect political forces or public opinion. Their role is not simply to implement the popular will. As Justice Stevens himself has explained,

> There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. Sir Matthew Hale pointedly described this essential attribute of the judicial office in words which have retained their integrity for centuries:
>
> > "That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.
> >
> > "Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice."[148]

In this passage, we come close to the heart of Justice Stevens's vision of the judicial role. It expresses both his willingness to strike out along his own path ("[n]ot to be solicitous what men will say or think") and his quest for impartiality (to "keep myself exactly according to the rule of justice").

Justice Stevens's question for impartiality represents an exemplary effort to remain faithful to the dictates of the judicial oath of office to "administer justice without respect to persons."[149] This vision explains Justice

148. Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) (internal quotations, citations, and internal numbering omitted).

149. In full, the oath provides,

Stevens's demand for impartiality in equal protection doctrine, as well as his willingness to examine fearlessly such controversial issues as black reparations.

I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution* and the laws of the United States.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).