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MARTIN B. MARGULIES*

I. INTRODUCTION

I have been asked to discuss the differences between the United States Supreme Court during the Warren era and the Burger-Rehnquist era. The differences can be encapsulated in a single case: Washington v. Davis.¹

In Davis, black applicants for the Washington, D.C. police force challenged the District’s civil service examination as racially discriminatory.² There was no allegation that the discrimination was intentional.³ The problem, rather, was that the examination emphasized various skills which the plaintiffs, victimized by inferior schooling, had never had the opportunity to master.⁴ The inevitable discriminatory consequence was that white candidates did relatively well on the test, while black applicants performed poorly.⁵ With only two dissenting opinions,⁶ the Court rejected the chal-

* Professor of Law, Quinnipiac College School of Law. Professor Margulies also has been an active first amendment and state constitutional litigator, and has appeared, either as direct counsel or as amicus curiae, in several of the cases that are cited in this article. These cases include Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983), Capitol Square Rev. & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995), and State v. Linares, 630 A.2d 1340 (Conn. App. Ct. 1993). He has, in addition, argued numerous other cases that present similar issues.

¹ 426 U.S. 229 (1976).
² 426 U.S. at 232. The action was commenced by two black applicants who alleged that the Washington D.C. Police Department’s recruiting procedures discriminated on the basis of race against black applicants by requiring, inter alia, written tests which excluded a disproportionately high number of black applicants. Id. at 233. The plaintiffs asserted that the recruiting practices were unlawfully discriminatory and thus violated the equal protection component of the Fifth Amendment’s Due Process Clause. Id. at 234.
³ Id. at 235.
⁴ Id. at 249-50.
⁵ Id. at 234. Test 21 was an examination used throughout the federal service as part of a 17 week training program. Applicants were required to satisfy certain physical and character standards, to have attained education equivalent to that of a high school graduate and to earn at least a 50% on the test. Id. Test 21, developed by the Civil Service Commission, measured verbal ability, vocabulary, reading and comprehension. Id. at 235.
⁶ Washington v. Davis, 426 U.S. 229, 259 (1976) (Brennan & Marshall, JJ., dissenting). The dissenting opinion, written by Justice Brennan and joined by Justice Marshall, argued that the plaintiffs ought to have prevailed on statutory grounds, and did not address the constitutional question. Id. at 257.
Unintended racially discriminatory impacts, it declared, do not trigger heightened scrutiny under either Fifth or Fourteenth Amendment equal protection concepts.

In the equal protection area alone, *Davis* has wielded tremendous influence. During the two decades following the decision, the Court has invoked *Davis*’ discriminatory intent requirement to turn back race discrimination challenges against exclusionary zoning laws, at-large voting systems, and capital punishment. The requirement has been extended to gender discrimination claims as well. It is now clear that before heightened scrutiny is applied to any equal protection-based attack upon a suspect or quasi-suspect classification, the discriminatory intent threshold must be satisfied.

Moreover, the Court has consistently equated “intent” with “purpose”: that is, in order to discriminate intentionally the government must have classified “because of,” and not just “in spite of,” a known or anticipated discriminatory impact. The Court re-

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7 *Davis*, 426 U.S. at 246. The Court unequivocally stated: “The test is neutral on its face andrationally may be said to serve a purpose the Government is constitutionally empowered to pursue.” *Id.*

8 U.S. Const. amend. V. The amendment states, in relevant part: “No person shall... be deprived of life, liberty, or property, without due process of law.”

9 U.S. Const. amend. XIV. The amendment states, in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.” *Id.*; see *Davis*, 426 U.S. at 246-48 (explaining that hiring or promotion practices with racial impact merely require determination of whether practice is rationally related to governmental purpose; such cases do not mandate “probing judicial review”).

10 See, e.g., *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 270-71 (1977) (relying on *Davis* in finding Village’s re-zoning denial was motivated not by racial discrimination but by desire to maintain Village’s zoning plan).


12 See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 297, reh’g denied, 482 U.S. 920 (1987) (referring to *Davis* in concluding that administration of Georgia’s capital punishment clause did not violate Equal Protection Clause). Even where such challenges have succeeded, it was only because the Court found that intentional discrimination was present. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating state constitutional provision which disenfranchised certain classes of felons). The Court concluded that the framers had deliberately selected felonies committed principally by blacks. *Id.* at 232-33; *Rogers v. Lodge*, 458 U.S. 613, 627-28 (1982) (invalidating at-large voting system on basis of discriminatory intent).


14 See *id.* at 279. The *Feeney* court explained that “discriminatory purpose” implies more than a mere awareness of the consequences, but rather that government has acted at least in part “because of” the action’s adverse effects upon an identifiable group. *Id.*; accord *Kemp*, 481 U.S. at 298.
jected pleas, from dissenting justices, to define "intent" as meaning merely knowledge, or perhaps even foreseeability, of the discriminatory effect.¹⁵

Davis would be a landmark case even if its principles were confined to equal protection issues.¹⁶ Those principles have, however, proved to be much broader.¹⁷ By allowing government decision-makers to ignore known discriminatory consequences, Davis really teaches that the Court's only obligations, when dealing with any "fundamental" constitutional right, are to remain strictly neutral and to ensure that the political branches do the same.¹⁸ In other words, neither the Justices nor elected officials have an affirmative constitutional duty to ameliorate private sector racial or

¹⁵ See Feeney, 442 U.S. at 283 (Marshall, J., dissenting) (arguing that discriminatory intent may be inferred from inevitable or foreseeable impact of statute). Interestingly, a "knowledge" test would be more consistent with the usual meaning of "intent" in criminal and tort law. See also Model Penal Code § 2.02 cmt. 2 (Proposed Official Draft 1962) (stating that acting knowingly is ordinarily sufficient to establish intent); Joshua Dressler, Understanding Criminal Law § 10.04, at 105 (2d ed. 1995) (defining criminal intent as acting with knowledge that social harm is virtually certain to result from one's conduct); Sanford A. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes 218-19 (6th ed. 1995); Grace Blumberg, De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veteran's Preference in Public Employment, 26 Buff. L. Rev. 3, 36 (1977) (explaining that tort law definition of intent encompasses actor's knowledge).


¹⁷ See Judith O. Brown et al., The Failure of Gender Equality: An Essay in Constitutional Dissonance, 36 Buff. L. Rev. 573, 593-94 (1987). "Washington v. Davis assumes existence of a nondiscriminatory society. . . . [T]hus, a 'neutral' reason for a government policy, notwithstanding its disproportionate racial impact, is sufficient to protect that policy from challenge." Id. David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 955 (1989). "Washington v. Davis signaled a withdrawal from the front lines of social change . . . explaining] that the alternatives to the discriminatory intent 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 to the average black than to the more affluent white.'" Id.

