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I would like to thank Abner Greene and Eduardo Penalver for organizing this symposium, my co-panelists for their stimulating comments, and my colleagues Josie Brown and Tommy Crocker for helping me work thorugh my argument. I had the privilege to clerk for Justice Stevens during October Term 2000 and will forever be in his debt for the opportunity to learn about law and life by his side.

EQUAL PROTECTION UNMODIFIED: JUSTICE JOHN PAUL STEVENS AND THE CASE FOR UNMEDIATED CONSTITUTIONAL INTERPRETATION

*Andrew M. Siegel**

During Justice John Paul Stevens's first full term on the United States Supreme Court, the Court decided *Craig v. Boren*, ushering in three-tiered judicial scrutiny of equal protection claims.[1] Sharp criticism of the Court's new doctrine was present at its creation[2] and voices of protest have continued to howl for more than three decades, articulating an increasingly predictable set of complaints about the rigidity and the arbitrariness of modern equal protection methodologies.[3] For those writing in this vein,

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1. *See* Craig v. Boren, 429 U.S. 190 (1976) (stating the test for a gender-based equal protection challenge in language that created a third "intermediate" tier of review).

2. *See, e.g.*, *id.* at 210, 211 n.* (Powell, J., concurring) (stating that he "would not endorse" the characterization of the opinion as creating a system of three-tiered review and "would not welcome a further subdividing of equal protection analysis"); *id.* at 211-12 (Stevens, J., concurring) (critiquing tiered equal protection analysis and developing an alternative vision grounded in the belief that "[t]here is only one Equal Protection Clause"); *id.* at 220-21 (Rehnquist, J., dissenting) ("I would think we have had enough difficulty with the two standards of review which our cases have recognized . . . so as to counsel weightily against the insertion of still another 'standard' between those two."). These criticisms build on and to a large extent mirror the concerns that Justice Thurgood Marshall and outside commentators had already begun to raise about the Court's increasingly rigid two-tier approach. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (expressing dissatisfaction with tiered review); Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 17 (1972) (noting a growing "malaise" on the Court about two-tiered review and encouraging Justices to follow their instincts and modify their approach). For an informative and detailed examination of the history of tiered judicial review, see G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. Rev. 1 (2005).

3. For external criticism, see, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481 (2004); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 163-65 (1984); *cf.* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977) (arguing in the immediate aftermath of *Craig* that equal protection doctrine was hopelessly fractured and offering a unitary substantive account

Justice Stevens's concurrence in *Craig* has become a canonical text,[4] particularly his provocatively obvious assertion that "[t]here is only one Equal Protection Clause."[5]

In this Article, I argue that—as flattering as the attention may be—the central role that Justice Stevens's *Craig* opinion has come to play in efforts to reform equal protection doctrine has tended to obscure both the argument that Justice Stevens was actually making in that opinion and his broader equal protection methodology. In particular, I argue that most critics of tiered equal protection scrutiny—including virtually all academic critics—seek to tear down that doctrinal edifice and replace it with a new (and usually more complicated) doctrinal structure.[6] In my reading of his opinions, however, Justice Stevens shows little or no interest in building an alternative doctrinal super-structure on top of the Equal Protection Clause's text.[7] To the contrary, his project is both simpler and bolder: The Court should apply the Constitution's guarantee of "equal protection of the laws" directly without the use of tiers of review, multi-factor balancing tests, or any other mediating doctrine.[8]

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of the Equal Protection Clause as a potential vehicle for establishing more cohesive doctrine). Within the Court, while others have occasionally voiced skepticism, *see, e.g.*, United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (accepting the utility of mediating doctrine such as tiered review in theory but attacking the system as it has developed); *supra* note 2 (citing opinions of several Justices in *Craig*), the major critics have been Justice Stevens and the late Justice Marshall. For Marshall's reasoning, see, for example, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting); *Rodriguez*, 411 U.S. at 98-99 (Marshall, J., dissenting).

4. *See, e.g.*, Goldberg, *supra* note 3, at 481 (using a quotation from Justice Stevens's *Craig* opinion as an epigraph); John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 Syracuse L. Rev. 1191, 1195 (1999) (using the same quotation prominently in the introduction).

5. *Craig*, 429 U.S. at 211.

6. *See, e.g.*, Goldberg, *supra* note 3 (advocating a complicated three-pronged doctrinal test); Lundin, *supra* note 4 (advocating a new overarching test synthesized from both current and pre-tiers case law); Shaman, *supra* note 3 (advocating a balancing test).

7. *See infra* Part II.

8. Much of the existing scholarly literature assumes that Justice Stevens advocates the adoption of a formal "balancing test" or "sliding scale" approach akin to the one proposed by Justice Marshall. *See, e.g.*, James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 Fordham L. Rev. 2301 (2006); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 326 (1998) (referring to "an explicit sliding scale, à la Justices Marshall and Stevens"); *cf.* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 77-78 (1996) (describing the Court's then-recent cases as reflecting "a modest convergence away from tiers and toward general balancing of relevant interests" and describing that trend as "reminiscent of . . . Justice Stevens's reminder that there is 'only one Equal Protection Clause'"). While James Fleming nicely illustrates that there are important points of contact between the approaches of Justice Stevens and Justice Marshall, *see* Fleming, *supra*, at 2311, this Article argues that the two approaches diverge substantially both in theory and in practice. For two analyses of Justice Stevens's equal protection jurisprudence that, while they assume he is interested in building a formal and consistent doctrinal super-structure over the Constitution's normative core, treat his proposal as fundamentally distinct from

If I am right that Justice Stevens's underlying approach[9] to equal protection cases, properly understood, eschews the use of mediating doctrine, then the Justice has aligned himself against the great majority of constitutional scholars and theorists who, regardless of ideology, tend to assume that the unmediated application of constitutional provisions is either misguided or impossible or both. Writing in this area, for example, Calvin Massey has suggested that only the use of mediating doctrine prevents constitutional litigation from deteriorating into "naked judicial value selection"[10] while Cass Sunstein has rejected free-form review of equal protection claims on rule-of-law grounds, arguing that "[t]he Chancellor's foot is not a promising basis for antidiscrimination law."[11] Writing more generally about constitutional doctrine, Richard Fallon has suggested that mediating doctrine is an essential aspect of any coherent effort to "implement" the Constitution,[12] while Mitchell Berman has recently insisted that it is logically impossible to apply constitutional provisions to concrete cases without multiple layers of mediating rules.[13]

Justice Marshall's, *see* Goldberg, *supra* note 3; Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 Harv. L. Rev. 1146 (1987).

9. I refer to Justice Stevens's "underlying approach" to equal protection cases to emphasize the fact that there are scattered instances in his jurisprudence where Justice Stevens offers the seeds of alternative equal protection methodologies that might arguably grow into new mediating doctrine. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452-54 (1985) (Stevens, J., concurring) (explaining that he always asks himself whether he could find a "rational basis" for the distinction at issue, explaining his understanding of what it means for a law to be "rational"—an understanding that is substantially more biting than the Court's normal use of such words—and then suggesting a series of questions that allegedly get to the heart of the constitutional question); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 497 & n.4, 498 (1981) (Stevens, J., dissenting) (arguing that tiers are better understood as differing burdens of proof and advocating a rule whereby statutes that differentiate on the basis of gender are grouped either with "presumptively unlawful" racial classifications or with presumptively lawful economic and social classifications depending on whether the distinction is related to "natural differences between the sexes"). While I read these bits of writing as representing little more than a semi-reflexive attempt by the Justice and his clerks to write in the same idiom as their colleagues and, in any case, find them much the minority in his writings, their existence is a reminder that my thesis describes the general thrust of Justice Stevens's jurisprudence in the equal protection area and does not apply with academic precision to all his published utterances on the subject.

10. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. Pa. J. Const. L. 945, 993 (2004).

11. Sunstein, *supra* note 8, at 78. Professor Sunstein's remark is directed at the prospect of replacing the tiers with an ad hoc balancing approach but would presumably apply with even greater force to a methodology that abandoned the aid of mediating doctrine altogether.

12. *See* Richard H. Fallon, Jr., Implementing the Constitution (2001) [hereinafter Fallon, Implementing the Constitution]; Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997).

13. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1 (2004) [hereinafter Berman, *Decision Rules*]; *see also* Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 Iowa L. Rev. 1487 (2004); Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781 (2005). On Professor Berman's reading, these rules need not be expressed but they are always present. *See* Berman, *Decision Rules*, *supra*, at 11-12. Professor Berman argues that, as a matter of course, constitutional interpretation requires judicial development of (1) doctrine that

This Article seeks to bring Justice Stevens's equal protection writings into conversation with the prevailing scholarly skepticism about unmediated constitutional interpretation. In Part I, I review the standard criticisms of tiered equal protection scrutiny and the alternative approaches to equal protection methodology suggested by leading scholars. In Part II, I survey Justice Stevens's equal protection methodology, concluding that his criticisms of tiered scrutiny track the leading academic critiques, but that the alternative he suggests diverges from their proposals. In particular, this part explains—and offers evidence for—my assertion that Justice Stevens's approach to equal protection law involves the unmediated application of judicial judgment to the constitutional text rather than the development of alternative doctrinal tests and structures. Finally, in Part III, I raise a handful of substantial criticisms that have been levied against unmediated constitutional methodologies and briefly consider whether those criticisms are borne out by the substance or the consequences of Justice Stevens's three-decade long experiment with such a methodology.

While this project was, of course, directly sparked by Justice Stevens's writings, it was also inspired by the Justice in a much more profound and personal way. As others have long commented,[14] perhaps the defining vision of Justice Stevens's jurisprudence, indeed of his entire life project, has been an unshakable faith in the capacity of men and women of the law to resolve difficult and contentious issues through the application of reason tempered by experience and humility. To participate actively but humbly in a reasoned discussion of whether constitutional theorists have underrated the capacity of judges to achieve just and appropriate results through the direct application of judgment to constitutional text is, in the end, the best tribute I can pay to Justice Stevens.

