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A Subversive Strand of the Warren Court

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I. Introduction

The choice between "*de jure*" and "*de facto*" standards of review arises whenever a legal standard is needed to identify violations of specific constitutional rights or norms in particular cases. The issue is *methodological* in the sense that the question is faced regardless of the particular right or norm at issue (although it is not really true that the choice between these methodologies would have *no* influence on the choice of rights or norms to apply). A *de*

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jure approach limits the imposition of constitutional norms to cases in which the state has affirmatively acted to help create a particular state of affairs, whether through explicit legislation or by some other affirmative mode of exercising state power. A *de facto* approach focuses on a given empirical state of social affairs and, in its strongest form, imposes constitutional norms whenever a review of the social order discloses that constitutional rights or norms are not extant, regardless of the source of their denial.

To help understand the distinction, think of the right of a woman to abort her fetus recognized in *Roe v. Wade*.[1] A *de jure* approach to identifying the denial of her right would focus on whether the government had done anything affirmative to block her ability to exercise her choice to abort; a *de facto* approach would ask whether she in fact was able to exercise her right, regardless of whether the source of any burden was "private" or "governmental." While not articulating its decisions in this terminology, the Court's decisions in *Maher v. Roe*,[2] upholding a state's refusal to fund medically "unnecessary" abortions through Medicaid while funding childbirth, and *Harris v. McRae*,[3] upholding a federal ban on abortion funding, are vivid examples of the *de jure* approach. So long as the government did

> not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.... The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.[4]

Conversely, a *de facto* approach would have found a constitutional violation on the basis of a woman's inability to exercise her constitutional right and therefore would have *required* government funding of the abortion procedure.

Stated in terms of its possible application to identifying violations of individual constitutional rights, the *de jure/de facto* distinction is related to, though not identical with, the difference between affirmative as opposed to negative rights. It is also implicated in the state action requirement in equal protection, due process and individual rights contexts. A *de facto* approach

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1. 410 U.S. 113 (1973).

2. 432 U.S. 464 (1977).

3. 448 U.S. 297 (1980).

4. Harris v. McRae, 448 U.S. 297, 316 (1980). The distinction I am discussing is not analytically absolute. As opponents argued, one could view the regulations in both *Maher* and *Harris* as constituting governmental action by favoring childbirth in its funding decisions. Later decisions reviewing a complex of abortion regulations reflect the lack of analytic clarity. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877-79 (1992) (stating that law is invalid if it creates "undue burden" for woman seeking abortion).

encompasses an affirmative rights approach, but it is not limited to individual rights issues. Its general application would also severely curtail the application of the state action doctrine as a limit on the application of constitutional norms.[5]

The *de jure/de facto* distinction is not always as polar as I treat it. In many cases, one could interpret the *de facto* approach as a variant of a commitment to the *de jure* approach. That is, a *de facto* standard of review could be seen as a way to flush out state action when it is difficult to prove, or, as in the school desegregation cases discussed below, as a way to relax causation standards when state responsibility has already been established. Alternatively, a *de jure* standard could constitute a particular position with respect to the interpretation of the existing social order, a subset of *de facto* analysis. Although one can mediate the polarity in particular contexts, the *de jure/de facto* distinction nevertheless marks an important lens through which to see the limits of and alternatives to dominant constitutional interpretation.

In order to understand the significance of the turn to *de facto* modes of constitutional review in the various doctrinal areas in which the Warren Court applied it, we must first comprehend the historical and doctrinal background within which members of the Court would have conceptualized what was at stake in constitutional interpretation. Before considering the particular Warren Court rulings embracing a *de facto* standard, I turn now to a brief description of the more general structure of constitutional review that the Warren Court faced.

II. Two-Tiered Constitutional Review in the Warren Court

As I am using the term, the *de jure/de facto* distinction refers to a methodological question of how to identify and apply constitutional norms, whatever those norms might be. This methodological question is an overlay to the issue of the actual content of constitutional rights and limitations; that is, the subject matter, as opposed to the methodological, scope of constitutional law. An important aspect of the Warren Court's partial legitimation of a *de facto* mode of constitutional interpretation is that this methodological issue arose against the backdrop of the Court's struggle to justify judicial review and the protection of individual rights in the wake of the demise of the *Lochner*[6] era mode of constitutional review.

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5. However, it is not clear in the Warren Court cases in which the Court debated the distinction that it understood those more general stakes. One of the questions raised by focusing on this methodological issue is why the Court did not consider the relevance of these similar topics across doctrinal categories.

6. Lochner v. New York, 198 U.S. 45 (1905).

In terms of subject matter, the Warren Court built upon and extended an unstable duality in constitutional doctrine. On the one hand, with the rejection of *Lochner*, the Court was committed to applying a deferential rational basis standard to the run of governmental social and economic regulation that was understood to reflect policy judgments appropriate for legislative determination.[7] On the other hand, the Warren Court revived heightened judicial review for matters relating to personal and civil rights, taken to include the rights of speech, voting, religion, accused criminal defendants, access to the courts, and nondiscrimination on the basis of race or gender. The Court's decisions in the areas of personal and civil rights are its most well known and celebrated.

The problem, however, was how to justify this duality with respect to the degrees of scrutiny applied to these subject matter areas. If the courts owed deference to the legislature regarding social and economic legislation, why did they not owe the same deference in personal and civil rights cases? In order to understand the experience of simultaneous coherence and illegitimacy that would be associated with the *de facto* standard of review, it is necessary to understand what *Lochner* and its fall meant for Warren Court era constitutional thinkers.

By the end of the Warren Court era, a conventional rationalization of many of the Court's decisions and its two-tiered approach, rooted in the famous footnote four of the 1938 *Carolene Products*[8] opinion and synthesized in the work of John Hart Ely took place.[9] The basic "process theory"[10] explanation proceeded as follows: After the legal realist movement, mainstream legal thinkers agreed that the realists were right and that legal issues inevitably required policy judgments for their resolution. Legal doctrine could not supply neutral and apolitical answers to issues of social conflict. Because all issues required policy judgment, the judiciary lacked legitimacy to determine those issues. Instead, only the legislature, by virtue of its democratic character, was ultimately competent to decide issues of social policy. If the legisla-

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7. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 485-91 (1955) (validating Oklahoma laws regulating sale of eyewear); Ry. Express Agency v. New York, 336 U.S. 106, 109-11 (1949) (deferring to local authorities as long as regulation has some relation to local concerns); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (upholding milk law as valid exercise of Congress's power to regulate interstate commerce).

8. *Carolene Prods.*, 304 at 152 n.4.

9. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

10. Here I discuss process theory as a mode of constitutional interpretation. The process theory approach to constitutional law was part of a much wider embrace of proceduralism in post-War American law used to respond to the legal realist assault on the legitimacy of American legal institutions. *See* Gary Peller, Neutral Principles *in the 1950's*, 21 U. MICH J. L. REFORM 561, 561-622 (1988) (analyzing Herbert Wechsler's *Toward Neutral Principles of Constitutional Law* and underlying process theory approach).

ture had in fact decided such an issue, its decision was entitled to deference. In doctrinal terms, mere rationality review would apply. On the other hand, because its democratic character was the basis for such general deference, the judiciary should not defer when the legislature called its democratic character into question by passing "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[11]

This liberal rehabilitation of judicial review after the fall of *Lochner* derived the subject matter scope of heightened judicial scrutiny from the very basis for deferring to legislative action in the first place – the democratic character of the legislature and the unelected character of the federal judiciary. Similarly, the judiciary derived heightened scrutiny for governmental action affecting "discrete and insular minorities"[12] from the limits of the majoritarian political process that mandated general deference. Because such groups could not, as a structural matter, be expected to protect themselves through ordinary democratic processes, deference to the legislature based on its democratic character was not warranted for decisions affecting them. Accordingly, from the basis for deference generally – the respective institutional competencies of legislatures and courts – the process theory approach to constitutional law derived the subject matter scope for heightened judicial scrutiny for personal rights (the rights affecting the political processes, such as free speech, voting, and related interests) and for civil rights (the rights of discrete and insular minorities not able to protect themselves in the political process).

From this institutional competence point of view, the problem with *Lochner* was that, by invalidating maximum hour legislation on the basis of "liberty of contract,"[13] the Court had imposed its own values on its review of economic legislation. Because the Court was unelected, and the issue of maximum hour legislation was not capable of neutral and apolitical resolution, its decision was institutionally illegitimate.

The premise of this conventional understanding of the mistakes of the *Lochner* era was that no neutral and apolitical basis of decision was available to resolve questions of economic regulation. By the mid-twentieth century, the legal mainstream had embraced Justice Holmes's assertion in his *Lochner* dissent that questions of economic regulation posed policy judgments about what economic theory to pursue, and the legislature was the only institution that could legitimately resolve such disagreements over policy.[14] Because the

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11. *Carolene Prods.*, 304 U.S. at 152 n.4.
12. *Id.*
13. Lochner v. New York, 198 U.S. 45, 61 (1905).
14. *Id.* at 75-76 (Holmes, J., dissenting).

institutional critique of *Lochner* depended on seeing issues of economic regulation as necessarily posing policy questions, it also depended on a rejection of the substantive theory of justice upon which the Court had based its *Lochner* era decisions.

A. The Lochner *Era Constitutional Ideology*

From within the reigning legal ideology of the late nineteenth century, the *Lochner* era judges were not overstepping their institutional bounds when they struck down economic regulations as violative of the "liberty of contract."[15] Instead, they were applying what they would have understood as the neutral and apolitical *substantive* theory of liberty imbedded in the Constitution. In that view, the invalidation of maximum hour legislation in *Lochner* did not involve a policy judgment at all, but rather merely the enforcement of boundaries between public power and private liberty that the constitutional guarantee of due process encompassed.

In order to view constitutional law as *Lochner* era judges might have seen it, we must accept what we would view as a libertarian interpretation of the Constitution, within which the Constitution demarcates appropriate spheres of governmental power and private liberty. The reason that maximum hour legislation was unconstitutional was not, as Holmes asserted, because the *Lochner* majority disagreed with its economic policy, but rather because they did not see it as a policy judgment at all. Instead, the relevant issues were the protection of the liberty of individuals and the enforcement of appropriate limits on state power. In this libertarian substantive theory of justice, individuals enjoyed the private right to contract on whatever terms they saw fit; maximum hour legislation represented a collective encroachment on this sphere of individual liberty.

Moreover, the *Lochner* era judges did not simply invent the boundaries of the private sphere that they wanted to protect against legislative encroachment. They derived constitutional limits on legislative power and constitutional definitions of individual liberty from the common law doctrines of contract, property, and tort, which themselves purported to distinguish social

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15. For fuller explications of the legal ideology of the *Lochner* period, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563-74 (1982) [hereinafter Kennedy, *Distributive and Paternalist Motives*]; Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 3 (1980); Gary Peller, *The Classical Theory of Law*, 73 CORNELL L. REV. 300, 300-09 (1988) [hereinafter Peller, *Classical Theory*]; Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1193-1219 (1985), *reprinted in* CRITICAL LEGAL STUDIES (J. Boyle ed., 1991) [hereinafter Peller, *Metaphysics*].

relations that were the result of free and voluntary choice from those that were imposed through duress or fraud, and which were understood to set forth the neutral framework within which individuals acted in the economic market. Because, under common law contract doctrines, the baker in *Lochner* was competent to contract and had acted of his own free will, without duress or fraud, his agreement to work a particular number of hours was an element of his private choice and freedom, and maximum hour legislation encroached upon that freedom.

The common law of contracts drew a line between enforceable and unenforceable agreements based on distinguishing between cases in which free will was present and those in which it was absent. These doctrines provided a ready-made delineation of private and public spheres at the constitutional level. Just as a common law court would not enforce a coerced agreement, gained through fraud or duress, the legislature was entitled to regulate such wrongful private behavior without encroaching on individual free will. Conversely, if a common law court would enforce an agreement as freely entered into by competent parties, the legislature would be prohibited from regulating such an agreement because the agreement by definition represented the free, voluntary exercise of private liberty. In a sense, the *Lochner* approach constitutionalized the common law, viewing it as a neutral reference point for defining individual liberty at the constitutional level. The coherence of the approach ultimately depended on whether the underlying common law doctrines were themselves truly neutral and objective, or whether doctrines such as fraud and duress instead embodied policy judgments amounting to regulations of the market.