¹⁸ See, e.g., Nathan Judish & Julia E. Judish, Falling Through the Cracks: Voting Rights and the Census—City of New York v. United States Department of Commerce, 30 Harv. C.R.-C.L. L. Rev. 199, 208 (1995). Davis indicates Supreme Court development of doctrine that "facially race neutral governmental action will be strictly scrutinized only if it is discriminatory in both impact and purpose." Id. Furthermore, the Davis Court "rejected the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Id. (footnotes omitted).
economic disparities, no matter how severely these disparities inhibit the exercise of important freedoms.\textsuperscript{19}

In this article, I shall show that \textit{Davis} has had a devastating (albeit largely unacknowledged) impact on First Amendment jurisprudence. I shall also argue that \textit{Davis}' assertedly neutral posture is not nearly as "neutral" as it professes. Next, I shall consider whether \textit{Davis} has any legitimate part to play in constitutional law, and if so, whether there is a principled way of limiting the decision to where it belongs. Finally, I shall briefly review the present Court's approach to \textit{Davis} in both the equal protection and First Amendment fields.

\section{II. THE WARREN ERA}

In contrast to the Burger-Rehnquist Court, the Warren Court made no pretense of neutrality.\textsuperscript{20} Its members evidently believed that the nation needed radical racial, economic and social reform. Believing that the political process was too skewed to provide such reform, the Justices opted to provide their own.\textsuperscript{21}

\textit{Brown v. Board of Education}\textsuperscript{22} was the most obvious example of Court-initiated reform. But by modern standards, there was nothing exceptional about \textit{Brown}, because it involved a race classification that was both purposeful and facial.\textsuperscript{23} More dramatic, therefore, was the 1966 ruling in \textit{Harper v. Virginia Board of Elections}.\textsuperscript{24} There, the Court invalidated a modest and facially


\textsuperscript{20} \textit{See} Joan C. Williams, \textit{The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law}, 1986 Wis. L. Rev. 83, 101. "It is an accepted tenet of the American legal establishment that the Warren Court engaged in judicial activism to achieve social goals." \textit{Id.}; \textit{see also} Erwin Chemerinsky, \textit{The Vanishing Constitution}, 103 HARV. L. REV. 43, 45, 46 (1989). "The Rehnquist Court's judicial philosophy obviously differs from...the Warren Court, which saw its role as safeguarding fundamental rights and racial minorities." \textit{Id.} at 45.

\textsuperscript{21} \textit{See} Kermit L. Hall, \textit{The Warren Court: Yesterday, Today and Tomorrow}, 28 IND. L. REV. 309, 309 (1995) (noting that Warren Court has traditionally been viewed as committed to social goals, including efficiency, humanitarianism, equality of economic opportunity, and equal treatment before law).

\textsuperscript{22} 347 U.S. 483 (1954).

\textsuperscript{23} \textit{Brown}, 347 U.S. at 493. At issue in \textit{Brown} were several state statutes which permitted or required segregation of white and black children in the public schools of a State solely on the basis of race. \textit{Id.} at 486-88 n.1. The Court found that such segregation deprived the minority children of equal educational opportunities. \textit{Id.} at 493.

\textsuperscript{24} 383 U.S. 663 (1966).
neutral poll tax which had a disparate effect on racial minorities and on the poor.\textsuperscript{25} Harper's dicta clearly stated that poverty, like race, was a suspect basis for classification,\textsuperscript{26} and that poor people were protected against purposeful discrimination as well as against unintended disparate impacts arising from facially even-handed state action.\textsuperscript{27}

Some of the Warren Court's most revolutionary decisions came in areas which, at first glance, seemed far removed from issues of race and wealth: for instance, criminal procedure and speech. The criminal procedure decisions had an implicit equal protection component, because their aim was to provide impoverished criminal suspects, many of whom were black, with the same procedural safeguards that middle class whites had always taken for granted.\textsuperscript{28} The speech decisions also had an implicit equal protection component, for their aim was to level the playing field so that racial minorities and the poor might use the political process more effectively.\textsuperscript{29} In both sets of decisions, the Justices seemed motivated by a wish to inspire America's "have-nots" with respect for law and confidence in the political order. Thus, controversial rulings such as \textit{Miranda v. Arizona},\textsuperscript{30} \textit{Escobedo v. Illinois},\textsuperscript{31} Gideon

\textsuperscript{25} Harper, 383 U.S. at 666. Under Virginia's constitution, payment of poll taxes was a pre-condition for voting. \textit{Id.} at 664 n.1. The tax was limited to $1.50 per year, to be used mainly to aid public schools with the remainder to be returned to the counties for general purposes. \textit{Id.} The Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." \textit{Id.} at 666. In support of its holding, the Court explained that wealth, like race, is not relevant to one's ability to participate intelligently in the electoral process. \textit{Id.} at 668.

\textsuperscript{26} \textit{Id.} at 668.

\textsuperscript{27} 383 U.S. at 668.


\textsuperscript{29} See David M. O'Brien, \textit{Storm Center: The Supreme Court in American Politics} 89 (3d ed. 1993) (noting that majority of Warren Court's decisions favored protecting individuals and minorities against government).

\textsuperscript{30} 384 U.S. 436 (1966) (holding self-incriminating statements acquired through in-custody interrogation of criminal suspects were inadmissible unless suspects were first warned of their rights to silence and free counsel).

\textsuperscript{31} 378 U.S. 478 (1964) (holding right to counsel attaches from moment of arrest, and that any self-incriminating statement elicited from uncounseled suspect who has requested and been denied counsel is inadmissible).
v. Wainwright & Mapp v. Ohio did not merely aim to make the criminal process more fair. They aimed at that, to be sure—but the objective was also far more ambitious. Implicit in all of these decisions was the perception that victims of police over-reaching tended, more often than not, to be poor, black, or both. Therefore, it was necessary to curb the overreaching, not only in order to achieve justice, but in order to give America's underclasses a sense that this was their country too.

Similarly, the Warren Court's first amendment jurisprudence did not seek just to expand speech opportunities for their own sake. Rather, the Court sought to expand such opportunities in the interest of people—many of them poor, black or both—who lacked access to the mass media that were coming to dominate the so-called marketplace of ideas. The Court pursued this objective in three principal ways.