I. TIERS OF SCRUTINY: STANDARD CRITIQUES AND PROPOSALS FOR REFORM

Though the modern three-tiered approach to equal protection review has become more and more embedded into the sinews of the law over the last quarter century, that doctrinal approach has, for whatever reason, never

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develops and explains the text's underlying constitutional meaning and (2) doctrine that translates that meaning into workable rules for deciding concrete cases. As I read Justice Stevens's equal protection decisions, he thoroughly rejects the need for that second set of doctrine (what Berman calls "constitutional decisional rules") but is more ambivalent about the need for the first (development of a detailed substantive reading of the Constitution's meaning that goes well beyond what is required by the text). I discuss this issue in some detail. *See infra* note 68; *infra* Part III.A.3.

14. *See, e.g.*, Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens,* in Rehnquist Justice: Understanding the Court Dynamic 157 (Earl M. Maltz ed., 2003); William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 Duke L.J. 1087; *cf.* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (criticizing the Justices in the majority for premising their ruling on "an unstated lack of confidence in the impartiality and capacity of the state judges" and lamenting that the "endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land").

become fully normalized.[15] Unlike other doctrines that, once adopted, appear inevitable or unremarkable, tiered review has remained a subject of comment and criticism, visible to the naked eye and easily identifiable as a judicial invention. While litigators and lower court judges have, for the most part,[16] found it advisable to frame their arguments in terms of the tiered approach, Supreme Court Justices and academic commentators have offered a series of provocative criticisms of the tiered approach, often coupling such criticisms with ambitious proposals for reform.[17] Their criticisms and their proposals are worth scrutiny, both for their own sake and because they provide a contrast that is useful in distilling Justice Stevens's unique contributions to Equal Protection Clause jurisprudence.

A. *Standard Critiques of Tiered Review*

Commentators have largely offered three overlapping (though occasionally cross cutting) critiques of tiered equal protection scrutiny. First, they have argued that the tiers are insufficiently helpful in resolving real world cases or predicting the behavior of courts. In particular, they argue that in any close case standard tiered review is non-determinative. For some commentators, the problem here is one of classification.[18] They argue that there is simply nothing in the modern doctrine that tells us conclusively in which box to place statutory schemes that impose burdens on gays and lesbians, or the mentally ill, or racial majorities. Since the choice of tier is so crucial to the outcome of the case, seat-of-the-pants determinations as to the proper classification of a given legislative scheme are often the deciding factor in resolving cases and those are—definitionally—difficult to predict.

For others, the problem is not so much the arbitrariness of the classification system as the slipperiness of the analysis of means and ends.[19]

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15. The doctrinal blueprint for the prevailing three-tiered approach to equal protection jurisprudence is so familiar as to barely need repeating. In its starkest form, the doctrine states that most legislative classifications will receive only "rational basis review" and will be upheld if the courts discern that the classification is "rationally related to a legitimate governmental interest," that classifications that involve a "suspect class" or burden a "fundamental right" will be subject to "strict scrutiny" and will be upheld only if they are "necessary to serve a compelling governmental interest," and that classifications burdening a few "semi-suspect classes" will be subject to "intermediate scrutiny" and will be upheld only if they are "substantially related to an important governmental interest." For a full, recent treatment of the doctrine, see Goldberg, *supra* note 3.

16. For a rare and interesting example of a lower court judge critiquing tiers of scrutiny and explicitly resolving a case by using a different methodology, see Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996) (Boggs, J.).

17. *See, e.g.*, cases and articles cited *supra* notes 2-3.

18. *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 Va. L. Rev. 951, 954, 961-68 (2002) (arguing that "existing accounts of equal protection leave the decision whether to treat a classification as suspect—and most other decisions as well—to almost completely unguided normative judgment").

19. *See, e.g.*, Peter Brandon Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 Wash. & Lee L. Rev. 1, 12 (1988) ("[O]nce the 'level of

According to this version of the critique, the code words modern tiered doctrine has developed do a perfectly adequate job of sorting out the easy cases but simply restate the question in hard cases—for example, asking whether educational diversity is "compelling"[20] or whether structuring state law to make it more difficult for gays and lesbians to pass civil rights statutes is "rational."[21] In particular, this critique has sharp words for "intermediate scrutiny,"[22] arguing that by creating a third category of review with amorphous standards and assigning to that category the very characteristics that are sometimes but not always relevant to governmental decision making, the doctrine gives absolutely no guidance in resolving disputes about, say, policies limiting the inheritance rights of children born outside of a marital relationship[23] or laws treating women and men differently for the purpose of establishing parentage.[24]

A second, somewhat cross cutting, critique of tiered scrutiny argues that such an approach is too rigid.[25] According to this critique, the tiered approach is too blunt—asking big picture questions about the nature of the classification drawn and then shoehorning wildly dissimilar statutory enactments into a superficial conformity without any mechanism for taking into account their dissimilarities. Critics arguing this point insist that whatever one believes about the ultimate constitutionality of, say, affirmative action, any methodology that pretends there are no constitutionally relevant differences between a governmental policy that seeks to perpetuate racial subordination and one that seeks to ameliorate it is hopelessly mechanistic and sadly out of touch.[26]

Finally, and I would argue most importantly, critics of tiered scrutiny have argued that the doctrine fails to adequately capture the normative content of the Equal Protection Clause.[27] In part, this complaint echoes the

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analysis' is chosen, the court still must weigh political and moral concerns that the given case raises to finally determine which party will prevail.").

20. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

21. *See* Romer v. Evans, 517 U.S. 620 (1996).

22. For a particularly pointed version of this critique, arguing for the abandonment of intermediate scrutiny, see George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 Geo. Wash. L. Rev. 1349, 1375, 1378 (1993); *cf.* Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 Cal. L. Rev. 819, 821 (2002) (arguing that "[t]aken seriously, intermediate scrutiny treats an evil as though it were a mere inconvenience").

23. *Compare, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978), *with* Trimble v. Gordon, 430 U.S. 762 (1977).

24. *See, e.g.*, Nguyen v. I.N.S., 533 U.S. 53 (2001); Miller v. Albright, 523 U.S. 420 (1998).

25. *See, e.g.*, Goldberg, *supra* note 3, at 508-12 (discussing "rigidity" of tiers); Shaman, *supra* note 3, at 173-74 (same).

26. *See, e.g.*, Goldberg, *supra* note 3, at 508-09; Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. Pa. L. Rev. 1 (2000).

27. *See, e.g.*, Goldberg, *supra* note 3, at 485-86; *cf.* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649, 1686-92 (2005) (explaining how equal protection doctrine has lost its fit with the substance of the

above objection, arguing that the tiers artificially constrict the constitutional analysis, removing from the calculus any number of factors, circumstances, and consequences that are relevant to a coherent discussion of whether a state is denying "equal protection of the laws." This argument is often coupled with the suggestion that current equal protection doctrine is under-inclusive, neglecting for whatever reason to target lower profile forms of discrimination that transgress the Fourteenth Amendment's commitment to impartial government.[28]

Critics voicing this objection also argue, albeit more obliquely, that the failure of modern tiered review to reflect the full normative content of the Equal Protection Clause is, at least in part, a necessary by-product of the development of a complicated doctrinal structure and would exist regardless of the content of that structure.[29] By framing and persistently applying complicated doctrinal tests, courts interpose mediating concepts between the case at hand and the relevant constitutional provision. Instead of asking whether a particular legislative scheme denies "equal protection of the laws" and meditating on that question, courts ask whether legislation aimed at a particular group should be treated as a "suspect classification" or whether a specified governmental purpose is "compelling," "important," or only "legitimate." Even when courts have derived intelligent and accurate mediating doctrines (indeed, even when they are interpreting provisions whose direct application is well-nigh impossible[30] and have derived optimal tests), the simple act of asking questions with different linguistic and

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Equal Protection Clause, though suggesting that the Court can relatively easily recalibrate the doctrine to solve this problem).

28. *See, e.g.*, Roosevelt, *supra* note 27, at 1688-89 (discussing the example of sexual orientation discrimination).

29. *See, e.g.*, Shaman, *supra* note 3, at 174 ("Under the system attention is concentrated on conceptions about classifications, interests, levels of scrutiny, and the like, to the extent that the actual merits of a case are neglected, if not lost altogether in the shuffle.").

30. The classic example here is the First Amendment's Free Speech Clause. Unless one adopts an absolutist position à la Justice Hugo Black (and perhaps even then, *see, e.g.*, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 Mich. L. Rev. 299, 351 n.167 (1996) (explaining, in accord with most scholars, that even so-called "absolutist" judges have never protected all speech from all infringements but have instead constructed elaborate rules for determining what counts as "speech" and what counts as an "infringement")), courts implementing that command need to develop rules for separating out laws that "abridge the freedom of speech" in a constitutionally relevant way and laws that do not. While working out the normative content of the provision gets you part of the way there, few if any judges or commentators believe such an approach sufficient, without the development of some sorting rules and mediating tests. That having been said, even in this very different context, there are an increasing number of judges and commentators, Justice Stevens included, who believe that the Court has focused its attention too much on its elaborate mediating doctrine and lost sight of the essence of the constitutional command. *See, e.g.*, Fleming, *supra* note 8, at 2302-03 (noting that Justice Stevens "might just as well have written . . . that '[t]here is only one First Amendment'"); Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 Ind. L.J. 801 (2004) (arguing that the development of a tiered methodology in the First Amendment context has created law that is stilted and unsatisfying and that the Court, led by Justice Stevens, is gradually abandoning such an approach).

conceptual reference points than the Constitution's text have a distortive or transformative effect, building substantive content into the body of constitutional law.[31] Moreover, if, as here, the textual provision in question expresses its underlying normative commitment in a relatively accessible fashion, then gaps between that commitment and the results prompted by the mediating doctrine may well become apparent, especially in close or novel cases.[32]

B. *Proposals for Reform*

The commentators who have participated in the collective project of critiquing modern equal protection doctrine have parted company when it comes time for a reformist prescription. Some have argued for a reworking of current doctrine that retains tiered review but purges it of some of its noticeable flaws. To this end, scholars have, for example, called for the adoption of more definitive criteria to determine whether classifications prompt heightened review,[33] for a more literal application of the doctrinal tests regardless of consequence,[34] and for the affirmative acknowledgment of a fourth category of review to deal with classifications aimed at unpopular groups who nevertheless fail to meet the traditional criteria for strict or intermediate scrutiny.[35]

Others, however, have advocated abandoning tiers altogether and adopting an alternative doctrinal structure. The most common proposal draws heavily on the jurisprudence of Justice Thurgood Marshall and advocates an explicit balancing test or sliding scale approach that weighs the strength of the government's justification for a classification (including the persuasiveness of the ends and the tightness of the fit) against the importance of the right impacted and the invidiousness of the

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31. For a general (and generally critical) discussion of this phenomena, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (2000).