B. The Realist Critique

The legal realist movement consisted in large part of a full scale assault on the underlying substantive theory of the *Lochner* period.[16] The gist of the

16. *See* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 52-96 (1936) (attributing legal development of reliance damages in contract law to consideration of real life problems); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-94 (1923) (recognizing that governmental inaction as well as action has consequences); Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1-14 (1894) (arguing that judicial decisions necessarily often have legislative considerations and that real life judges do not apply law as they would theories of mathematics); *see also* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 35-39, 51-54 (1992) (explaining attack on traditional contract and tort principles on lack of objectivity, despite their purporting to be objective); Kennedy, *Distributive and Paternalist Motives*, *supra* note 15, at 563-74 (describing different motives behind judicial construction of contract and tort law); Peller, *Classical Theory*, *supra* note 15, at 300 (asserting that "image of a classical common law that is . . . neutral,

realist critique was the demonstration that the underlying common law doctrines of contract, property, and tort were not themselves neutral and objective, but rather embodied policy judgments, and therefore the so-called private law was really public. According to the realists, the market doctrines that were assumed merely to provide neutral background rules were actually elements of public, rather than private, law, because they reflected policy choices about how to identify consent and which interests to protect from violation by other private parties. For example, a commitment to respect the private choices of individuals might require a fraud doctrine to identify when an individual was not really making a choice, but nothing in the concept of free choice could determine whether to define fraud narrowly, according to *caveat emptor* notions, or broadly, imposing full disclosure duties.[17] The choice between narrow and broad fraud rules had distributive consequences with respect to whom they benefitted and whom they burdened. Although these consequences helped establish the bargaining power of individuals with each other, they followed from the policy decision to define fraud in a certain way, rather than from any free choice on the part of market actors.

The same kind of analysis applied to determining which interests the law should protect. The failure to protect a particular interest (say, freedom from sexual harassment or gains from superior news gathering)[18] simply meant that a privilege to injure the interest without paying compensation existed. The protection of the interest established a right to compensation for its violation. But nothing in the concept of property could determine whether to regulate particular interests by establishing privileges or entitlements in particular settings. The choice to protect was a policy judgment with obvious distributive consequences shaping the bargaining power that different individuals bring to economic relations.[19]

This realist critique of the *Lochner* era legal ideology was directed not (at least in the first instance) to the proceduralist issue of whether the Court

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objective, and determinative is, quite simply, analytically incoherent"); Peller, *Metaphysics*, *supra* note 15, at 1193-1219 (arguing that formalist era judges were mistaken in their beliefs that they could apply law without underlying ideology); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 532-42 (1988) (book review) (criticizing "neutral" principles that liberal theorists advocate).

17. *See* Kennedy, *Distributive and Paternalist Motives*, *supra* note 15, at 574 (examining hypothetical contractual promise from employee who promises not to join union).

18. *See* Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 229-46 (1918) (recognizing gathered news as property interest to be protected from piracy).

19. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 417-19 (1922) (Brandeis, J., dissenting) (equating legislative with common law restrictions on use of property with respect to third party effects). *See generally* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from* Bentham *to* Hohfeld, 1982 WIS. L. REV. 975.

had overstepped its institutional boundaries, but rather to debunking the *substantive* libertarian theory of justice within which the *Lochner* era judges could believe that their decisions were neutral and objective. The realists demonstrated that what the *Lochner* era judges assumed was private – such as contractual agreements between individuals – really bore the marks of public power, embodied in the legal doctrines that purported to identify free contractual will, and in the doctrines establishing the baseline of entitlements and exposures that formed the bargaining framework within which individuals contracted. Public power constituted the "private" market.

C. The Embrace of Realist Premises in Constitutional Decisions

At the constitutional law level, those decisions holding that so-called "private" economic relations were really of public concern because they had public consequences – what we call today "third party effects" – reflected the realist deconstruction of the *Lochner* public/private distinction most clearly.

For example, the Court's ruling in *Miller v. Schoene*[20] mirrored the realist point that the enforcement of "private" common law doctrines embodied public policy judgments. The Court rejected a "takings" challenge to a state law requiring the destruction of cedar trees endangering nearby apple orchards because of the risks that cedar rust posed to apple trees.[21] The Court asserted that, even in the absence of legislative regulation, the application of common law rules still would have constituted a policy choice by privileging the cedar tree owners to injure nearby apple trees without paying compensation: "It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards . . . ."[22] As the realists had argued, the baseline common law rules did not merely provide a neutral framework within which market actors transacted; the legal rules necessarily benefitted some and burdened others, and no neutral principles could justify which way such distributive consequences should run.

Similarly, in *Home Building & Loan Association v. Blaisdell*,[23] the Court upheld a mortgage moratorium law extending the period of redemption from foreclosure sales on the ground that private rights had meaning only in the context of a publicly created economic structure: "[The] question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."[24] Rather than see a sharp distinction between the public and

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20. 276 U.S. 272 (1928).
21. Miller v. Schoene, 276 U.S. 272, 277-81 (1928).
22. *Id.* at 279.
23. 290 U.S. 398 (1934).
24. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934).

private spheres, the Court permitted what the *Lochner* era judges would have viewed as a blatant regulation of existing contractual agreements on the ground that private rights presuppose public power.

In *Nebbia v. New York*,[25] the Court upheld price controls on the sale of milk on the ground that private agreements had public consequences that were appropriate subjects of legislative regulation.[26] In the Court's view, all "private" businesses were "affected with a public interest"[27] to the extent that regulation of them would be beneficial. In contrast to the *Lochner* era's sharp distinction between public and private realms, the Court concluded that "there is no closed class or category of businesses affected with a public interest."[28]

Several years later, the *Shelley v. Kraemer*[29] ruling that equal protection norms applied to judicial enforcement of racially restrictive covenants seemed to complete the constitutional embrace of realist premises by finding state action in the simple application of common law doctrines of contract, tort, and property.[30] The implication of *Shelley* was that private rights could not be truly exercised separate from state power because every exercise of such rights ultimately depends on the state for ratification and enforcement. Furthermore, as the *Miller v. Schoene* analysis demonstrated, the government could not simply stay out of the "private" sphere because inaction embodied a policy choice to recognize privileges on the part of individuals to harm others without having to pay compensation. The private sphere was an empty set.

D. The Warren Court's De Jure *Individual Rights Decisions*

The two-tiered approach to constitutional review during the Warren Court era partly embodied these realist analytics. Deference to legislative economic regulation presupposed the realist critique of the *Lochner* era in that the basis of such deference was the inevitably political character of economic and social issues. However, many of the Warren Court's rulings in the areas of personal

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25. 291 U.S. 502 (1934).

26. *See* Nebbia v. New York, 291 U.S. 502, 538-39 (1934) (noting that price control is unconstitutional only if arbitrary, discriminatory, or irrelevant to purposes of statute).

27. *Id.* at 531.

28. *Id.* at 536.

29. 334 U.S. 1 (1948).

30. *See* Shelley v. Kraemer, 334 U.S. 1, 8-23 (1948) (ruling that judicial enforcement of restrictive covenants between private individuals is state action to which Fourteenth Amendment applies). Although this general conclusion seems to follow analytically from the Court's treatment of the issue, courts have not followed such a broad reading, which would eviscerate virtually the entire state action doctrine. *See* Louis Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 473-505 (1962) (endorsing narrow reading of *Shelley* in which liberty and privacy rights of people engaging in discrimination will sometimes require judicial enforcement).

and civil rights were in tension with its deference with respect to social and economic matters because its rulings applying *de jure* standards in the areas of personal and civil rights depended on the same libertarian image of a private realm free from public power that it had so thoroughly discredited in the social and economic area.