First, the Court vastly expanded speakers' access to traditional public fora such as streets, sidewalks, parks, and the grounds surrounding state capitols. It did so primarily by curbing the discretion of state and local officials to deny speaking permits, or to arrest demonstrators who provoked hostile audience responses or created other sorts of public disturbances. Significantly, the leading decisions on the subject—Shuttlesworth v. Birmingham, Gregory v. Chicago, Cox v. Louisiana ("Cox I"), and Edwards v. South Carolina—all arose in the context of civil rights demonstrations.

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32 372 U.S. 335 (1963) (holding that states, like federal government, must appoint free counsel for indigent criminal suspects).
33 367 U.S. 643 (1961) (holding that evidence seized in violation of Fourth Amendment is inadmissible in state as well as federal criminal proceedings).
35 See generally Kenneth L. Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. Ill. L. Rev. 95, 123 (asserting that First Amendment decisions of Warren Court were important because Court authoritatively asserted that Black people were citizens whose voices deserved to be heard).
40 Shuttlesworth, 394 U.S. at 159 (invalidating city ordinance which proscribed participating in any parade or procession on city streets or public ways without first obtaining permit from City Commission). The Shuttlesworth case involved an orderly civil rights march by 52 blacks in Birmingham, Alabama, in 1963. Id. at 148-49; see also Gregory, 394 U.S. at 112 (finding arrest and conviction for disorderly conduct of peaceful civil rights
Second, the Court also expanded access to what would today be called non-traditional government fora. In perhaps its most important and ambitious speech decision—*Brown v. Louisiana*—a three-member plurality held that protesters were entitled to conduct a non-disruptive silent sit-in at a public library when the purpose was to protest racial segregation at the library itself. Lower courts seized upon this ruling to declare that all sorts of government facilities became "public fora" whenever the speech bore some special relationship to the premises, either symbolically, or because the property was likely to contain the speaker's desired audience.

Third, the Court also granted speakers access to private property, in the form of large, privately-owned shopping centers. The Court's decision in *Amalgamated Food Employees v. Logan Valley Plaza* used the dubious logic of the "state action" doctrine to declare that these centers resembled municipal downtowns, and were therefore state actors by virtue of exercising a delegated sovereign function. Nobody reading the opinion, however, should be taken in. The Court did not really mean that shopping center owners somehow functioned as government agents. Rather, the

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42 Id. at 143.
43 Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983). I argued for plaintiffs on behalf of the Connecticut Civil Liberties Union Foundation in that case. The United States Court of Appeals for the Second Circuit held that the State of Connecticut had to allow marchers to use an abandoned strip of railway property, intersecting Highway 84, in order to publicize their view that it was environmentally sounder to revive rail transportation than to expand that very highway. Id.; New York City Unemployed Welfare Council v. Brezenoff, 677 F.2d 232, 240 (2d Cir. 1982) (holding welfare office had to allow welfare rights activists to pass out literature in its waiting rooms); Wolin v. Port of New York Authority, 392 F.2d 83, 94 (2d Cir.) cert. denied, 393 U.S. 940 (1968). In *Wolin*, the United States Court of Appeals for the Second Circuit held that a bus terminal had to accommodate anti-war demonstrators who wished to address soldiers embarking from the terminal *en route* to a training camp and added, in dicta, that police were obliged to protect the demonstrators in the event of a hostile audience reaction. *Id.* at 94.
44 391 U.S. 308 (1968). *Logan Valley* built upon a much earlier decision granting speakers access to the public streets of wholly-owned company towns. See *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the state action rationale was more convincing, because the property owner in that case was indeed exercising a power traditionally associated with sovereignty. *Id.* at 502-03. Only governments, historically, have operated cities and towns. Seldom if ever, in western nations, have governments peddled consumer goods.
Court was saying in substance what its plurality had said in *Brown*: the property was a "public forum" because the speakers could find their desired audience there as nowhere else; because they lacked the means to communicate effectively in any other place or manner; and because the property owner would suffer little or no injury from the speech activity.\(^{45}\)

The Court cast these decisions in disarmingly modest terms. They were rationalized as classic negative prohibitions: state and local governments could not exclude demonstrators from streets or public libraries, or use their police power to enforce a shopping center's no-solicitation policy against public speakers.

But there is no mistaking the decisions' true import. In *Shuttlesworth*, *Gregory*, *Cox*, *Edwards*, and *Brown*, the Court was, in essence, requiring government officials to make public property available to impecunious speakers who lacked property of their own with which to communicate. This was no mere negative prohibition; on the contrary, these cases imposed an affirmative duty on government to provide a speech subsidy. In *Logan Valley*, the Court went even further: it required wealthy and powerful private parties to provide the speech subsidy directly,\(^{46}\) and instructed the police to side with the speakers if the private parties refused to comply.\(^{47}\)

Thus, the Warren Court's speech decisions followed the same pattern as the criminal procedure decisions.\(^{48}\) In all of these instances the Court set out to reform and transform what it perceived as a badly skewed society. The only difference was that in the criminal procedure cases, the Court instituted the reforms directly, while in the speech cases, the Court pursued its objective more circuitously. By helping the poor to participate more effectively in the political process, it enabled them to seek the necessary reforms themselves.

III. THE BURGER-REHNQUIST COURT

It is neither my purpose, nor within my competence, to trace in detail the impact of the Burger-Rehnquist Court on constitutional

\(^{45}\) 391 U.S. at 323.
\(^{46}\) 391 U.S. at 324-25.
\(^{47}\) 391 U.S. at 319-20.
criminal procedure. Suffice it to say that the Warren-era revolution has been halted and, in some instances, rolled back. For instance, though suspects must still be advised of their rights to silence and to counsel prior to custodial interrogation, admissions obtained in violation of this requirement may now be used for impeachment purposes. Additionally, even though illegally seized evidence remains generally inadmissible, there is a good faith exception when police obtain the evidence in reasonable reliance upon an invalid warrant. I shall not discuss whether these decisions are sound, other than to observe that the modern Court—unlike Earl Warren’s—seems untroubled by the likelihood that impoverished and uneducated defendants will be disproportionately affected.

Instead, I shall focus on the Burger-Rehnquist Court’s first amendment jurisprudence in the field which deals with speakers’ rights of access to public and private premises: the field of forum-analysis. For here, I believe, is where Davis has cast its longest and most malign shadow.