32. At least up to this point in the Article I do not mean to suggest that there is anything particularly problematic about the degree to which doctrine transforms normative expectations and creates constitutional meaning, nor do I mean to suggest that courts necessarily should operate with the assumption that the full normative content of the Constitution is judicially enforceable. Many commentators have argued with considerable persuasiveness that the development of mediating doctrine is necessary to implement or operationalize broad constitutional commitments, *see, e.g.*, Fallon, Implementing the Constitution, *supra* note 12, and that due regard for the institutional prerogatives of other branches requires that courts leave certain constitutional principles under-enforced, *see, e.g.*, Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice (2004). Full consideration of either of these arguments is beyond the scope of this Article, though I will consider the former position briefly and with at least a dollop of skepticism in the coming pages.

33. *E.g.*, Dorf, *supra* note 18.

34. *E.g.*, Massey, *supra* note 10.

35. *Cf.* Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 Vill. L. Rev. 117, 137 (2005) (arguing that the Court should explicitly apply rational basis with bite in situations where prejudice and hostility "are especially likely to be present").

classification.[36] Another prominent proposal, forwarded by Professor Suzanne Goldberg, argues for a new "standard" that consistently vets governmental legislation on three axes: the plausibility of the available justifications in light of the specific regulatory context, the likelihood that those justifications might apply so broadly as to countenance the development of impermissible class legislation, and the possibility that the regulation in question was in actuality the product of bias or stereotype.[37] What these proposals—and others like them[38]—have in common is the assumption that the fall of the tiers will leave a vacuum that must and will be filled by another (likely more complicated) doctrinal structure.

II. JUSTICE STEVENS AND MODERN EQUAL PROTECTION METHODOLOGY: A COMMON DIAGNOSIS AND AN UNCONVENTIONAL PRESCRIPTION

As indicated above, the academic critics of modern equal protection doctrine tend to treat the writings of Justice Stevens (and Justice Marshall) as prophetic and inspirational. While such attention is flattering and largely appropriate, it also tends to amalgamate Justice Stevens's thinking into the ideas of a larger movement, handicapping efforts to unpack and assimilate the jurisprudential insights at the heart of his many equal protection writings. This part seeks to overcome those hurdles by consciously asking whether his criticisms of tiered review and his proposals for reform track those of academic commentators or, instead, are distinct in important ways.

A. *The Ills of Tiered Review: A Familiar Critique*

Justice Stevens has been strikingly forthright in his distaste for tiered review, routinely noting the basic reasons for his dissatisfaction and periodically updating his standard arguments with deeper reflections on the

36. *E.g.*, Shaman, *supra* note 3.

37. Goldberg, *supra* note 3, at 491-92.

38. *See, e.g.*, Lundin, *supra* note 4 (offering another overarching test for equal protection cases). In addition to those who propose to reform equal protection jurisprudence through the development of new mediating tests, a substantial number of scholars have proposed reforming the case law by adopting new or different normative understandings of the Constitution's meaning. For two classics of this sort, see Karst, *supra* note 3 (arguing that the Equal Protection Clause promises "equal citizenship" and reasoning through the Court's cases on that premise); Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976) (reading the Equal Protection Clause as grounded in an "anti-subordination" principle). Some such articles appear to acknowledge the need for new implementing doctrine for their proposal, some seem comfortable with the old doctrine as long as they are put in the service of a new normative vision, and others implicitly suggest that their vision might be implemented without mediating doctrine. Most, however, are simply silent on the question of how to implement their vision. Since the bulk of these articles do not address the question of appropriate mediating doctrine or do not question the propriety of the current doctrine, they are largely outside the scope of this Article. Their existence and importance, nonetheless, require acknowledgment.

problems implicit in such an approach.[39] Though the language of these explanatory opinions is uniquely the Justice's own, their substance is strikingly familiar, echoing (or perhaps inspiring)[40] the academic concerns chronicled above.

In his first year and a half on the Court, Justice Stevens articulated his objections to the burgeoning of category-driven equal protection doctrine several times, most notably in his *Craig v. Boren* concurrence.[41] That opinion begins with the Justice's famous assertion that "[t]here is only one Equal Protection Clause" and his less-quoted but absolutely essential corollary that the Clause requires the States to "govern impartially."[42] Rereading that opinion in the context of three decades of further explication of the Justice's thinking on equal protection questions, what is striking is the degree to which a short (four-paragraph) writing focused on a single epigrammatic sentence encapsulates or at least foreshadows each of the Justice's major concerns with modern tiered review.

As James Fleming also argues in this Symposium,[43] the assertion that "there is only one Equal Protection Clause" is not a singular criticism of the Court's equal protection jurisprudence but rather a jumping off point for several distinct criticisms. First, the opinion most directly argues that the tiers are not, as a descriptive matter, reflective of the Court's decision making, but are instead after-the-fact explanations offered for decisions arrived at through some other process.[44] Second, the opinion expresses some concern that the tiers, to the extent they shape the Court's reasoning, are unduly rigid, limiting the Court's ability to "articulate"—and perhaps, in the long run, to consider[45]—a variety of factors that are crucially

39. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring); Harris v. McRae, 448 U.S. 297, 352 n.4 (1980) (Stevens, J., dissenting); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

40. Since the Justice began to voice his criticisms of tiers even before the three-tier system had taken hold and stated those criticisms to much fanfare in the case setting up three-tiered review, it is likely that his ideas had some influence on the academic commentary that developed in the ensuing years.

41. *Craig*, 429 U.S. at 211; *see also* Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) ("My point . . . is to suggest that the 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."); *cf.* Mathews v. Lucas, 427 U.S. 495, 516, 523 (1976) (Stevens, J., dissenting) (arguing that a statutory presumption based largely on legitimacy was unconstitutional after an analysis that begins with "the proposition that all persons are created equal," and proceeds to assess "the competing interests at stake in [the] litigation" without employing tiers or presumptions); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (discussing and focusing the Court's resolution of the case on the general constitutional command that both "the federal sovereign" and the States "must govern impartially").

42. *Craig*, 429 U.S. at 211.

43. *See* Fleming, *supra* note 8.

44. *Craig*, 429 U.S. at 212.

45. I say "in the long run" because, at least at this point in his career, Justice Stevens appears convinced that the Court's actual method for resolving cases is sufficiently flexible to take into account these factors, whatever its opinions might say. *See id.* In the three

important to resolving equal protection cases.[46] Finally, and most importantly, the opinion strongly suggests—though it does not explicitly argue—that tiered review does not accurately capture the normative content of the Equal Protection Clause, in particular the Clause's guarantee to all citizens (not just those in protected classes) that their concerns will be considered by an impartial sovereign.[47]

In his opinions since *Craig*, Justice Stevens has remained remarkably consistent in his criticisms of tiered review and has developed each of the above-mentioned themes more richly. For example, his belief that the tiers are an explanatory rather than an analytical device has flowered into a firmer conviction that tiered review is incapable of policing the line of constitutionality.[48] To this end, he has characterized modern tiered doctrine as "wooden,"[49] "sterile,"[50] and "misleading,"[51] and has repeatedly looked behind the doctrine to ask what is truly motivating his colleagues.[52]

In a similar fashion, Justice Stevens has grown increasingly frustrated with the artificial limits that tiered review imposes upon the factors and circumstances his colleagues are willing to consider in equal protection cases. Irrespective of the outcome of the cases,[53] he has routinely expressed hostility at the rigidity of the categories and impatience with the

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intervening decades, however, his conviction on this point appears to have wavered. *See infra* notes 53-58 and accompanying text.

46. *Craig*, 429 U.S. at 212-13.

47. Though the notion is not further developed, the idea that the tiers distort the substantive content of the Equal Protection Clause to the detriment of those victims of discrimination who do not fall into traditional protected classes is suggested by the famous first sentences of the opinion. *See id.* at 211-12 ("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.").

48. *Cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring) ("I have never been persuaded that these so-called 'standards' adequately explain the decisional process.").

49. Rice v. Cayetano, 528 U.S. 495, 547 (2000) (Stevens, J., dissenting). *Cayetano* deals with claims under both the Fourteenth and Fifteenth Amendments.

50. Harris v. McRae, 448 U.S. 297, 351 (1980) (Stevens, J., dissenting).

51. *Id.* at 351-52; *see also* Bush v. Vera, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting) ("The conclusion that race-conscious districting should not always be subject to strict scrutiny merely recognizes that our equal protection jurisprudence can sometimes mislead us with its rigid characterization of suspect classes and levels of scrutiny.").

52. *E.g.*, Vieth v. Jubelirer, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting) ("What is clear is that it is not the unavailability of judicially manageable standards that drives today's decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.").