Take the Warren Court obscenity rulings, for example. In contrast to earlier doctrine, which for the most part treated sexually explicit speech as completely outside the realm of First Amendment protection, the Warren Court established virtually limitless protection for sexual expression. Under its stringent test, the Constitution prohibited the state from regulating any sexual expression unless it was "utterly without redeeming social value."[31] The Court proceeded to issue a long series of per curiam reversals of convictions for the dissemination of obscenity, finding some social value in even the raunchiest sexual expression and curtailing substantially the ability of state and local governments to regulate sexually explicit speech. At the height of Warren Court protection of sexually explicit speech, the Court prohibited the state from banning private possession of material that was obscene even under the Court's narrow definition on the ground that such a ban would invade the privacy interests of the reader or viewer, the "individual's right to read or observe what he pleases."[32] The basis for this strong protection of sexual speech was the libertarian idea that individuals should be free to read and view what they wished, without state interference. In fact, viewed this way, state regulation appeared as an attempt to impose repressive and outmoded sexual mores on society.

The problem, however, was that these libertarian premises of the obscenity rulings made no sense in light of the realist critique of the *Lochner* public/private distinction. Just as "private" economic relations had public consequences, so "private" dissemination of sexually explicit material had third party effects. In fact, the effects of such expression were apparent in the proliferation of garish and outlandish sexual displays across the urban landscapes of virtually every major American city. By treating sexual expression as if it only concerned an individual speaker and a possible recipient, the Warren Court's approach ignored the broad third party effects manifest in the degradation of public spaces across the country.[33] Conservatives on the Court

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31. Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) (emphasis omitted). The Court stated the *Memoirs* test in a plurality opinion; though the formulation was not formally adopted by a majority, it was understood to state the relevant standard until the Burger Court narrowed the scope of constitutionally protected sexual speech in *Miller v. California*, 413 U.S. 15 (1973).

32. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

33. Although I limit my discussion here to Warren Court obscenity rulings, the same

were left to articulate the third party effects of sexually explicit expression on the "interest of the public in the quality of life and total community environment, the tone of commerce in the great city centers .... '[To grant an individual the right to sexually explicit expression in public places] is to affect the world about the rest of us, and to impinge on other privacies ....'"[34]

Just as the state could not simply be neutral to the "private" economic sphere, so also it could not simply be neutral to the "private" free speech marketplace. In the same way that the common law protection of cedar tree owners established a legal privilege to harm apple tree owners, the Court's protection of pornographers established a privilege to harm those with negative reactions to various sexually explicit displays. The right to unfettered sexually explicit public expression privileges those speakers to injure those that find such exhibitions repugnant and inhibits those other speakers from also appearing in the (now degraded) public sphere to exercise their own rights to free speech. The exercise of a free speech right to march through Skokie, Illinois, in Nazi regalia privileges Nazis to injure those concentration camp survivors (and others) who suffer significant emotional distress when faced with such a display and who may end up protecting themselves by foregoing their own rights to public expression.[35] As the realists asserted with respect to economic relations, the state cannot be neutral to the exercise of free speech rights because legal rules create the system of privileges and entitlements within which private parties act, whether it be an economic marketplace or a marketplace of ideas. Even when the state does not affirmatively act, it privileges private individuals vis-à-vis other individuals in society.

Unfortunately, many liberals and progressives during the Warren Court period (and some beyond) mocked as parochial the attention of conservatives to the third party effects of the exercise of private free speech rights. An odd

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analysis applies to other decisions applying heightened scrutiny to the category of personal and civil rights. The constitutional protection of libel created a privilege on the part of speakers to injure the reputations of other individuals, yet the Court treated the situation as if the only relevant actors were the speaker and the state, ignoring third party effects of its rulings. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265-92 (1964) (reversing judgment of libel when no "actual malice" existed). Similarly, keeping religion out of the public sphere privileged the growth of secular humanism as the reigning ideology of public education. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 205-27 (1963) (disallowing recitation of prayers at public schools); Engel v. Vitale, 370 U.S. 421, 422-36 (1962) (same); *see also* Gary Peller, *Creation, Evolution, and the New South*, TIKKUN, Nov./Dec. 1987, at 72, 72-76 (arguing that rejection of creationism is functionally state's acceptance of new evolutionist culture).

34. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-59 (1973) (emphasis omitted) (quoting Alexander Bickel, *On Pornography: Concurring and Dissenting Opinions*, 22 PUB. INT. 25, 26 (Winter 1971)).

35. *See* Collin v. Smith, 578 F.2d 1197, 1200-10 (7th Cir. 1978) (allowing Nazis to march through neighborhoods with high concentration of Holocaust survivors).

aspect of the debate was that, in this opposition, the conservatives favoring regulation of sexually explicit speech used the same collectivist arguments that progressives had used a generation before in critiquing the laissez faire economic assumptions of the *Lochner* era, and progressives and liberals of the period defended a libertarian view of the relationship between public and private spheres that had been analytically debunked decades before and that was conceptually inconsistent with the liberal position that the Court should defer to legislative judgment with respect to economic and social issues. Not until the feminist critique of pornography and the anti-hate speech movements in the 1980s and 1990s did a progressive constitutional discourse apply the "third party effects" critique of libertarian assumptions to the category of personal and civil rights.[36]

III. The De Facto *Standard as a Mediation of the Contradiction*

The Warren Court's two-tiered approach was analytically unstable to the extent that the Court adopted the same libertarianism with respect to its review of personal and political rights that its deference with respect to social and economic issues rejected. Just as the *Lochner* era Court had viewed the relationships between individuals as "private" by ignoring the constitutive role of the state in private economic relations and the public consequences of those market relations, many of the Warren Court's rulings with respect to personal and civil rights applied a *de jure* model, which treated the state and the individual actor as the only relevant units of analysis and ignored the public effects of an individual speaker's or criminal's actions on other individuals in civil society.[37]

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36. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1-136 (1993) (examining and critiquing First Amendment protections of racist speech); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16-70 (1985) (describing harm that pornography inflicts on women and violence that pornography represents). The same phenomenon occurred with respect to rulings about the rights of criminal defendants. The Warren Court decisions proceeded as if the only relevant parties were the government and the individual defendant and suppressed the manner in which the expansion of the rights of defendants created exposures on the part of the communities in which criminals acted. Again, not until the 1990s did progressives begin to articulate the "third party effects" of the constitutional protection of the rights of criminal defendants. *See* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255-78 (1994) (arguing that underenforcement of crimes affecting minorities is perhaps more problematic than overenforcement against minority perpetrators).