A. The Leading Speech Decisions

Ironically, the Davis principle, insofar as it applies to speech, traces its roots to the Warren Court, which sometimes wavered in its treatment of speech issues. There are at least two important exceptions to that Court’s pattern of expanding poor people’s speech opportunities. In Adderley v. Florida, a bare-bones majority held that demonstrators were not entitled to assemble on the curtilage of a county jail, even when the purpose of the demon-

49 Harris v. New York, 401 U.S. 222, 226 (1971). Chief Justice Burger urged that “[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.” Id.; Richard K. Sherwin, Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions, 136 U. Pa. L. Rev. 729, 799 (1988) (arguing that in Harris, Chief Justice Burger was not concerned with institutional fairness or individual rights but only with “the true value of the illegal confession” to be used at trial).

50 United States v. Leon, 468 U.S. 897, 922 (1984). The Court noted that “suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.” Id. at 923; see Donald Dripps, Living With Leon, 95 YALE L.J. 906, 907 (1986) (agreeing with result of Leon, but arguing that Leon does less to effect exception to exclusionary rule than to substitute procedural for substantive definition of probable cause).

stration was to protest racial segregation at that jail.\textsuperscript{52} Likewise, in \textit{United States v. O'Brien}\textsuperscript{53}, the Court, with just one dissent, applied a fairly relaxed standard of scrutiny to what it termed a content-neutral rule which governed the non-expressive component of so-called symbolic, i.e. non-verbal, speech.\textsuperscript{54}

\textit{Adderley} and \textit{O'Brien}, however, are easily distinguishable from vintage Warren-era speech decisions. Had the Warren Court's majority survived into the 1970s and 1980s, I suspect that it would have distinguished both rulings and thereby confined them. The jail in \textit{Adderley} differed from the library in \textit{Brown}, and from the state house grounds in \textit{Edwards}, in that jails are tightly-controlled facilities which are not generally open to the public. This single detail would have sufficed to limit \textit{Adderley} to its facts.\textsuperscript{55} As for \textit{O'Brien}, the federal statute at issue was passed during the Vietnam War to forbid the mutilation of draft cards.\textsuperscript{56} The Court could have explained its deferential posture as reflecting its traditional acknowledgment of expansive national war powers.\textsuperscript{57}

It fell, however, to Warren Burger, William Rehnquist and their colleagues, not to Earl Warren and his, to interpret these rulings. In their hands, \textit{Adderley} and \textit{O'Brien} received broad applications and \textit{Davis} implicitly guided the applications.

\textsuperscript{52} \textit{Id.} at 46-48. The Court reasoned that "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful non-discriminatory purpose." \textit{Id.} at 48; cf. \textit{Cox v. Louisiana}, 379 U.S. 536, 557-58 (1965) (reversing convictions grounded in breach of peace, obstructing of public passages, and picketing near passages in connection with public demonstration against racial segregation); \textit{Edwards v. South Carolina}, 372 U.S. 229, 236-37 (1963) (reversing breach of peace conviction in connection with demonstration at State capitol against racial segregation since "breach of peace" allegation was so overly broad as to endanger First Amendment rights of demonstrators).

\textsuperscript{53} 391 U.S. 367 (1968).

\textsuperscript{54} \textit{Id.} at 376. The Court formulated a four part test for determining when a sufficiently important governmental interest exists, so as to allow regulation of expressive conduct:

\begin{quote}
\textbf{[A] government regulation is sufficiently justified if it is within the Constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.}
\end{quote}

\textit{Id.} at 377.

\textsuperscript{55} \textit{See Adderley}, 385 U.S. at 41 (stating that traditionally, State capitol grounds are open to public but jails are not).

\textsuperscript{56} \textit{O'Brien}, 391 U.S. at 380.

First, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, the Burger Court, citing *Adderley*, constructed a new, categorical approach to forum-analysis which differentiated sharply between public and non-public forum property. Later cases make it clear that only "traditional" public fora are open, as of right, to speech activity, and that the only "traditional" public fora are municipal and suburban streets, sidewalks and parks, and the grounds of seats of government such as state capitols. On all other property, the government is free to exclude or regulate speakers virtually at will, as long as it does not overtly discriminate on the basis of viewpoint. In particular, these later cases lay to rest Brown's bold proposition that "public fora" exist wherever speakers can find their desired audiences. Government agencies, therefore, no longer have to accommodate non-disruptive speech which bears a special relationship to the premises if the property may lawfully be closed to unrelated expression.

Second, even in traditional public fora, the Burger-Rehnquist Court, building upon *O'Brien*, has applied a nominally intermediate but, in practice, rather relaxed review to content-neutral speech regulations. Here, the Court has melded two formerly distinct but similar lines of analysis: the *O'Brien* analysis, which it

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59 Id. at 46. The *Perry* Court established three categories to distinguish public and non-public forum property. Id. at 46-47.

I should mention, finally, that the Burger Court, in its early years, appeared to embrace a forum-theory similar and perhaps even identical to the Warren Court's: it declared that all government properties, physically suitable for speech, were public fora unless the government could show in particular instances that the proposed manner of speech was incompatible with the property's normal use. *Grayned* v. City of Rockford, 408 U.S. 104, 119 (1972). But *Perry*, though it does not formally repudiate *Grayned*, in fact stands it on its head: all government property is henceforth presumed incompatible with speech unless the property is a traditional public forum.

61 The Second Circuit has gotten the message. It recently questioned whether its older cases, involving special relationships between speech and the premises, were still valid, and strongly intimated a negative answer. *Lee*, 925 F.2d at 579.
used for statutes that govern the non-expressive components of non-verbal speech activity;\textsuperscript{62} and the analysis it used for regulations which directly control the time, place and manner of either verbal or non-verbal speech.\textsuperscript{63} The common denominator in both analyses was that the government interest which supports the regulations does not depend upon the substance of the expression. Hence, the analyses are now interchangeable.\textsuperscript{64} Applying one analysis or the other, but in either event using the same relaxed standard of review, the Court has deferred to purely speculative concerns of government decision-makers,\textsuperscript{65} sustained underinclusive and overinclusive regulations,\textsuperscript{66} and refused to weigh the asserted governmental interests.\textsuperscript{67} In addition, the Court has intimated—and lower courts have agreed—that persons speaking in a traditional public forum may be assessed reasonable fees for the costs of police protection as long as the assessments are grounded in content-neutral criteria.\textsuperscript{68} The Court has also intimated—and

\textsuperscript{62} O'Brien v. United States, 391 U.S. 367 (1968) (upholding statute that prohibited burning of draft cards).