53. It is notable that Justice Stevens's frustration at the rigidity of the prevailing doctrine is sometimes provoked by the decision to strike down a regulatory scheme that he believes to have been the product of legitimate governmental deliberation (for example, the districting plans and affirmative action programs at issue in cases like *Bush v. Vera* and *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995)) and at other times provoked by the decision to uphold a classification that he believes is only explicable by legislative bias (for example, the property tax preferences at issue in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), or the Hyde Amendments' abortion funding prohibitions, at issue in *Harris*).

hollowness of the analysis they provoke.[54] These concerns are most obvious in his complicated writings on affirmative action and race-conscious redistricting,[55] but are notably present in a substantial number of gender discrimination,[56] alienage,[57] and general regulatory cases.[58]

Finally, and most pressingly, Justice Stevens has become increasingly convinced that the doctrine creates a substantive gap between the case law and the Constitution's normative commitment to equality. Though the evidence here is largely impressionistic, it seems that in wading through decades of cases—particularly those in the areas just mentioned—Justice Stevens has become increasingly troubled that the tiers push the Court towards results that are simultaneously over-inclusive and under-inclusive. More specifically, by making the characteristic the legislature uses to draw its line determinative of the standard of review, the Court has created a hierarchy of entitlement that simultaneously dooms honest legislative attempts to respond to legitimate gender- and race-correlated concerns[59] and gives a free pass to legislative partiality in other contexts.[60]

These arguments find eloquent expression in Justice Stevens's opinions and his persistent championing of them has, no doubt, played a role in their substantial acceptance by academic commentators. While the full Court has never formally embraced these arguments, their influence can be seen in the outcome and even the reasoning of numerous cases that ostensibly apply traditional tiered review, but whose results are best explained by positing that the Justices have implicitly loosened the rigidity of the tiers or perhaps

54. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 441 (1998) (opinion of Stevens, J.) (deriding party, amici, and dissenters for arguing that an "eminently reasonable" statute "justified by important Government policies" is nonetheless unconstitutional because it imposes "a 'gender-based classification'"); *Bush*, 517 U.S. at 1010 (Stevens, J., dissenting) ("The conclusion that race-conscious districting should not always be subject to strict scrutiny merely recognizes that our equal protection jurisprudence can sometimes mislead us with its rigid characterization of suspect classes and levels of scrutiny."); Shaw v. Hunt, 517 U.S. 899, 919 (1996) (Stevens, J., dissenting) (distancing himself from the majority's attempt "to apply in a rigid fashion the strict scrutiny analysis developed for cases of a far different type"); *cf. Harris*, 448 U.S. at 352 n.4 (Stevens, J., dissenting) (arguing that the case demonstrates the degree to which the "method" of tiered review "may simply bypass the real issue").

55. *See, e.g.*, *Shaw*, 517 U.S. at 918-19 (Stevens, J., dissenting) (collecting citations to cases where he has argued against rigid application of strict scrutiny to situations in which a racial majority attempts to enable a "minority to participate more effectively in the process of democratic government").

56. *See, e.g.*, *Miller*, 523 U.S. 420.

57. *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 311-12 (1978) (Stevens, J., dissenting).

58. *See, e.g.*, Nordlinger. v. Hahn, 505 U.S. 1, 28 (1992) (Stevens, J., dissenting).

59. For a list of some of the cases in which Justice Stevens has expressed this frustration in the race context, see *Shaw*, 517 U.S. at 918-19. For an example in the gender context, see Caban v. Mohammed, 441 U.S. 380, 401 (1979) (Stevens, J., dissenting).

60. An example of this is the case of partisan reentrenchment. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451-52 (1985) (Stevens, J., dissenting) ("Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.").

even partially weaned themselves from tiered review altogether.[61] On the flaws and dangers of tiered review, Justice Stevens's seemingly iconoclastic views are well within the constitutional mainstream.

B. *But What Comes Next?: Justice Stevens's Embrace of Unmediated Constitutional Interpretation*

While Justice Stevens has written substantially more about his preferred approach to equal protection cases than about his criticism of the tiers, his ideas on this question are less familiar and harder to pin down. In part, this disparity stems from the density and as-applied nature of much of his writing in this area. To put this point colloquially, the affirmative portions of his equal protection writings involve a lot more showing than telling. Beyond that, however, I would—and will—argue that Justice Stevens's preferred equal protection methodology is, at its root, so different from what we have come to expect from constitutional interpretation that we have lost our ability to appreciate its salient features. If I am right, Justice Stevens's underlying approach to the Equal Protection Clause involves nothing more and nothing less than the direct and unmediated application of the Constitution's guarantee of "equal protection of the laws."[62]

1. A Few Preliminary Observations on the Nature of Unmediated Constitutional Interpretation

A few caveats are necessary before I turn to Justice Stevens's writings. First, in positing a methodology of unmediated constitutional interpretation, I do not mean to suggest that a judge applying such a method would skip to his or her conclusion without any analysis. The conventions of judicial practice require a judge to provide such analysis[63] and nearly all judicial opinions, including quite obviously those of Justice Stevens, ask intermediate questions that help propel the jurist towards a final judgment in any given case. Second, I do not mean to adopt the Panglossian notion that the concept of "equality" is so fixed so as to allow its content to be accessed in an objective or universally unobjectionable way. Our experiences as a nation are strikingly to the contrary.[64]

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61. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a race-conscious law school admission program while ostensibly applying strict scrutiny); Romer v. Evans, 517 U.S. 620 (1996) (striking down a state constitutional amendment that made it more difficult for gays and lesbians to obtain statutory protection for discrimination while ostensibly applying rational basis review); *Cleburne*, 473 U.S. 432 (striking down zoning laws that disfavor the mentally retarded while ostensibly applying rational basis review).

62. U.S. Const. amend. XIV, § 1.

63. *Cf.* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121 (2005) (discussing the scope of the courts' duty to decide cases and arguing for at least modest requirements of candor, responsiveness, and elaboration).

64. Societal consensus on the meaning of "equality" is famously elusive. *See, e.g.*, Dorf, *supra* note 18, at 957 ("At the conceptual level . . . equality is either entirely empty or so hotly contested that it can be invoked with (equal?) aplomb by those on either side of our

What then would unmediated constitutional interpretation look like? I will largely explore that question in describing Justice Stevens's methodology, but a brief preliminary sketch will provide a standard against which the Justice's writings can be measured. In rough form, an unmediated approach to equal protection jurisprudence would begin by ascertaining in a largely nonlinguistic way a vision of the "equality" promised by the text. It would then proceed to frame every inquiry into the constitutionality of governmental action around the question whether that vision is thwarted by the regulatory scheme in question. In ascertaining the appropriate answer in any given case, a judge applying such a methodology might—and probably should—ask a variety of questions about the challenged statute, its impact on individuals, and the various overlapping contexts in which it emerged, but such a jurist would not be compelled to ask any particular set of questions in any given case or to reach a particular conclusion based on the matrix of answers he or she receives to those questions. Such a judge would then end the inquiry where it began, wondering whether in light of all of the information uncovered by these helpful questions, the scheme in question violates the Constitution's commitment to "equal protection of the laws."[65]

2. Does Justice Stevens Practice Unmediated Constitutional Interpretation?

Justice Stevens never says explicitly that his equal protection jurisprudence is a form of unmediated constitutional interpretation. In fact, in a number of opinions he goes to great pains to explain the intermediate steps that he takes in evaluating equal protection challenges, in one case even listing a series of "basic questions" "we have to ask" in "every equal protection case."[66] Nevertheless, if one looks at his equal protection

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most divisive national questions . . . ."); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 Fordham L. Rev. 2313 (2006); *cf.* Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982) (famously arguing that "equality" is such a contested and under-theorized concept that it lacks any normative utility).

65. While the focus of this Article is limited to Justice Stevens's opinions, it is worth noting that the Court's opinion in *Romer v. Evans*, 517 U.S. 620, a decision which the Justice joined and over which he undoubtedly rejoiced, reads like an almost comical amalgam of two distinct methodologies. Large chunks of the opinion persuasively reject Colorado's Amendment 2 based on its direct conflict with the central norms of the Equal Protection Clause without resort to tiered analysis. Others portions attempt to translate the determination into the conclusion that the provision is not "rationally related" to a "legitimate state interest" with more conviction than finesse. The difference between the two portions of *Romer* nicely illustrate the difference between mediated and unmediated interpretation of the Equal Protection Clause.

66. *Cleburne*, 473 U.S. at 453 (Stevens, J., dissenting). Justice Stevens listed the basic questions to ask as follows:

> In every equal protection case, we have to ask certain basic questions. 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

opinions over thirty years from a broad perspective, there is much evidence that his underlying approach to such cases is largely unmediated. The manner in which he structures his opinions and the substance of his writing both point to that conclusion.

a. *Articulating and Forwarding a Normative Vision of the Equal Protection Clause*

As one might expect from a jurist pursuing an unmediated approach, Justice Stevens puts substantial energy into developing and articulating a normative vision of the Constitution's meaning. He is not content with a set of rules for implementing the Constitution but instead wants to understand at a deeper level what it means to prohibit states from denying those within their borders "the equal protection of the laws." His opinions—particularly his concurrences and dissents[67]—tend to blur the line between constitutional law and constitutional theory, proffering a vision of the Equal Protection Clause's promise that turns on ideas of "impartiality" and "rationality" while simultaneously resolving the concrete disputes before him.[68]

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treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."

Id.

67. Concurrences and dissents tend to be a better window into a Justice's true thoughts because they often speak only for the author and, even when carrying the signatures of others, do not reflect the kinds of compromises and elisions often necessary to gain a majority.