37. I should say at this point that I agree with many of what I describe as the Warren Court's *de jure* based rulings with respect to personal and civil rights; for example, I think that many of the curbs on sexual expression struck down by the Warren Court were parochial and

One way to solve the analytic contradiction that the Warren Court faced with respect to its two-tiered structure of review would have been to apply the same deference to personal and civil rights that the Court applied to social and economic legislation. However, the problem was that the institutional premises underlying deference required some inquiry into legislative legitimacy. As the process theorists argued: If the basis for deferring to the legislature is its democratic character, no reason exists simply to assume that democratic character without any inquiry whatsoever into the actual nature of the society in which the legislature acts. If political dissension were not tolerated, for example, a legislature in such a setting could hardly be called democratic. Democracy, at a minimum, requires free speech rights, rights of dissent, rights to organize and vote, and so on.

An alternative was available to resolve the contradiction in the Warren Court's two-tiered approach. In scattered doctrinal categories, the Warren Court adopted a *de facto* method for identifying the denial of constitutional rights. The *de facto* approach provided a way to mediate the contradictions in the Court's two-tiered structure of review by providing a single standard of review regardless of the subject matter at issue. Its application in various doctrinal contexts rejected the *de jure* limitation of constitutional norms to governmental actions.

A. The School Segregation Remedies Cases

The school desegregation remedies cases decided between 1968 and 1979 most fully articulated the debate between *de jure* and *de facto* constitutional standards at the Supreme Court level. The terminology was used to refer to whether the equal protection ban on school segregation established in *Brown v. Board of Education*[38] would be applied to racially identifiable schools in which the plaintiffs had not proven that the *state* was responsible for the lack of school integration (a *de facto* approach) or whether the right recognized by *Brown* was more narrowly a right only against racial discrimination caused by the state (a *de jure* approach).

The Court's 1968 decision in *Green v. County School Board of New Kent County*[39] represents a paradigmatic application of its *de facto* approach. In *Green*, the Court reviewed so-called "freedom of choice" school desegregation plans that many school systems across the South had adopted in the wake of

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regressive. But, as an analytic matter, the conservatives had better arguments. They were correct that it was intellectually indefensible to ignore the social effects of the exercise of so-called individual rights.

38. 347 U.S. 483 (1954).

39. 391 U.S. 430 (1968).

the *Brown* and various desegregation orders.[40] Under the freedom of choice plans, the state took no formal position on pupil assignment; parents were legally free to send their children to the public school of their choice.[41] The school system challenged in *Green* had legislatively mandated racial segregation of its two schools until it adopted its freedom of choice plan.[42] In the three year period during which the freedom of choice plan had been in effect, no white child had chosen to attend the school formerly segregated for black pupils, and about eighty-five percent of the black children remained in that school.[43]

Under a *de jure* approach, racial segregation continuing under the freedom of choice school assignment policies would not have been constitutionally cognizable to the extent that this segregation was not traceable to affirmative governmental actions. By adopting and implementing an official policy of governmental neutrality in school assignments, the state was no longer acting to foster school segregation – and desegregation plaintiffs in the case were apparently not able to show that, despite its official policy, the government was taking other racially discriminatory actions with respect to school assignments or that continuing segregation was causally traceable to prior governmental acts. Nevertheless, acting unanimously, the Court struck down the freedom of choice plan and ruled that school systems that had operated *de jure* segregated schools came under an "affirmative duty" to achieve integrated schools, not simply a duty to cease state sponsored segregation.[44]

The *Green* result meant that, while a constitutional violation in the public school context in the first instance still required (at least formally) a showing of *de jure* action to segregate schools, once such a violation was shown, a *de facto* remedial standard would apply. Apparently, as Justice Rehnquist repeatedly charged,[45] the *de facto* remedy was broader than the *de jure* right because continuing segregation could result from parental choice, housing patterns, and other factors that "are the product not of governmental restrictions," in the words of the *Harris* Court.[46]

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40. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 431 (1968).

41. *Id.* at 433-34.

42. *Id.* at 433.

43. *Id.* at 441.

44. *Id.* at 437.

45. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 (1979) (finding that showing of *de facto* discrimination was sufficient because school had intentionally segregated its schools in past); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979) (finding school board under continuing duty to remedy *de jure* segregation); Keyes v. Sch. Dist., 413 U.S. 189, 265 (1973) (Rehnquist, J., dissenting) (contending that majority opinion was too broad).

46. Harris v. McRae, 448 U.S. 297, 316 (1980).

As I am presenting it, the *Green* decision is significant because it legitimized an alternative way to apply constitutional equal protection norms generally, one embraced without dissent on the Court. In this way, it is akin to a ruling in the abortion funding cases[47] – that the government had an obligation, not simply to avoid putting affirmative obstacles in the way of a woman choosing to abort but, more broadly, to ensure, through funding and subsidies, that women were in fact able to choose the abortion procedure. By viewing constitutional norms in the context of the racial apartheid of civil society, the *Green* opinion focused on racial power as it was being exercised in fact, regardless of whether the government was formally responsible for it or not.

True, the *Green* ruling need not be interpreted so broadly. Its application of the *de facto* standard was limited in its formal doctrinal reach to a specific remedial context. In addition, rather than manifesting a dramatic alternative to a *de jure* standard, it might have been justified as a necessary, albeit extraordinary, relaxation of the usual requirements for proof of causal consequences. In light of the phenomenon of massive resistance to school desegregation orders, the *Green* decision could be understood to rest on the belief that continuing school segregation really was due to prior state action and that a *de jure* approach still defined the contours of equal protection requirements. Thus, school segregation was properly remediable within conventional understandings of equal protection requirements. On this narrow reading, a *de facto* standard applied to the evaluation of remedial measures only because of the special difficulty of proof.

On the other hand, whatever narrowing interpretations might be available, the fact is that the Court in the school desegregation context came very close to abandoning a *de jure* requirement for proving an equal protection violation altogether. While continuing to claim that it was requiring proof of *de jure* segregative action to establish a constitutional violation in the first instance, the Court dramatically relaxed the standards of proof necessary to find *de jure* action by approving an expanded series of evidentiary presumptions. These rulings enabled plaintiffs to establish a system-wide equal protection violation by proving *de jure* segregative acts in only one portion of the district.[48] Once plaintiffs made that showing, they were entitled to the presumption that any official actions with respect to policies such as pupil and teacher assignment that failed to further integration violated the *de facto* standard embodied in *Green*'s affirmative duty to achieve integrated schools.[49]

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47. *See supra* notes 1-4 and accompanying text (discussing abortion funding cases).