\textsuperscript{63} Heffron, 452 U.S. at 654 (concluding that Minnesota state fair rule requiring that all enterprises sell or distribute materials from fixed location did not violate First Amendment rights of Krishna Society).

\textsuperscript{64} Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297-99 (1984) (sustaining Park Service regulation that prohibited camping in certain parks). To put it differently, when the government regulates the non-expressive component of symbolic expression (by saying, for instance, that one may not burn a draft card), the government is really regulating the manner of expression; it is telling us, in other words, that we may convey our opposition to conscription, or to war, in a number of ways, but not by mutilating our registration certificate.

\textsuperscript{65} Heffron, 452 U.S. at 653 (sustaining fairgrounds rule, confining solicitors of funds to booths, based on purely speculative fear that allowing solicitors to approach fairground patrons outside booths would cause congestion or other problems).

\textsuperscript{66} See, e.g., City Council v. Taxpayers for Vincent, 466 U.S. 789, 805-07 (1984) (sustaining regulation banning posting of unattended signs on municipal property based on municipality's asserted aesthetic interests, even though municipality had taken no action against other, non-expressive visual pollutants); see also Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989) (sustaining sound regulation, of rock music in New York City's Central Park, without requiring City to pursue less speech-restrictive means of sound control).

\textsuperscript{67} See, e.g., Vincent, 466 U.S. at 816-17 (accepting City's position that aesthetic interest in avoiding visual clutter justifies removal of signs creating or increasing such clutter); Clark, 468 U.S. at 299 (deferring to Park Service's ban on overnight sleeping in certain Washington, D.C. parks, even though ban was only supported by administrative convenience concerns). A more recent ruling, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), suggests that the time, place and manner standard is acquiring some teeth, but it is still not nearly as rigorous as the standard which governs content-based regulations. Id. at 2469-70. The Turner Court held that a government regulation must promote "a substantial government interest that would be achieved less effectively absent the regulation." Id. at 2469.

\textsuperscript{68} Forsyth Co. v. Nationalist Movement, 112 S. Ct. 2395, 2405 (1992) (holding that fees levied on organizations in connection with parades or demonstrations were unconstitutional); Gay and Lesbian Servs., Inc. v. Bishop, 832 F. Supp. 270 (W.D. Mo.), as modified
the United States Court of Appeals for the Second Circuit has agreed, despite its earlier statement to the contrary—that police have no obligation to protect such persons at all, even against hostile audiences, unless the refusal is based on invidious factors such as the speaker's race or police hostility to the views expressed.69

Third, the Burger Court initially distinguished the Logan Valley decision,70 and confined it to its facts, in Lloyd Corp. v. Tanner,71 and then overruled Logan Valley altogether in Hudgens v. NLRB.72 As a result, no speaker today may assert a First Amendment right to use someone else's private property for speech purposes. This is so even when the property is generally open to the public and attracts the same sorts of large and diverse audiences that thronged America's downtown shopping areas before privately-owned shopping centers came into being.73

841 F. Supp. 295, 296 (1993) (holding that parade permit fees assessed in order to cover projected police expenses constituted a reasonable time, place and manner restriction); Long Beach Lesbian & Gay Pride v. Long Beach, 17 Cal. Rptr. 2d 861, 874 (2 Dep't Super. Ct. 1993). The latter court concluded that parade permit fees were valid time, place and manner regulations. Id. The court went on to say that "there is no content based deficiency in a permit scheme that requires the permittee to pay costs of traffic control while incidentally providing built in public safety protection." Id.

69 DeShaney v. Winnebago County Soc. Servs. Dep't, 489 U.S. 189 (1989) (stating that Fourteenth Amendment does not impose affirmative obligations on government, and hence social service agency is not constitutionally liable for failing to protect child abuse victim); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993). The Dwares Court interpreted DeShaney to hold that "an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause." Id. However, a due process violation would arise if police officers "had assisted in creating or increasing the danger to the victim." Id. But see Wolin v. Port of New York Auth., 392 F.2d 83, 94 (2d Cir. 1968) (reasoning that plaintiff was entitled to protection by Port Authority police in his exercise of speech rights).

70 Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968) (holding members of public may not be excluded from exercising First Amendment rights at privately owned shopping center, because it was "community" business block).

71 407 U.S. 551, 564 (1972) (distinguishing Logan Valley on basis that handbilling in present case was unrelated to any activity at defendant's shopping center and plaintiffs had adequate alternate means of communication). The distinction was purportedly based on the fact that in Logan Valley, the expression—labor picketing—was related to the premises. Id.

72 424 U.S. 507, 518 (1976) (stating that Logan Valley rationale did not survive Lloyd case).

B. The Relationship Between Davis and Speech

Perry and its progeny, O'Brien and its progeny and Hudgens all owe a doctrinal debt to Davis. In order to appreciate Davis’ impact, one must examine how the Burger-Rehnquist Court’s speech jurisprudence operates, first in theory, and then in practice.

In theory, the guiding principle is one of strict neutrality. Well-to-do and poor people alike may use their own property to disseminate messages. They may also use government property, provided that the property is a traditional public forum such as a municipal or suburban street, sidewalk or park, or the grounds of a seat of government such as a state capitol. The government, however, may control the time, place and manner of their expression through even-handed regulations. Neither the affluent nor the indigent are entitled to disseminate messages in non-traditional government fora, or on other people’s private property.

The practice, however, is dramatically different. Poor people, many of whom belong to racial minorities, often do not own property. Most certainly, they do not own newspapers, radio or television stations, or shopping centers. Thus, they have no effective mechanisms of their own for communicating to society at large.

74 Though Hudgens was released slightly before Davis, it was decided the same year. Hence I think it fair to include it as part of Davis’ legacy, or at any rate as inspired by the same principle.

75 See, e.g., Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (noting that newspapers cannot constitutionally be compelled to provide forum to others); City of Ladue v. Gillio, 114 S. Ct. 2038, 2047 (1994) (holding that City ordinance which forbade residents from posting signs at their private residences violated their First Amendment rights).

76 See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983) (setting out three categories of public forums); Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1968). The Shuttlesworth Court stated that streets and parks have immemorially been held in trust for the use of the public. Id. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. Id. (quoting Hague v. C.I.O., 307 U.S. 496, 515-16 (1939)).

77 See Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975) (stating that time, place and manner regulation of speech must apply to all speech, without regard to content); Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 517 (1967) (forbidding regulation against wearing black arm bands in schools as restriction on content).