68. The Justice's reliance on terms such as "impartiality" and "rationality" raises an immediate objection to my thesis that Justice Stevens practices "unmediated" constitutional interpretation. After all, those terms are no more mentioned in the Constitution's text than standards of review. If Justice Stevens relies on these concepts to shape his thinking in any sort of systematic way, aren't they serving as a form of mediating doctrine? This is a fair question, albeit one that loses some of its bite on careful inspection. As Mitchell Berman and Kermit Roosevelt have recently emphasized, judicial discussion of constitutional rules can largely be divided into two categories: discussion meant to uncover and capture in words the underlying normative vision of a particular textual provision and discussion meant to design and explain rules for implementing that constitutional vision. *See generally* Berman, *Decision Rules*, *supra* note 13; Roosevelt, *supra* note 27. For Justice Stevens, the idea of an "impartial sovereign" and the requirement of genuine "rationality" in legislative action are attempts to explicate the Constitution's meaning rather than doctrinal tools for pursuing that vision. As such, they serve a fundamentally different role in his analysis than tiers of review, balancing tests, presumptions, and other similar implementing doctrine would serve. I think it can plausibly be argued that a jurist who aggressively rejects "implementing doctrine" is practicing "unmediated" constitutional interpretation even if he or she spends significant time and energy developing a normative vision of the text's underlying meaning. That having been said, my argument that Justice Stevens is practicing "unmediated" constitutional interpretation goes further. In addition to eschewing implementing doctrine (or, to use Professor Berman's term, constitutional decisional rules), Justice Stevens is committed to a substantive understanding of the Equal Protection Clause that hews fairly closely to the constitutional text. In explaining the overarching purposes of the Equal Protection Clause, Justice Stevens does not recount history, cite to philosophers and theorists, or speculate about the role of the courts in a constitutional democracy. Instead, he offers his vision in plain and unapologetic language, almost as if he assumes that his

Rather than scattering his discussion of normative matters throughout his opinions, Justice Stevens likes to lead with them. His writings (or the discussion sections thereof) often begin with a strong and clear articulation of the Equal Protection Clause's central meaning. In one early case, his jumping off point was "the proposition that all persons are created equal."[69] In a number of other cases, he launched his analysis with the statement that the Constitution guarantees an impartial sovereign[70] or requires that the states "govern impartially."[71] In still other cases, he framed the central normative principle in terms of rationality[72] or "legitimacy."[73]

These normative statements are not—as they might be in the writing of other Justices—mere precatory preening. Nor are they hints towards the standard of review the Justice intends to apply. Instead, they serve a more substantive and fundamental role in his opinions. In case after case, these broad normative statements announce a polar star, a textually grounded fixed point which the rest of the opinion will use to navigate the dense (and perhaps unmappable) landscape of equal protection review. Justice Stevens might wander off and examine an interesting patch of evidence about the legislature's motive or the historical treatment of the minority group at issue, but, when it comes time to evaluate that evidence, he returns time and again to the normative principles that front the opinion.[74]

In articulating the particular normative principles that guide his equal protection analysis, Justice Stevens hews fairly closely to the text. Sometimes he does so directly, asking, for example, whether a scheme accords "equal justice under law."[75] More often than not, his fidelity to the text is more subtle. While the words "impartiality" and "rationality" do not appear in the Equal Protection Clause, they are strongly suggested by the full text of the provision. Within the constraints of our language, Justice Stevens's formulations—in particular his repeated references to

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commonsensical reading of the clause ought to be self-evident from the text. As I argue below, one gets the sense that Justice Stevens views "impartiality" as a fairly literal one-word translation of the text's command. *See infra* notes 75-77 and accompanying text (discussing this issue further).

69. Mathews v. Lucas, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting).

70. Fullilove v. Klutznick, 448 U.S. 448, 533 (1980) (Stevens, J., dissenting); *cf.* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring) (inquiring into whether an "impartial lawmaker" might accept a proposed justification).

71. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting); Lyng v. Castillo, 477 U.S. 635, 636 n.2 (1986); *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring); Harris v. McRae, 448 U.S. 297, 349, (1980) (Stevens, J., dissenting); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

72. *E.g.*, *Cleburne*, 473 U.S. at 452; Craig v. Boren, 429 U.S. 190, 213 (1976) (Stevens, J., concurring).

73. *E.g., Cleburne*, 473 U.S. at 452.

74. For some examples, see cases cited *infra* notes 103-04.

75. *Hampton*, 426 U.S. at 100 ("The concept of equal justice under law is served by the . . . Equal Protection Clause of the Fourteenth Amendment."); *see also* Mathews v. Lucas, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting) ("We are committed to the proposition that all persons are created equal.").

"impartiality"—are credible one-word encapsulations of the textual promise that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[76] Given that the conventions of judging and the requirement of transparency compel the Justice to articulate in words a largely nonlinguistic understanding of the equal protection promise, it is hard to imagine a single-word formulation that would shift our focus less far from the Constitution's text than the ones the Justice has selected.[77]

b. *Detailed and Case-Specific Inquiry and Application*

When Justice Stevens turns from articulating the relevant normative principles to applying them in concrete cases, his principal strategies track his normative commitments. For example, having stated that the core concern of the Equal Protection Clause is whether governmental action accords with what one would expect of an "impartial sovereign,"[78] the Justice more often than not focuses his inquiry directly at the question of legislative partiality, usually through a comprehensive, lawyerly examination of the plausibility of the proffered rationales for the statute.[79] While the Justice occasionally slides into the language of presumptions,[80] his normal approach to this inquiry is to assess the evidence of a justification's plausibility head-on without resort to any such sorting rule. In a large number of difficult and controversial equal protection cases, Justice Stevens has rested his vote primarily or exclusively on an observation that the factual record either belied or supported the proposed neutral justifications for the law.[81]

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76. U.S. Const. amend. XIV, § 1.

77. Certainly, "equality"—a contested term, *see supra* note 64, that seems to suggest an end state rather than a process—would serve no better.

78. *See supra* note 70 (citing cases).

79. The examples are legion. For cases where such an examination leads to the conclusion that the law in question is not sustained by an impartial reason, see, for example, Michael M. v. Superior Court, 450 U.S. 464, 496-502 (1981) (Stevens, J., dissenting) (looking at evidence and arguments proffered by the legislature and the majority, focusing on whether they are empirically and logically sound, and rejecting them as illogical); Califano v. Goldfarb, 430 U.S. 199, 219-20 (1977) (Stevens, J., concurring) (looking at evidence for an alleged administrative and fiscal justification and finding that, because the costs of the challenged classification are so high and the gains so small, no rational legislature motivated by such concerns would have adopted the statute in question); Harris v. McRae, 448 U.S. 297, 355-57 (1980) (Stevens, J., dissenting) (finding a proposed neutral fiscal justification ludicrous because it is much more expensive to pay for childbirth and medical care for children than for abortions and concluding that the Hyde Amendments did little more than "require the expenditure of millions and millions of dollars in order to thwart the exercise of a constitutional right"). For an example of a case where a similar examination led Justice Stevens to uphold a statute, see N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

80. *See, e.g.*, *Michael M.*, 450 U.S. at 497 n.4.

81. In addition to the cases cited *supra* note 79, see, for example, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 281 (1979) (Stevens, J., concurring) (concluding that "the answer" to the constitutional question in a case involving an alleged *sub silentio* gender classification "is largely provided by the fact that the number of males disadvantaged by [the statute] (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged

Second, in the cases where Justice Stevens finds it necessary to move beyond the text of the statute and its fit with the proffered justification in order to resolve an equal protection challenge, he has been quite eclectic in the types of evidence he is willing to consider and quite case-specific in determining how much weight to give to each type.[82] No one type of evidence trumps; no single question directs his analysis. In reaching his final conclusion as to whether a given regulatory scheme is the action of an impartial sovereign, Justice Stevens has shown interest in the specific drafting history of the provisions in question,[83] the broader history of regulations of this kind,[84] the general social history of the groups burdened by the scheme,[85] and the consequences of the laws.[86] The evidentiary questions that he asks, the order in which he asks them, and the use he makes of the answers is different in literally every single case.

The Justice's commitment to treating each equal protection case as a unique pursuit of the Constitution's normative vision also means that he is less committed to maintaining linguistic consistency from case to case than would be a justice who is focused on creating and maintaining a system of mediating doctrine. If, in the specific circumstances of a given case, pursuit of an answer to the question of whether the legislature acted impartially requires examination of a subsidiary question about whose import he has previously expressed skepticism, Justice Stevens will pursue the inquiry, his previous words notwithstanding. For example, while the Justice has on several occasions downplayed the importance and even the relevance of evidence that legislators acted with an "improper motive,"[87] in other

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females (2,954,000)—to refute the claim that the rule was intended to benefit males as a class over females as a class"). *Cf.* Johnson v. California, 125 S. Ct. 1141, 1153-57 (2005) (Stevens, J., dissenting) (voting to strike down a California policy of segregating prisoners without remanding the case for application of strict scrutiny because the State's failure to present any empirical evidence to support its claims and logical fallacies implicit in the State's argument demonstrate that the policy was not the product of careful deliberation by an impartial sovereign).

82. The evidentiary eclecticism that Justice Stevens embraces in this constitutional context is directly analogous to the approach he takes in statutory interpretation cases. *See, e.g.*, Abner S. Greene, *The Missing Step of Textualism*, 74 Fordham L. Rev. 1913 (2006).

83. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 455 (1985) (Stevens, J., concurring) (stating that "the record convinces me" that the permit requirement at issue was not adopted as a rational attempt to deal with the special needs and limits of the mentally retarded but instead was "required because of the irrational fears of neighboring property owners").

84. *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 308-09 (1978) (Stevens, J, dissenting) (discussing the history of and reasons for the traditional tendency to exclude noncitizens from certain forms of public employment).

85. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 532-34 (2000) (Stevens, J., dissenting) (discussing the history of discrimination against native Hawaiians and of a special ward-like relationship between them and the United States government).

86. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 496-502 (1981) (Stevens, J., dissenting) (comparing the consequences for teen pregnancy rates of gender-specific and gender-neutral statutory rape laws).

87. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("A law conscripting clerics should not be invalidated because an atheist voted for it.").

situations, he has not been shy about framing his inquiry around the question whether the legislature acted out of bias or stereotype and pursuing all forms of evidence that might serve to unmask legislative bias and ignorance.[88] Similarly, while Justice Stevens has at times insisted that a statute may be justified on any neutral ground even if there is no evidence the legislature considered that rationale,[89] he has at other times taken the logical implausibility or factual inaccuracy of the legislature's proffered justifications as grounds for concluding that a law lacked sufficient indicia of impartiality.[90] To take an even more straightforward example, while the Justice has stated and relied on the assertion that "[t]he word 'discriminate' does not appear in the Equal Protection Clause,"[91] he has also been willing to employ the term and concept of "discrimination" to help differentiate between constitutionally permitted and constitutionally proscribed race-conscious legislation (albeit while putting that term in quotation marks).[92]

Perhaps these tensions between cases are reconcilable on their face[93] and certainly one has no right to expect absolute consistency from case to case over a thirty-year period. Nonetheless, I suspect that the Justice's willingness to act in case *B* in a way that might be inconsistent with a methodological pronouncement in case *A* has much to do with his sense that every equal protection case is different and his concomitant commitment to resolve each case based on a holistic assessment of whether the government has acted as would an impartial sovereign. Justice Stevens offers generalized pronouncements as to the types of evidence he is likely to follow and the kinds of questions that are helpful to him in resolving equal protection cases as part of his obligations as a judge in a system of common-law constitutionalism. But the rules and framing propositions he

88. *See, e.g.*, *Michael M.*, 450 U.S. at 499-500 (Stevens, J., dissenting) (concluding that a gender-specific statutory rape law must have been the product of stereotyping rather than rational legislative choice); *Foley*, 435 U.S. at 307, 308-09 (Stevens, J., dissenting) (concluding that the actual reasons for laws banning the public employment of aliens were impermissible patronage concerns); *see also* Califano v. Goldfarb, 430 U.S. 199, 220 (1977) (Stevens, J., concurring in the judgment) ("It is inconceivable that Congress would have authorized such large expenditures for an administrative purpose without the benefit of any cost analysis, or indeed, without even discussing the problem. I am therefore convinced that administrative convenience was not the actual reason for the discrimination.").

89. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring in the judgment).

90. *See, e.g.*, cases cited *supra* note 79. To be clear, it is not that Justice Stevens rejects proposed justifications because the state did not consider them, but rather that he assumes fairly quickly that the justifications offered by the state are the only plausible ones and that refuting them is sufficient to establish a likelihood of bias or stereotyping. One recent case where this approach is fairly clear is *Johnson v. California*, 125 S. Ct. 1141, 1153 (2005) (Stevens, J., dissenting), *see supra* note 81, but this tendency is present to some degree in many of his equal protection writings.

91. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1976) (Stevens, J., dissenting).

92. Bush v. Vera, 517 U.S. 952, 1011 (1996) (Stevens, J., dissenting).

93. For example, *Fritz* offers a credible effort at explaining how Justice Stevens's methodology rejects the notion that only "actual" governmental motivation counts while simultaneously screening for claims of bias and stereotype. *Fritz*, 449 U.S. at 180-82 (Stevens, J., concurring in the judgment).

offers are constantly being tested by the unique facts of new cases and need not—indeed, ought not—be followed if they prove unhelpful or counterproductive in future cases.

c. *Express Advocacy of Evidentiary Eclecticism and Frustration with the Rigidity of His Colleagues*

The flexibility of Justice Stevens's inquiry is not accidental. To the contrary, Justice Stevens expressly views evidentiary eclecticism and case specificity as virtues in the equal protection context. While the Justice will frequently express the meaning of the Equal Protection Clause in broad terms,[94] he is famously unsympathetic to attempts to frame the rules for applying that meaning to cases in a similarly broad fashion. He is skeptical of the utility of "an attempt to articulate [an equal protection standard] in all-encompassing terms"[95] and dismissive of decisions that turn on the rote application of "glittering generalities."[96] For three decades, Justice Stevens has consistently argued for the proposition that the answer to the toughest equal protection cases lies not in broad rules but in the details of the statutory scheme and the accompanying legislative and historical record.

As Justice Stevens has endeavored to demonstrate the virtues of his approach, he has consistently used the approach of his colleagues as a foil. While his colleagues have been surprisingly reluctant to engage the substance of Justice Stevens's equal protection jurisprudence,[97] he has sharpened the affirmative case for his eclectic and free-form methodology by demonstrating the drawbacks—and on occasion the absurdities—of the standard tiered approach. In critiquing the work of the other Justices, Justice Stevens has shown particular passion and frustration in cases where he believes his colleagues have simply failed to take into account salient pockets of evidence because of the ostensible requirements of their doctrinal rules.[98]

While visible elsewhere, this theme is best illustrated by Justice Stevens's dissents in cases involving race-conscious policies intended to aid traditionally disadvantaged groups. Though Justice Stevens is by no means a rubber stamp for affirmative action programs,[99] he has sharply critiqued the Court for ignoring the historically grounded difference between "a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination," insisting that "[n]o sensible conception of

94. *See supra* Part II.B.2.a.

95. Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).

96. Rice v. Cayetano, 528 U.S. 495, 527 (2000) (Stevens, J., dissenting).

97. They have also been reluctant to engage the substance of his critiques of tiered review.

98. Again, the parallels to statutory interpretation cases are striking. *See generally* Greene, *supra* note 82.

99. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (Stevens, J., concurring in part and concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 532-34 (1980) (Stevens, J., dissenting).

the Government's constitutional obligation to 'govern impartially,' would treat the two the same."[100] Similarly, when dissenting from the series of cases striking down legislative districts drawn with the "predominant purpose" of electing racial minorities, he has expressed genuine bafflement that the majority allows the constitutionality of intentionally drawn majority-minority districts to turn on little more than a syllogism framed around the propositions that such districts are in essence racial classifications and therefore are presumptively unconstitutional.[101]

Even more than the majority's conclusions in these cases, Justice Stevens takes issue with a methodology that leaves no room for consideration of the difference between statutes drawn to keep minorities out of government and those drawn to include them or even the difference between race-conscious schemes that specifically harm individuals of other races and those that classify by race without imposing any concrete harms.[102] The point here is not that these differences are necessarily dispositive—though Justice Stevens ultimately concludes that they often are—but that they are differences, salient facts that must be weighed, balanced, and evaluated before a responsible jurist can make an assessment as to whether legislation violates equal protection norms.

d. *Conclusions Expressly Grounded in Normative Precepts*

Another defining characteristic of Justice Stevens's equal protection methodology is his tendency, particularly in his separate opinions, to return to first principles when announcing and providing the ultimate justification for his conclusion. In the great majority of his equal protection writings, his concluding paragraph or sentence appeals explicitly to the equal protection norm, either by referencing the constitutional text directly or, more often, by discussing whether the regulatory scheme in question reflects impartial, legitimate, or rational lawmaking.[103] In other cases, these norms are more subtly weaved into the body of the analysis, explaining the questions he chooses to pose, the kinds of evidence he finds persuasive, and the kinds of

100. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (citation omitted); *see also* Shaw v. Hunt, 517 U.S. 899, 918-19 (1996) (Stevens, J., dissenting) (arguing similarly and collecting citations to numerous other opinions of his that also make such arguments).

101. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 1003 (1996) (Stevens, J., dissenting); Shaw v. Hunt, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting); Miller v. Johnson, 515 U.S. 900, 929 (1995) (Stevens, J., dissenting).

102. On the absence of concrete harms, see, for example, *Miller*, 515 U.S. at 929-31.

103. For example, he concludes an assessment of the constitutionality of California's gender-specific statutory rape law by observing, "[a] rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially." Michael M. v. Superior Court, 450 U.S. 464, 502 (1981) (Stevens, J., dissenting). Similarly, when assessing the constitutionality of legislation that singles out medically indicated abortions from other medical procedures for the purpose of Medicaid funding, he concludes, "In my judgment, these Amendments constitute an unjustifiable, and indeed blatant, violation of the sovereign's duty to govern impartially." Harris v. McRae, 448 U.S. 297, 356-57 (1980) (Stevens, J., dissenting).

governmental arguments he declines to credit.[104] In almost every equal protection case in which he has written, however, Justice Stevens has always kept the normative content of the Equal Protection Clause close at hand, declining to take more than one or two steps out into doctrinal parsing or policy analysis without then returning to his central normative concerns.

Justice Stevens has described the Court's equal protection case law as reflecting "a continuum of judgmental responses to differing classifications," rather than "well-defined standards" of review.[105] Despite suggestions to the contrary by some commentators,[106] it is not immediately clear, either from the context of the remark or from his behavior in other cases, whether Justice Stevens approves of an equal protection methodology built around the notion of a "continuum" or whether he would relegate that construct to the scrap heap along with more rigid sorting devices such as "well-defined" tiers of review. What is abundantly clear, however, is that Justice Stevens embraces the notion that resolving concrete equal protection cases requires "judgmental responses to differing classifications."[107] For Justice Stevens, resolving equal protection cases requires a clear understanding and articulation of the equal protection ideal, a roll-up-the-sleeves attitude towards uncovering relevant evidence coupled with a flexible approach to identifying such evidence, and an eye firmly fixed on the equal protection norm. At every step along the way, such a methodology relies on judicial judgment to keep the Constitution on course.

III. ASSESSING JUSTICE STEVENS'S UNMEDIATED EQUAL PROTECTION JURISPRUDENCE

If I am right that Justice Stevens has waded out into the middle of the lake with only a firm conviction as to the normative content of the Equal Protection Clause and his own judgment as a paddle, constitutional theorists ought to be dying to know whether he has sunk or swum. After all, many commentators of varying stripes have expressed either strong reservations about the wisdom of such a methodology, or skepticism about its plausibility, or both.[108] If, largely without notice, Justice Stevens has actually been applying an unmediated methodology for three decades without incident, indeed while earning generally positive reviews for the

104. Perhaps no opinion he has written refers to the theme of governmental impartiality more often than the Justice's recent dissent in the partisan gerrymandering case *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting), an opinion that concludes with the admonition that the majority's refusal to treat such claims as justiciable reflects "a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially." *Id.* at 341; *see also id.* at 317, 318, 326, 333 & n.26, 337, 341 (making nine additional references to the requirement that the legislature act "impartially").

105. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

106. *See, e.g.*, Fleming, *supra* note 8.

107. *Cleburne*, 473 U.S. at 451.

108. For some examples, see *supra* notes 10-13.

meticulousness and moral perspicacity of his jurisprudence, then perhaps the academy has overstated the problems with such an approach.

I hesitate to conclude as much in advance of a full examination of the substance and consequences of the Justice's equal protection project and, of course, have no room for such a lengthy undertaking in this Article. However, even a cursory comparison of the Justice's record with the standard substantive critiques of unmediated constitutional interpretation demonstrates that the case against such an approach is neither as simple nor as clear as theorists have posited.