48. *See Keyes*, 413 U.S. at 213 (finding entire school district guilty of *de jure* segregation).

49. *See Penick*, 443 U.S. at 467 (ruling that school board was under duty to correct past *de jure* segregation); *Brinkman*, 443 U.S. at 541 (same).

The debate over the choice between *de jure* and *de facto* standards for identifying equal protection violations in the school desegregation context had its fullest articulation at the Supreme Court level in the1973 *Keyes v. School District*[50] decision, in which Justice Powell proposed that the Court no longer require proof of *de jure* segregative intent or purpose, but rather order desegregation "where segregated public schools exist within a school district to a substantial degree."[51] According to Justice Powell, the recognition in *Green* of an affirmative duty for school systems to remedy *de facto* segregation once they had been proven to have engaged in *de jure* segregation could not be limited to the remedial context without imposing indefensibly different duties in the North, which often did not have legally required school segregation, and in the South, where legislation had typically mandated it.[52] Justice Powell concluded that, after *Green*, the *de jure/de facto* distinction "no longer can be justified on a principled basis."[53]

Given his center-Right jurisprudential identity, Justice Powell's opinion in *Keyes* may have represented the apex of the possibility of applying a *de facto* approach to equal protection law. Even so, this was a limited recognition at best. Justice Powell was not proposing to apply the *de facto* approach generally to identify equal protection violations; his opinion discusses only the school segregation context, and his emphasis on the different constitutional standards that would be applied to northern and southern schools were the *de jure* requirement to be applied seriously is linked to prudential considerations rather than to a new vision of constitutional interpretation.

B. The De Facto *Standard in Other Doctrinal Settings*

The school desegregation cases reflected the Court's most extensive and explicit treatment of the *de jure/de facto* modes of constitutional review. But, as I have already suggested, the *de jure/de facto* distinction was at play in various doctrinal contexts; using different terminology, the Warren Court embraced *de facto* standards in other important rulings. *Green* was part of a wider phenomenon in constitutional interpretation.

With much less controversy than the school desegregation context engendered, the Warren Court adopted a *de facto* mode of review to identify unconstitutional burdens on First Amendment rights to the free exercise of religious beliefs. In *Sherbert v. Verner*,[54] the Court struck down an unemployment

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50. 413 U.S. 189 (1973).

51. Keyes v. Sch. Dist., 413 U.S. 189, 224 (1973) (Powell, J., concurring in part and dissenting in part).

52. *Id.* at 218-19 (Powell, J., concurring in part and dissenting in part).

53. *Id.* at 224 (Powell, J., concurring in part and dissenting in part).

54. 374 U.S. 398 (1963).

scheme that required that recipients be available for "suitable work."[55] Although the regulation was facially neutral to religion, when applied to a Seventh-Day Adventist observer of a Saturday Sabbath, the regulation rendered her ineligible for benefits unless she made herself available for Saturday work, in violation of her religious beliefs.[56] According to the Court, the burden on her religious practice was the "same kind of burden upon the free exercise of religion as would be a fine imposed against appellant for her Saturday worship."[57]

The *de facto* character of the *Sherbert* decision is evident when the ruling is compared to the abortion funding decisions discussed above. Unlike *Sherbert*, the Court in the abortion funding cases treated the burden on abortion rights flowing from the economic inability to pay for the procedure as constitutionally irrelevant because the state was not responsible for the indigency of a poor woman choosing to abort her fetus. In contrast, in *Sherbert*, the Court treated the Saturday Sabbath practitioner's economic need for unemployment benefits as the constitutionally relevant source of the constitutional violation. If she had been independently wealthy and therefore did not need to work or to receive unemployment benefits, then the state's denial of benefits to her would not have burdened her choice to observe a Saturday Sabbath. The "pressure upon her to forego"[58] the observance of a Saturday Sabbath flowed from her economic condition, the very status the Court years later would hold constitutionally irrelevant in the abortion funding context. In *Sherbert*, the Court interpreted the Constitution to require that the state consider the *impact* of its social and economic regulations on individuals' ability to exercise their constitutional rights, a position with extraordinary implications were the Court to apply it generally.

The Warren Court pursued this kind of *de facto* constitutional review in other contexts as well. In *Griffin v. Illinois*,[59] the Court held that the state must provide an indigent criminal defendant appealing a conviction a free trial transcript.[60] Over the dissent's argument that the state had no duty to "alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action,"[61] the plurality asserted that the *impact* of the state's failure to provide a free trial transcript would be to deny meaningful

55. Sherbert v. Verner, 374 U.S. 398, 401 (1963).

56. *Id.* at 404.

57. *Id.*

58. *Id.*

59. 351 U.S. 12 (1956).

60. *See* Griffin v. Illinois, 351 U.S. 12, 20 (1956) (requiring that Illinois provide some type of trial record on appeal if criminal defendant could not afford cost).

61. *Id.* at 34 (Harlan, J., dissenting).

appellate review altogether to those unable to pay for a transcript themselves.[62] Similarly, the Court looked to the *de facto* impact on indigents when it struck down the poll tax in *Harper v. Virginia State Board of Elections.*[63] And in perhaps the farthest-reaching application of the *de facto* standard, in the final term of Chief Justice Warren's tenure, the Court in *Shapiro v. Thompson*[64] struck down a state's residency requirement for the receipt of welfare benefits on the ground that it constituted an unconstitutional burden on the right of interstate travel.[65] Like *Sherbert*, *Shapiro* involved a challenge to a state's economic welfare regulations and, like *Sherbert*, rather than defer to the states with respect to social and economic decisions, the Court applied a *de facto* analysis to find that the *impact* of the waiting period for the receipt of welfare benefits was to burden the choice of poor people who depended on welfare benefits to travel interstate.[66]

The impact analysis embodied in the *de facto* mode of review also threatened the traditional state action doctrine. If the Constitution required the government to take account of the impact of its actions on the ability of people to exercise their rights (as this group of cases seemed to hold), the distinction between governmental action and inaction would be insignificant. In *Reitman v. Mulkey*,[67] the Court came very close to obliterating the state action doctrine as traditionally understood.[68] The case concerned the passage of a state constitutional amendment that repealed state fair housing laws by prohibiting the state from denying the "right of any person [to] decline to sell, lease, or rent [real property] to such person or persons as he, in his absolute discretion, chooses."[69] Even though it recognized that the state had no obligation to pass fair housing laws in the first instance, the Warren Court found the repeal of such legislation constitutionally impermissible because of its "impact" in the

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62. *See id.* at 18 (stating that requiring payment of costs would render constitutional rights "meaningless promises to the poor"); *see also* Douglas v. California, 372 U.S. 353, 357-58 (1963) (requiring state to provide indigent defendants appointed counsel for their first appeal from conviction).

63. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667-68 (1966) (concluding that requiring voters to pay poll tax discriminated against citizens who could not pay tax and thus violated Equal Protection Clause).

64. 394 U.S. 618 (1969).

65. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

66. *See id.* at 629 ("An indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute.").

67. 387 U.S. 369 (1967).

68. *See* Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (declaring that statute that allowed property renters and sellers to discriminate on basis of race violated Equal Protection Clause).

69. *Id.* at 371.

racially charged "milieu in which that provision would operate."[70] That impact, the Court found, was to encourage and authorize private discrimination in housing, in violation of the Equal Protection Clause.[71] From the *Reitman* premise that constitutional limitations apply if state "neutrality" works in a particular factual context to encourage or embolden "private" action, no feat of logic would be necessary to hold that the state had an affirmative obligation to protect citizens from racial discrimination in the first instance if its failure to act would have the *de facto* impact of encouraging discrimination. In this interpretation, *Reitman* came analytically close to applying the *Green* affirmative duty to achieve an integrated society without the prior finding of a *de jure* violation that *Green* required.[72]

C. The Burger and Rehnquist Courts' Rejection of De Facto *Review*

Although commentators have commonly noted that the Burger and Rehnquist Courts have followed and extended many once controversial Warren Court rulings, virtually all of the Warren Court's decisions applying *de facto* standards in particular doctrinal settings have been reversed or curtailed. In the school desegregation context, *Green* and its progeny have been made largely irrelevant by the Court's willingness to find that school

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70. *Id.* at 378-79.

71. *Id.* at 380-81.

72. For contemporaneous arguments that *Reitman* "signaled" the functional end of the state action doctrine for equal protection purposes, see Charles L. Black, Jr., *Foreward: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 99 (1967); Kenneth C. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 S. CT. REV. 39, 55-56.

In addition to these cases, all of which were noted and controversial applications of the *de facto* standard of review, the Court's heightened constitutional scrutiny of regulations of conduct through which free speech expression occurs, *see* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying heightened standard of review to law that prohibited destruction of selective service registration certificate), constitutes a broad doctrinal area in which one can say that *de facto* review at least implicitly occurs. Protection of rights to picket, leaflet, parade, solicit door-to-door, and other conduct through which free expression occurs implicitly assumes that rights to free speech are not meaningful if they cannot be effectively exercised. In order to see that a state's regulation of door-to-door soliciting might impinge on free speech rights, one must look to the *de facto* impact of the regulation on the exercise of free speech rights in the same way that the *Sherbert* Court looked at the *de facto* impact of the state's availability for work requirement, which on its face was neutral to the exercise of religious beliefs. The *de facto* character of review implicit in the intermediate scrutiny accorded to regulations of conduct with an incidental effect on free expression has, to my knowledge, only been noted in Supreme Court opinions by Justice Scalia, who linked this doctrinal category with discredited *de facto* equal protection standards and advocated applying a *de jure* standard of review that would end intermediate scrutiny for regulations of conduct with an incidental effect on free speech rights. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring).

systems at some point discharged their duties to achieve unitary status and that any continuing racial disproportion is not constitutionally cognizable if it cannot be traced to *de jure* governmental acts.[73]

Sherbert has been all but overruled by the Court's decision in *Employment Division, Department of Human Resources v. Smith*,[74] which rejected impact analysis in the context of a free exercise challenge to a state's peyote prohibition by Native American Church members asserting, on the basis of *Sherbert*, that the impact of the law on their religious practice required an exemption.[75] In addition, the Court has replaced the *Reitman* approach to the state action doctrine with highly restrictive tests focused on formal governmental action.[76]

In *Washington v. Davis*,[77] the Court gave its most extensive justification for rejecting the *de facto* standard that many of the Warren Court's equal protection rulings seemed to implement. The Court's 1971 interpretation of Title VII in *Griggs v. Duke Power Co.*[78] to require a *de facto* (or in that terminology, a "disparate impact") standard for identifying discriminatory practices in private employment suggested that a general *de facto* standard might apply for equal protection purposes as well;[79] Justice Powell's opinion in *Keyes*, discussed above, furthered that speculation. However, in *Washington*, the Court definitively rejected a *de facto* impact standard for identifying equal protection violations.[80] The plaintiff challenged a written qualifying test

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73. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (ordering that district court relieve school board from judicial supervision if court found that board had discharged its original duty to desegregate); Freeman v. Pitts, 503 U.S. 467, 499 (1992) (ruling that district court should relinquish control of school district); Bd. of Educ. v. Dowell, 498 U.S. 237, 249 (1991) (ordering that district court relieve school board from judicial supervision if court found that board had discharged its original duty to desegregate). *But see* United States v. Fordice, 505 U.S. 717, 726 (1992) (imposing *Green* affirmative duty on university system).

74. 494 U.S. 872 (1990).

75. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990); *see also* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (striking down congressional attempt to reinstate *Sherbert* standard).

76. *See, e.g.*, S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542-47 (1987) (finding that U.S. Olympic Committee is not government actor); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-61 (1978) (rejecting government action claim when warehouseman threatened to sell debtor's belongings as permitted by state law); Jackson v. Metro. Edison Co., 419 U.S. 345, 358-59 (1974) (finding that public utility is not government actor).

77. 426 U.S. 229 (1976).

78. 401 U.S. 424 (1971).

79. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (finding that acts, procedures, or tests, neutral on their face or in their intent, violate Title VII if they operate to maintain status quo or prior discriminatory employment practices).

80. *See* Washington v. Davis, 426 U.S. 229, 239-41 (1976) (requiring discriminatory

that the police department used, on the ground that its racially disproportionate results and lack of proven relationship to the jobs for which it applied made its use an equal protection violation.[81] In holding that disproportionate impact was not a basis for a constitutional claim of discrimination, the Court emphasized that *de jure* proof was required, meaning proof of a purpose or intent to discriminate on the basis of race.[82] The *Davis* Court argued that a *de facto* standard "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white."[83]

IV. The Virtues and Limitations of the De Facto *Standard*

The *de jure* and *de facto* standards of constitutional review embody distinct views about what forms of social power are relevant to constitutional and democratic legitimacy. Most generally, the *de jure* approach incorporates individualist premises, assuming that the locus of social power relevant to the legitimacy of a liberal democracy is the state. Although, within the analytic terms of the *de jure* approach, state power might be identified through more or less formal ways, the point of a commitment to the *de jure* standard is that governmental power is at issue; any power exercised in civil society that is not governmental is constitutionally irrelevant.