78 See generally Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-25, at 999 (2d ed. 1988) (noting constitutional toleration of private property owner’s rights to exclude unwanted views); Ragosta, supra note 73 passim (detailing public and private forum analysis of free speech in shopping centers).

79 See generally Owen M. Fiss, Silence on the Street Corner, 26 SUFFOLK L. REV. 1, 1 (1992) (noting that most radicals do not have sufficient funds to buy air time).

80 See generally Thomas Kelven, Free Speech and the Struggle for Power, 9 N.Y.L. SCH. J. HUM. RTS. 315 (1992) (noting that political and social stratification are facilitated by access to powerful communications mechanisms).
Although they do have access to traditional public fora, that access is of little practical use to them today for three reasons.

The first reason is that well-documented population shifts, from the cities to the suburbs, have emptied the traditional public forum of its former audiences, forcing the speaker to follow the public to airport terminals, suburban post offices, and suburban shopping malls. Under the Burger-Rehnquist Court's speech jurisprudence, however, these places are off limits to expressive activity, because they are either non-public government fora or private fora. In consequence, as Justice Kennedy and two of his colleagues recently observed, "our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity, in a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse...."

The second reason flows from the first. Since traditional public fora no longer provide direct access to large audiences, there is only one way that speakers who utilize these fora can obtain such access. That one way is by attracting media attention through dramatic devices: for instance, the public burning of a selective service registration certificate. O'Brien and its progeny, however, allow the government to prohibit such measures as long as government officials can conjure up a plausible and content-neutral justification for doing so.

The third reason why access to public fora is of little use to speakers with limited financial resources also originates with O'Brien. Later decisions, based on O'Brien, suggest that the government may make the use of traditional public fora prohibitively risky, or expensive, either by withholding police protection alto-

81 Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324 (1968) (noting advent of shopping centers as population moves from cities to suburbs).
82 International Soc'y for Krishna Consciousness, Inc., v. Lee, 112 S. Ct. 2709, 2717 (1992) (Kennedy, Blackmun and Souter, JJ., concurring). Interestingly, even though Justices Kennedy and Souter were appointed by Presidents Reagan and Bush, respectively, their forum-analysis has closely resembled the Warren Court's approach.
84 See id. at 377 (justifying governmental regulation if it furthers an important or substantial governmental interest); see also United States v. Eichman, 496 U.S. 310, 318 (1990) (holding that Texas anti-flag burning statute, because content based, did not survive strict scrutiny analysis); Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that Texas anti-flagburning statute did not survive strict scrutiny analysis).
gether, or by charging for it, provided once again that the government's actions are even-handed. Under these decisions, persons who lack resources to provide their own security, or to pay police, may find it dangerous or financially impossible to speak publicly at all.

For all of these reasons, the Burger-Rehnquist Court's speech jurisprudence discriminates in practice against the speech of the poor. By doing so, moreover, it also discriminates against the anti-establishment views that poor people, many of whom belong to racial minorities, are likely to utter. To be sure, rich and poor people alike have the indefeasible right to use their own property, or public forum property, in order to challenge the existing political, economic and social structure. With the exception of a few idiosyncratic declassées, however, rich people will not do so. The result is de facto viewpoint discrimination: speakers with a stake in the status quo have ample expressive opportunities, while speakers who wish to attack the status quo have few or none.

These latter speakers' only recourse is to speak out in some empty downtown street. The First Amendment serves, for them, merely a cathartic, not a truly communicative, function.

Here, however, is where Davis comes into play. The consequences that I have described do not arise from intentional government action as that term is presently defined. True, government officials are perhaps aware of these consequences when they place post offices or airport terminals off-limits to speech activity. At the very least they ought to foresee such consequences. There is no reason to suppose, however, that they act for the purpose of suppressing disfavored ideas. Therefore, these known or foreseeable consequences do not give rise to a First Amendment viola-

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85 See Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-31 (1992) (holding ordinance allowing permit fee was invalid because content based); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (noting that language of Due Process Clause does not require States to protect its citizens from infringement upon liberty by private persons).


87 See generally Texas v. Johnson, 491 U.S. 397, 414 (1989), "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Id.

88 Fiss, supra note 79, at 3 (noting that street corner is now "last, desperate forum").

89 Id.

90 See, e.g. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977) (noting that in order to succeed against former employer for wrongful discharge based upon consti-
tion. They are, instead, constitutionally irrelevant discriminatory effects. Thus, *Davis* has subtly guided the Burger-Rehnquist Court’s First Amendment jurisprudence, even though the decision itself is rarely cited in the pertinent cases.\footnote{At least one First Amendment decision does cite *Davis*. Employment Div. Or. Dep’t of Hum. Resources v. Smith, 494 U.S. 872, 886 (1990). The Court held that facially neutral criminal statutes do not violate the First Amendment’s Free Exercise Clause merely because they incidentally burden a religious practice. \textit{Id.} The Court was unimpressed by the fact that—since more powerful sects usually have sufficient clout to defeat such statutes, or to procure statutory exemptions—the only practices likely to be burdened in this manner are those of religious minorities. \textit{Id.} Though \textit{Smith} was a free exercise case, not a speech one, the message is the same: unintended disparate impacts do not matter.}

IV. *DAVIS*: A TRULY NEUTRAL PRINCIPLE?

The Burger-Rehnquist Court has prided itself on its neutrality and *Davis* is its crowning achievement. Reduced to its essentials, *Davis* postulates that the Justices have no business thrusting their vision of social justice upon the nation. Rather, their only function is to ensure that government does not load the scales by purposely discriminating on the basis of invidious factors such as race, gender or speakers’ points of view.\footnote{Washington v. Davis, 426 U.S. 229, 241 (1976).}

*Davis*, however, is not as neutral as it professes to be. In the first place, it serves to perpetuate the status quo, for it mutes both the voices of the poor and the dissident viewpoints which poor people may wish to express. Moreover, it tacitly reflects, and thrusts upon the nation, a social vision of its own. That social vision is quite different from the Warren Court’s, but it is nevertheless a social vision. Earl Warren and his colleagues believed that society was too badly skewed for theoretical equality to produce even roughly equal results.\footnote{See ARNOLD S. RICE, \textit{THE SUPREME COURT IN AMERICAN LIFE: THE WARREN COURT 1953-1969} 213 (1987). The Court stated that Chief Justice Warren possessed “an uncommon degree of common sense about what was just and proper in society in general and in the law in particular . . . . The Warren Court was by far the most activist, law-changing Court in the history of the nation.” \textit{Id.}} Accordingly, in their view, it behooved the judiciary to examine, and seek to rectify, society’s wealth and power disparities. Most members of the present Court appear to believe, in contrast, that society is not as skewed as their predecessors had supposed. They believe, in other words, that if civil service examiners treat all applicants the same, blacks and other ethnic minorities will get their fair share of jobs if only they try
hard enough; that if elected and appointed officials treat all speakers the same, impecunious speakers—including blacks and other ethnic minorities—will be able to influence the political process as effectively as anyone else, although they may have to expend some additional effort in order to do so.