In the remainder of this part, I perform two tasks. First, I take in turn three of the leading criticisms of unmediated constitutional interpretation and ask whether they find support in Justice Stevens's record. Finding little evidence to confirm these criticisms, I then offer a fourth potential objection to unmediated interpretation—partially borrowed from other commentators and partially my own—that has a bit more purchase.

A. *Three Standard Objections*

1. Argument 1: Unmediated Interpretation Is a Threat to the Rule of Law

Some scholars have argued that unmediated constitutional interpretation is unduly destructive of rule-of-law values, particularly predictability and consistency.[109] According to this argument, mediating doctrine plays a crucial role in insuring that judicial decisions reflect a relatively consistent, stable, and coherent set of principles. If governments do not know in advance what rules the courts are going to apply, they will be unable to adjust their behavior accordingly. If judges do not apply a coordinated set of doctrines of sufficient specificity, they will reach contradictory results. Constitutional law will cease to be a system of rules, with consequences ranging from a substantial increase in litigation costs to a loss of public confidence in the wisdom and impartiality of the bench.

Here, assuming that we are grading on a curve, Justice Stevens passes with flying colors. The results that the Justice has reached have not been noticeably inconsistent either with the full Court's opinions or with each other. Particularly in recent years, he has dissented relatively rarely in equal protection cases,[110] and when he has, he has been joined more often than not by several Justices applying more traditional methods.[111] While,

109. *See, e.g.*, Sunstein, *supra* note 8.

110. Justice Stevens has been in the majority in the great majority of the contentious recent equal protection cases, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Easley v. Cromartie*, 532 U.S. 234 (2001), *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), *United States v. Virginia*, 518 U.S. 515 (1996), and *Romer v. Evans*, 517 U.S. 620 (1996).

111. Justice Stevens's major area of disagreement with the modern court has been racial redistricting cases. *See supra* note 101 and accompanying text. In that area, he has been joined uniformly by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer. His few solo dissents in recent years have turned largely on procedural issues. *See, e.g.*, Johnson v. California, 125 S. Ct. 1141, 1153-57 (2005) (Stevens, J., dissenting); Cent. State Univ. v.

over the course of his career, he has been something of an unpredictable vote in gender and affirmative action cases,[112] the full Court has been no more consistent in its result in those cases and has by most measures been substantially less consistent in its reasoning.[113] On issues involving the constitutionality of discrimination on the basis of mental retardation and sexual orientation,[114] Justice Stevens's unflagging commitment to legislative impartiality has been, if anything, more determinative than other Justices' reliance on the tiers, making his vote more predictable in such cases than those of his colleagues.[115]

2. Argument 2: Unmediated Interpretation Is an Invitation to Judicial Policy Making

Other scholars have suggested that mediating doctrine is all that stands between us and "naked judicial value selection."[116] They argue that, in the absence of tiers of review or some other device to constrain judicial judgment, judges will—either consciously or unconsciously—import their own subjective notions of justice into constitutional analysis, mistaking heartfelt personal policy preferences for constitutional imperatives.[117] Mediating doctrine serves to dim the prospects of such blatant judicial policy making by forcing judges to meditate not on abstract philosophical questions about constitutional meaning but on more specific and more manageable intermediate questions. Moreover, as long as the doctrine is framed in sufficiently broad terms,[118] it will work to impose at least a rudimentary neutrality constraint on jurists, preventing the most blatant forms of judicial favoritism or partisanship.

Am. Ass'n of Univ. Professors, 526 U.S. 124, 130 (1999) (Stevens, J., dissenting); United States v. Armstrong, 517 U.S. 456, 476 (1996) (Stevens, J., dissenting). *But see* Nordlinger v. Hahn, 505 U.S. 1, 30 (1992) (Stevens, J., dissenting) (solo dissent on the merits).

112. On Justice Stevens's initial skepticism about affirmative action, see, for example, cases cited *supra* note 99. For one recent case in which Justice Stevens split with his usual allies and cast the decisive vote to uphold a gender classification that many commentators assumed doomed, see *Nguyen*, 533 U.S. at 53.

113. Justice Stevens was, after all, in the majority in both *United States v. Virginia* (arguably ratcheting up the standard of review for gender discrimination claims) and *Nguyen* (arguably ratcheting them down).

114. *E.g.*, *Romer*, 517 U.S. 620; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

115. *Cf. Cleburne*, 473 U.S. at 451-52 (Stevens, J., dissenting) ("Cases involving classification based on alienage, illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.").

116. The phrase belongs to Professor Massey, *see supra* note 10, at 993, but the idea is widely shared.

117. For such scholars, the fact that Justice Stevens has been predictable and consistent does not answer all objections to his use of unmediated constitutional interpretation. To the contrary, it underscores a suspicion that the lack of mediating doctrine may have allowed him to vote his policy preferences in equal protection cases.

118. Doctrine that tells a court to treat cases that draw lines on the basis of race or political affiliation in a particular way imposes at least a superficial neutrality constraint. Doctrine that tells a court to treat all cases involving African-Americans or Democrats in a particular way obviously would not.

While these arguments are not directly refutable, the experience of the modern Court suggests that they are, at minimum, overblown. To begin with, these arguments are premised on the assumption that mediating doctrine actually imposes a substantial constraint on judicial decision making. While it was once thought that the tiers of review imposed such a constraint in the equal protection context,[119] the last quarter century of cases have cast doubt on that belief, leaving many court watchers convinced that the crucial decisions in the application of the tiers all ultimately require a resort to "unguided normative judgment."[120] More importantly, scholars such as Ted White and Kermit Roosevelt have demonstrated that mediating doctrine by its very nature tends to become less useful as a constraint on judicial decision making as it ages, particularly if the decisions it commands no longer reflect society's values and moral commitments.[121]

Moreover, to the extent that some degree of judicial value judgment is implicit in constitutional litigation, there is something to be said for a methodology, like that of Justice Stevens, that elucidates a substantive vision of the Constitution directly and then expressly evaluates the available evidence in any given equal protection case against standards discerned directly from that exercise. Certainly, it is easier to understand—and to critique—a judicial opinion that is upfront about the values it is forwarding and the evidence it is crediting than an opinion that obscures its own normative foundations.[122] In a constitutional context in which normatively tinged line drawing ("value selection") is inevitable, there is a strong argument in favor of any methodology that maximizes transparency.

Finally, to the extent that this objection turns on a concern that judges engaged in unmediated constitutional interpretation are more likely to invalidate democratically enacted legislation that those disciplined by mediating doctrine, the objection is unsupported by Justice Stevens's record. To the contrary, Justice Stevens's equal protection jurisprudence demonstrates that unmediated constitutional interpretation does not lead

119. The traditional articulation of this assumption, first coined by Gerald Gunther, was, of course, that strict scrutiny is "'strict' in theory and fatal in fact" while rational basis review provides "minimal scrutiny in theory and virtually none in fact." Gunther, *supra* note 2, at 8.

120. Dorf, *supra* note 18, at 954. Even when doctrine arguably points to a particular result, the Court has been willing—and able—to reject that result for a more normatively desirable one while continuing to pledge fealty to the mediating doctrine. For an astute discussion of this phenomenon in the context of the recent affirmative action decisions, see Roosevelt, *supra* note 27, at 1700-07. He concludes, "Subterfuge is the natural response to doctrine that appears to direct the wrong outcome." *Id.* at 1707.

121. *See* Roosevelt, *supra* note 27, at 1686-93 (explaining how doctrine gradually grows outdated and is either surreptitiously ignored by the Court and/or affirmatively replaced); White, *supra* note 2 (demonstrating the modern tiered review is but the latest round in a persistent effort to develop doctrine to divide areas of intense judicial involvement from areas of judicial abdication, explaining how prior versions of such doctrine gradually became unworkable and collapsed over time, and suggesting that tiered review is well on its way to the same fate).

122. *Cf.* Roosevelt, *supra* note 27, at 1689-92 (describing the alternative strategy as "subterfuge").

inexorably to broad judicial usurpation of democratic lawmaking prerogatives, but is instead a methodology whose consequences for the relative authority of the various branches of government turns on the jurist's understanding of the substantive provision at issue. Despite his very different methodology, Justice Stevens has been well within the mainstream of the Court with regard to the amount of legislation he would strike down under the Equal Protection Clause.[123] Even in the absence of mediating tiers that command such a result, Justice Stevens, like his colleagues, has granted substantial latitude to the popularly elected branches to draw classifications that impose burdens and distribute benefits unevenly across society. For Justice Stevens, that deference stems not from a prudential rule or from mediating doctrine designed to balance justice and democracy, but from his understanding of the Constitution's substance, particularly his conviction that among policies that might plausibly be adopted by rational and impartial legislatures, the Equal Protection Clause is neutral.[124]

3. Argument 3: Unmediated Constitutional Interpretation Is a Fool's Errand

Still other critics have suggested that the idea of unmediated constitutional interpretation is a chimera, a logical and logistical impossibility.[125] This argument takes a number of different forms. In arguing this position, some scholars have insisted that the rights-bearing provisions of the Constitution are so vague and open-ended that they provide little guidance in resolving concrete cases. To resolve concrete constitutional debates, judges must, at a minimum, develop an understanding of the relevant provision's underlying normative commitments.[126] (Moreover, in ascertaining such commitments, the text standing alone is radically indeterminate and, therefore, of little help.) The adoption—for largely nontextual reasons—of one particular conception of the normative meaning of a textual provision constitutes the adoption of mediating doctrine, even if the judge does not articulate such an understanding (indeed, even if the judge does not appreciate that he or she has adopted such an understanding).

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123. As noted above, *see supra* note 110, Justice Stevens has been in the majority in the great majority of recent equal protection cases. For every area where he would, if given his druthers, strike down more legislation (for example, political gerrymandering and perhaps certain kinds of irrational economic or tax policies) there is an area (for example, racial gerrymandering and perhaps benign gender classifications) where he would strike down less.

124. *See supra* Part II.B.2.a-b. Justice Stevens tends to focus his attention in equal protection cases on the question of whether there are rational, legitimate, or impartial reasons for the classification at issue, thus imposing relatively modest substantive obligations on lawmakers.