The problem with the *de jure* standard is that it cannot legitimate as democratic any particular social order, and thus it cannot justify general judicial deference to governmental decisionmaking with respect to the run of social and economic issues. The *Davis* Court's argument against *de facto* constitutional interpretation assumes that the Court could not legitimately review the "whole range of tax, welfare, public service, regulatory, and licensing statutes,"[84] presumably because such review would make the Court's constitutional interpretation the arbiter of such a wide scope of governmental action. But even though its basis for deference with respect to such social and economic legislation is the democratic character of the legislature, the *de jure* approach forbids the judiciary from examining whether citizens *in fact* enjoy the rights necessary for self-determination (however those rights are defined). Just as the rules regulating the availability of welfare (in *Shapiro*) or unem-

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purpose as element of equal protection violation).

81. *Id.* at 232-33.

82. *See id.* at 245 (ruling that proof of discriminatory racial purpose is necessary for making out equal protection violation).

83. *Id.* at 248.

84. *Id.*

ployment benefits (in *Sherbert*) have an impact on people's ability to exercise their rights to travel or practice their religious beliefs, economic regulation in general impacts the exercise of all rights deemed preconditions to democratic self-rule in that it establishes and protects a particular distribution of wealth and income. By embracing a vision of social reality in which the state is the only force exercising collective power and in which the social universe consists of the state and discrete private individuals, the *de jure* approach recycles the debunked libertarianism of the late nineteenth century.

Particularly when applied in a formalistic way, the *de jure* standard substantially limits the occasions for judicial review and therefore appears to avoid the institutional competence problem of "judicial activism," the unelected judiciary making policy decisions. The problem is that the *de jure* standard limits judicial review according to an intellectually discredited worldview. This return to *Lochner* is reflected most directly in the common defense of *de jure* constitutional review that the state is not implicated in the economic restraints that may prevent individuals from exercising particular constitutional rights. Recall the abortion funding argument that the plaintiff's financial constraints were "not the product of governmental restrictions . . . but rather . . . of her indigency."[85] The rejection of *Lochner* in constitutional doctrine was premised on the opposite assumption – that the state *was* responsible for the structure of the economy and that economic relations had public consequences beyond the choices of particular market actors.

The virtue of the *de facto* standard is that it permits a wider appraisal of the social order to determine if the social conditions for constitutional legitimacy actually exist. Whereas the *de jure* approach disclaims social responsibility for individual circumstances, the *de facto* standard is linked to views of collective responsibility and to the norm of social solidarity.

But the *Davis* Court correctly concluded that the logical consequence of the victory of a general *de facto* standard of constitutional review would be to subject virtually all legislative action to judicial scrutiny – and the result is even more extreme than that. Under a *de facto* approach, no reason would exist to wait for legislative action at all – because governmental inaction itself might be the reason for the inability to exercise rights of free speech, or voting, or travel. A *de facto* approach in its strongest form would require the judiciary to do exactly what the two-tiered structure of constitutional review forbids – review the constitutional legitimacy of economic and social relations for their consistency with democratic self-rule (or whatever norms the subject

85. Harris v. McRae, 448 U.S. 297, 316 (1980); *see also* Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting) ("All that [the state] has done is fail to alleviate the consequences in differences in economic circumstances that exist wholly apart from any state action.").

matter scope of constitutional review made relevant). Accordingly, were the Court to apply widely the *de facto* standard, the judiciary would evaluate the entire social field to ensure its consistency with constitutional norms.

The limitation of the *de facto* approach is that no neutral, principled way to conduct the review of the social order that the standard entails exists. There is no nonideological discourse within which to perceive and represent social "reality." The focus on accounting for the social "facts" connects the *de facto* approach to the tradition reflected in the "Brandeis brief," revealing the limits of formalism by presenting empirical and factual information. Whatever scientific status sociological description may have had in the early twentieth century, by the time of the Warren Court this aspect of *de facto* review was widely perceived as "political."

V. Conclusion

The competition between *de jure* and *de facto* ways to identify constitutionally prohibited acts represents one site of ideological conflict over the meaning and identification of the social power that must be regulated in a liberal democracy. The *de jure* approach embodies the individualist, libertarian view that the formal power of the state is the only form of collective power threatening the freedom and liberty of individual citizens. Many of the celebrated Warren Court rulings in the areas of individual and civil rights applied a *de jure* analysis, and accordingly incorporated a conservative social theory, even as the rulings seemed to favor progressive political and cultural positions. In addition, the embrace of a *de jure* standard left the Warren Court's individual and civil rights decisions in analytic tension with its commitment to broad deference to legislative judgments with respect to social and economic legislation.

The *de facto* standard reflects a more progressive embrace of realist premises in constitutional adjudication. The embrace of the *de facto* approach in scattered Warren Court rulings points to a way to mediate the instability of the Court's general two-tiered approach by reintroducing heightened judicial review for social and economic legislation. The *de facto* approach embodies a more collectivist view of the sites in which social power is exercised and in which constitutional norms should therefore apply. It provides an analytic avenue from which to escape the ultimately conservative limitation in constitutional interpretation that no heightened judicial scrutiny should apply to social and economic legislation, and from which to begin to build constitutional analysis that makes democratic legitimacy turn, at least in part, on economic justice. The near total demise of the *de facto* standard under the Burger and Rehnquist Courts represents the victory of Right-wing constitutional analysis.

In my view, the rulings of the Warren Court applying a *de facto* standard of review represent significant starting points for progressive critique of dominant constitutional interpretation.[86] In underdeveloped and sometimes inconsistent ways, these cases introduce a discourse for articulating a more collectivist, interdependent, social welfare interpretation of constitutional law. The existence of this alternative strand of constitutional interpretation puts into relief the ideological assumptions of reigning *de jure* constitutional interpretation. And although the *de facto* approach cannot be applied apolitically, neither can the *de jure* alternative, which achieves judicial restraint only by viewing the social world through the ideological filter of *Lochner* era libertarianism.

86. Although I argue that a *de facto* approach opens the way for more Left-leaning constitutional interpretation, I do not think that the *de facto* standard is necessarily the mark of more progressive rulings; for example, the integrationist constitutional norms applied on a *de facto* basis in the school desegregation context arguably furthered a conservative approach to racial justice. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 780 (describing effect of integration on southern school desegregation).

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