Perhaps the present-day Justices are making a different point. Perhaps they are saying, instead, that critical private sector wealth and power imbalances may indeed exist, but that judges lack institutional competence to identify them, because to do so would require the courts to make forbidden political and social value judgments.94 This too, however, implicitly conceals precisely such a value judgment, for it postulates that the disparities are not self-evident enough for courts to take judicial notice of them. From the likes of Earl Warren, William Douglas, Abe Fortas, Arthur Goldberg and William Douglas, the modern Court's reticence (or, as they might have put it, blindness) would have provoked a sneer and a chortle.

If anything, private sector wealth and power disparities are even more pronounced today than in Earl Warren's time.95 In the face of these disparities, *Davis* and kindred decisions comprise, collectively, a jurisprudence of denial.

V. IN PARTIAL DEFENSE OF *DAVIS*

I have treated *Davis* harshly. I must acknowledge, however, that it nevertheless has its place. As a purely equal protection decision, *Davis* makes sense. If known or foreseeable disparate racial impacts triggered strict scrutiny's virtually automatic death sentence—if state and local governments, in consequence, had an affirmative constitutional obligation to rectify such impacts—then federal judges would run the country. In a racially stratified society, virtually all laws have racially disparate impacts. As *Davis* itself observed, abandoning the discriminatory intent requirement or equating intent with knowledge or foreseeability of conse-

94 See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 90-91 (1978) (holding there is no principled basis for identifying historically disadvantaged minorities); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (holding that "social and economic" legislation must be subject to same rational basis review regardless of whether it implicates economic rights of businesses or economic rights of welfare recipients, because there is no principled basis for distinguishing between them).

quences "would raise serious questions about, and perhaps invali-
date, a whole range of tax, welfare, public service, regulatory, and
licensing statutes that may be more burdensome to the poor and
to the average black than to the more affluent white."96 The price,
in loss of representative self-government at the state and local
levels, would simply be too high.97

Nor do I argue that government has an affirmative constitu-
tional duty to ameliorate poverty by providing subsistence bene-
fits, either for their own sake or as a means of enabling poor peo-
ple to speak out more effectively.98 Experts and the general public
alike disagree bitterly over whether welfare and kindred entitle-
ments truly ameliorate poverty, or whether they instead exacer-
bate and perpetuate it by destroying individual initiative.99 In the
face of such widespread disagreement, which no empirical evi-
dence can resolve, federal courts have no principled choice but to
leave welfare decisions to the political process.100

Finally, I do not mean to denigrate, or dismiss as altogether fu-
tile, Davis' search for neutral principles. I do not believe that con-
stitutional law is an oxymoron, or that it inevitably functions as
politics in disguise. Though perfect neutrality is unattainable, the
quest for it is still worthwhile; by very dint of pursuing it, we inch
closer to the goal. I merely urge that the pursuers keep their eyes
open to neutrality's inevitable failings.

Forum-analysis, however, is special. As Professor Harry Kalven
explained, its very purpose is to provide speech opportunities to
"those with little access to the more genteel means of communica-
tion": in other words, to the poor.101 Hence the doctrine functions
as a unique constitutionally mandated affirmative duty—a duty to
subsidize poor people's speech by providing impecunious speakers

96 Davis, 426 U.S. at 229, 248.
97 See Tribe supra note 78, at 1513 n.94. On the other hand, it might make sense to
adopt a knowledge or foreseeability standard for at least some discriminatory impacts
under state constitutions, where federalism concerns are by definition absent.
98 See Edelman, supra note 95, at 37-40 (advocating use of constitutionally guaranteed
welfare rights as mechanism for enhancing speech opportunities for indigents).
99 Id. at 15-16 (noting welfare may increase poverty or, alternatively, create depen-
dency); cf. Ralph K. Winter, Changing Concepts of Equality: From Equality Before the Law
to the Welfare State, 1979 WASH. U. L.Q. 741, 753-54 (asserting that there is no benefit to
equal distribution of material wealth).
100 See Dandridge v. Williams, 397 U.S. 471, 487 (1970). "[T]he intractable economic,
social and even philosophical problems presented by public welfare assistance programs
are not the business of this Court." Id.
with suitable locations for communicating to large audiences. By definition, therefore, the doctrine requires courts to consider economic and similar impacts.

It is no great stretch to recognize that the economic impacts of the United States Supreme Court's forum decisions will vary from one generation to the next. Thus, guaranteed access to the nation's streets, sidewalks and parks may have sufficed, forty or fifty years ago, to offset many of the disadvantages that poor people faced when attempting to disseminate their views. Today, "in times of fast-changing technology and increasing insularity," it suffices no longer. The Court, accordingly, should provide the poor with other speech locations. It should do so, moreover, regardless of whether those other locations are publicly or privately owned, for ultimately the public must pay for the subsidy in either event. If the property consists of a government office building or parking lot, the costs will be assessed in slightly higher taxes; if it consists of a shopping center, the costs will be assessed in slightly higher prices for consumer goods. The First Amendment, of course, does not prevent the property owner—governmental or private—from imposing reasonable regulations in order to minimize those costs, but the subsidy should include, at the very least, police protection on the property for unpopular speakers. Otherwise, access would be too risky to be worthwhile.

Expanding access to forums, on behalf of the poor, is actually consistent with Davis' objectives in at least two ways. First, Davis expressly sought to strengthen the political process, by leaving the remediation of most disparate impacts to that process. Judicial creation of a more generous public forum doctrine would admittedly thwart the process in the short run, for it would override the will of political decision-makers who try to exclude speakers from public property in the name of aesthetics, economy or administra-

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103 In the case of shopping centers, the state action which the First and Fourteenth Amendments require should be found, not in the attenuated logic of the public function doctrine, but rather in the present use of state trespass laws to exclude speakers at the behest of shopping center managers. This approach would by no means open truly private property—free-standing stores, apartment complexes or the like—to speech uses. Shopping centers are clearly distinguishable from most other forms of private property, on the merits, by virtue of the large and diverse audiences that they attract, and also because shopping center speech activities, if reasonably regulated, will cause little if any harm to the owners' proprietary interests.
tive convenience. In the long run, however, it should enhance the process by making the political system more representative and responsive. What is more, there is no danger, as there was in Davis, that an impact-oriented forum approach would spill over to invalidate a wide range of other laws. Once the political system becomes more representative and responsive, perhaps we could rely upon it more confidently to rectify unintended racial imbalances on civil service tests or in the administration of criminal justice.