125. The most sophisticated work developing this point is that of Professor Berman. For a list of his recent articles developing this point, see *supra* note 13.

126. This argument is central to the life project of many important modern constitutional thinkers. For some important examples, see generally Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1997); Ronald Dworkin, Law's Empire (1986); Sager, *supra* note 32.

Another version of this argument, voiced most persuasively by Professor Berman, insists that even in moving from statements about constitutional meaning to decisions in particular concrete cases, courts must adopt decisional rules of some sort because the courts "lack[] unmediated access" to the facts necessary to resolve the substantive constitutional questions.[127] Since judges lack omniscience, all they can do, in the absence of mediating doctrine, is adopt substantive readings of the Constitution and gather evidence as to whether the lines drawn by their operative substantive propositions have been transgressed. When it comes time to reach a conclusion in a specific case, however, the courts by definition must rely on some form of mediating doctrine—some rule of decision—to process the relevant evidence and reach a conclusion. "It is the fact of epistemic uncertainty that makes decision rules (or something functionally equivalent) unavoidable."[128]

According to this reading, a judge who sets out to implement the Constitution without mediating doctrine is engaging in a fool's errand. While he may think he is simply applying the Constitution's substance directly to the facts of particular cases, he is actually applying certain unspoken rules for processing those facts and reaching a conclusion. Most likely such a judge is simply ascertaining whether or not, given the totality of the facts, he is persuaded that the Constitution has been transgressed. If that is the judge's thought process he might be said to be applying a "preponderance of the evidence" standard as his decisional rule.[129] Rather than eschewing mediating doctrine, he has unthinkingly adopted a mediating rule without any reflection on whether such a rule either minimizes errors or achieves any of the other purposes (such as deterrence and cost minimization) that mediating doctrine might serve.

There is a logical purity to arguments about the impossibility of unmediated interpretation, but I doubt that these arguments would detain Justice Stevens for long. In response to the argument that the text of a provision such as the Equal Protection Clause is indeterminate and, therefore, requires normative extrapolation before it can be applied to concrete constitutional disputes, Justice Stevens would almost certainly agree with those premises but reject the implication that those facts in any way call into doubt his equal protection methodology. As discussed above,[130] Justice Stevens is willing to articulate a normative understanding of the Equal Protection Clause in language that deviates, in at least superficial ways,[131] from the provision's text. Moreover, though he never says so expressly, I suspect that he is humble enough to acknowledge that his reading of the Clause's substance is not the only possible reading of the text. Nevertheless, I believe that he would cling to the opinion that his

127. Berman, *Decision Rules*, *supra* note 13, at 10.
128. *Id.* at 10 n.35.
129. *See id.* at 10.
130. *See supra* notes 68, 75-77 and accompanying text.
131. *See supra* note 77 and accompanying text.

careful and relatively small steps away from the text differ not only in degree but also in kind from the approaches of scholars and judges who develop elaborate theories of constitutional interpretation premised on normative considerations external to or only tangentially related to the text's promise. As detailed above,[132] his opinions—whatever their strengths or weaknesses—reveal a jurist whose eyes remain continually fixed on the textual command and committed to treating each case as a unique effort to actualize the Constitution's articulated ideal.

Similarly, Justice Stevens would probably meet the observation that every constitutional case by definition utilizes a decisional rule with a shrug of the shoulders. As a descriptive matter, Professor Berman is undoubtedly right—to reach a decision one must have a rule for ascertaining the consequences of the available evidence. But the normative upshot of that observation is not abundantly clear. In the great bulk of his equal protection decisions, Justice Stevens appears to be weighing the accumulated evidence as to the constitutionality of the challenged practice without assumptions or presumptions, thereby utilizing what Professor Berman would call a "preponderance of the evidence" standard.[133] It is certainly logically and linguistically defensible to call such a standard a "mediating doctrine," but to do so blurs a crucial distinction between Justice Stevens's approach and that of other judges and commentators who adopt or advocate tiers, a sliding-scale balancing test, or other cumbersome mediating rules. Where judges using the tiers or another similar mediating system are constantly required to ask themselves complicated questions about how to classify particular cases and about whether the evidence of unconstitutionality reaches a line that has been drawn in a purposefully low or purposefully high place, Justice Stevens is required simply to ask himself whether—all things considered—he finds himself persuaded. Thus, unlike his colleagues, Justice Stevens is free in any given case to ponder upon and pursue a normatively satisfying result in a manner that is, in a meaningful way, unmediated.

Finally, even if one were to grant that it is logically impossible to interpret the Constitution in a completely unmediated way, such a conclusion ought not be read as a license to develop elaborate mediating structures that draw judicial attention far afield from the text's core promise. Put more bluntly, the fact that it may be logically impossible to apply constitutional meaning directly to concrete cases does not necessarily establish that judges should not endeavor to do so. To the contrary, perfect enforcement of the Constitution's substance might be one of those ideals—like complete neutrality, total dispassion, or pure humility—that can never be achieved yet can only even be approached if we strive to achieve the impossible. It is fully likely that Justice Stevens has gotten some equal protection rulings "wrong," either by discounting the prejudice and

132. *See supra* Part II.B.2.b.

133. Berman, *Decision Rules*, *supra* note 13, at 10.

partiality that actually motivated particular legislation or by misunderstanding legislative bungling as evidence of irrational bias or stereotyping. Nevertheless, he would likely argue—and I would tend to concur—that, by approaching the constitutional question directly rather than through an elaborate tiered mediating doctrine, he has come much closer to operationalizing the Constitution's commitment to equal protection than others who have consciously deployed a mediating doctrine. At least with regard to a constitutional principle so essential to both individual liberty and the proper functioning of democratic government, that fact alone might justify the conscious adoption of an unmediated approach.

B. *A Lingering Concern*

I find much to admire in Justice Stevens's largely unmediated approach to equal protection cases and am skeptical about many of the leading arguments usually offered against such a methodology. Nonetheless, for reasons that are at first blush hard to articulate, I have a difficult time giving unqualified approval to an unmediated constitutional methodology. Perhaps my (limited) disquiet reflects nothing more than an inability to transcend an ill-founded professional and cultural consensus. While I do not fully discount that possibility, I suspect that my lack of unqualified approval is at least in part grounded in legitimate concerns about the implications of unmediated constitutional interpretation for the healthy functioning of our constitutional democracy.[134]

While deciding cases in a legally and normatively satisfying manner is an essential judicial function, constitutional theorists have long argued that the courts (and in particular the Supreme Court) actually perform a variety of roles, several of which are essential to the functioning of a constitutional democracy. Determining the boundaries of the Court's proper role has, of course, been an obsession of modern constitutional scholarship and arguments about the consequences for both justice and democracy of different institutional arrangements have increasingly come to dominate constitutional theory.[135] Both theorists engaged in the larger project of broadly defending our constitutional design and those who more closely study the functioning of doctrine, have emphasized the responsibility that the Justices bear for adopting a workable set of rules that can be understood by the public, implemented by the court, and engaged by the larger culture.[136]

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134. I have been pushed on the issues raised in this section by a number of people. This portion of the Article benefits in particular from my reflections on the private comments of Josie Brown and a public question from Pam Karlan. I thank them both for highlighting this concern.

135. *See, e.g.*, Christopher L. Eisgruber, Constitutional Self-Government (2001); Sager, *supra* note 32; Cass R. Sunstein, Designing Democracy: What Democracies Do (2002).

136. For examples from the latter group, see, for example, Berman, *Decision Rules*, *supra* note 13, at 93-100 (explaining the various factors that go into the selection of appropriate

Drawing on their arguments, one can grant that Justice Stevens's opinions more fully reflect the Constitution's normative commitments than those of his colleagues, and that they do so without encouraging either legal instability or judicial aggrandizement, but still insist that his adoption of such an approach disserves the nation. Such an argument would insist that, while Justice Stevens's approach reaches normatively desirable results in the cases at hand, it fails to appreciate the Supreme Court's broader responsibilities. If the Supreme Court's project is not only to decide cases correctly but also to provide citizens, politicians, and lower courts with the tools to transform constitutional aspirations into lived reality, then unmediated interpretation is, at a minimum, disquieting. A Supreme Court that declines to provide more detailed guidance for adhering to, understanding, and embracing the Constitution, but instead insists that the answer to every constitutional question can be achieved only through the nuanced application of judgment to text, is committing itself to serve as the ultimate arbiter of every close constitutional question and relegating the public, the other branches, and the lower courts to the role of spectators.

To some extent, this argument is an extension of the arguments about unmediated doctrine and the rule of law that are discussed above.[137] To the extent that these concerns echo those arguments, the responses detailed above remain salient.[138] However, the concern voiced here is not just about consistency, efficiency, and process, but is more deeply rooted in the question of what kind of constitutional culture we wish to have. In an era in which the Court has claimed an unprecedented authority to conclusively interpret the Constitution and the nation has largely acquiesced, the adoption of a constitutional methodology that relies almost exclusively on judicial judgment ought, at minimum, raise eyebrows.[139]

Justice Stevens has proven time and again that wisdom and justice often flow from the application of judicial judgment to difficult and contentious issues. In the equal protection context in particular, his reluctance to adopt constraining doctrine has enabled him to write with enviable moral insight. However, even in a world where all judges were graced with his skill and humanity, leaving interpretation of the Equal Protection Clause to the unmediated judgment of the Supreme Court would not be costless. In a world where we can safely assume that not every judge is a Justice Stevens, it may well be that those costs remain worth absorbing, but that conclusion is not self-evident. Justice Stevens's equal protection jurisprudence

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constitutional decisional rules, many of which go to their consequences for other courts and non-judicial actors); Fallon, Implementing the Constitution, *supra* note 12 (laying out a vision of the Supreme Court's role in which it is charged with coming up with workable rules for implementing, not just interpreting, the Constitution).

137. *See supra* Part III.A.1.

138. *See supra* Part III.A.1.

139. On the Court's recent accretion of interpretive power, see, for example, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2002); Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001).

demonstrates the virtues of an unmediated approach to constitutional interpretation, but such a demonstration does not end the conversation as to the advisability of such a methodology, but rather begins it.