Second, broader forum access accords conceptually with Davis' requirement of strict neutrality. Unlike judicial invalidation of racially skewed examination results, or judicially imposed subsistence rights, such access would in theory be available to all, regardless of race or economic status. To be sure, not all speakers would seek access. For instance, I do not see Ted Turner, Rupert Murdoch or Donald Trump handing out leaflets in bus terminals, welfare office waiting rooms, or shopping centers. These people have what Kalven called "more genteel means" of communicating to the public. As a practical matter, therefore, most speakers who avail themselves of the broader access would be members of racial, political or economic minorities. But this would constitute what Davis itself would call a constitutionally irrelevant disparate impact—and for once, ironically, the disparity would favor the "have-nots" rather than the "haves."

VI. The Status of Davis Today

As an equal protection doctrine, Davis remains entrenched. In Hernandez v. New York,\textsuperscript{105} for instance, six of the nine Justices sustained a prosecutor's authority to use peremptory strikes against Spanish-speaking jurors.\textsuperscript{106} The prosecutor did so because he feared that these jurors might not accept the official translation of the testimony of Spanish-speaking witnesses.\textsuperscript{107} According to the six, though the strikes had a disproportionate impact on Hispanic jurors, they were not aimed at Hispanics as such, but rather at individuals who were fluent in Spanish whether they were Hispanic or not.\textsuperscript{108} Hence, the prosector's action was allowable.

\textsuperscript{106} Hernandez, 500 U.S. at 372.
\textsuperscript{107} Id. at 360.
\textsuperscript{108} Id. at 361.
Officially, Davis' spirit continues to infuse First Amendment forum-analysis as well. In its two most recent public forum decisions—Rosenberger v. University of Virginia\textsuperscript{109} and Capitol Square Rev. & Advisory Bd. v. Pinette\textsuperscript{110}—the Court hewed to the categorical approach that it established in Perry by focusing, both times, on whether the property where the expression occurred was a "traditional" or at least a "designated" public forum. Capitol Square, moreover, ignored the manifest likelihood that the expression which the decision protected would be overwhelmingly religious. By sweeping aside any Establishment Clause objections to the expression, the Court displayed its traditional indifference to non-purposeful disparate consequences.\textsuperscript{111}

In the First Amendment area, however, there are harbingers of change. In Rosenberger and Capitol Square, none of the parties had any occasion to challenge Perry's ascendancy. The last such challenge occurred in International Soc'y for Krishna Consciousness, Inc. v. Lee,\textsuperscript{112} where Perry barely survived. Former Associate Justice Byron R. White joined the Court's 5-to-4 opinion in that case. Since then, he has left the Court, and Associate Justice Ruth Bader Ginsburg has replaced him. Should a future challenge materialize, her vote could topple Perry's fragile majority.\textsuperscript{113} In addition, though Associate Justice Sandra Day O'Connor has thus far accepted the Perry analysis\textsuperscript{114} she has also demonstrated a growing sensitivity to the impact of private sector wealth dispar-

\textsuperscript{109} 115 S. Ct. 2510 (1995) (holding that public university which subsidizes wide range of student organizations, including publications, may not withhold funds from otherwise-qualified student publication merely because publication is religious).

\textsuperscript{110} 115 S. Ct. 2440 (1995). Capitol Square held that if a traditional public forum allows the display of privately-sponsored unattended non-religious symbols, such as craft booths or United Way thermometers, it must also accommodate privately-sponsored unattended symbols that have a religious content. Id. at 2458.

\textsuperscript{111} See Pinette v. Capitol Square Review and Advisory Bd., 844 F. Supp. 1182, 1184 (S.D. Ohio 1993). It was clear, from the record in numerous lower court decisions, that when a government forum accommodates privately-sponsored unattended expressive symbols, the vast majority of such symbols will be religious ones. Id.; Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1392 (11th Cir. 1993) (documenting how Rotunda had been used by religious organizations); Doe v. Small, 964 F.2d 611, 614 (7th Cir. 1992) (listing various religious groups that had used public park as forum); Smith v. Albemarle County, 895 F.2d 953, 955 (4th Cir.) (holding presence of creche on front lawn of county office building violated Establishment Clause), cert. denied, 498 U.S. 823 (1990).


\textsuperscript{113} The appointment of Associate Justice Stephen G. Breyer to replace retired Associate Justice Harry A. Blackmun is unlikely, in my view, to alter the balance further.

ities on the effective exercise of First Amendment freedoms. For instance, her separate and ultimately dispositive concurring opinion in *Lee* applied an unusually rigorous version of rational basis review to content-neutral speech regulations in a non-public forum. As a result, one of the regulations, a ban on leafletting inside airport terminals, was invalidated. And in *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*,115 she acknowledged, in another separate opinion, that private sector power concentrations can pose a significant threat to First Amendment liberties.116 These developments suggest that *Perry*, and its accompanying obliviousness to unintended disparate impacts, may now be vulnerable to attack.

VII. CONCLUSION

The Warren Court, for the most part, got its First Amendment cases right. The Burger-Rehnquist Court erred by taking *Davis*—a sensible enough equal protection decision—and applying its teachings to speech, where they have no proper business. As a result, poorer Americans have scant opportunity either to attain power themselves, or to influence those who presently wield it. I hope that some future Court will set matters straight.117

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116 *Id.* Justice O'Connor qualified this acknowledgment by emphasizing, nonetheless, that the First Amendment's principal thrust is to curtail governmental rather than private power. In the very same sentence, though, she said (I think significantly) that this is only true of "the First Amendment as we understand it today." *Id.* (emphasis added).
117 My own state of Connecticut has at least made a start at setting matters straight. Using its state constitution, it repudiated the *Perry* line of cases and revived the older incompatibility test first enunciated in *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). *State v. Linares*, 655 A.2d 737, 755 (Conn. 1995). I submitted an *amicus curiae* brief on behalf of the Connecticut Civil Liberties Union in *Linares*, urging the Court to substitute *Grayned*'s test for *Perry*'s.