THE RETURN TO DARKTOWN:

A POLITICAL ANALYSIS OF CONSTITUTIONAL LITIGATION

FOR RACIAL EQUALITY IN THE PROVISION OF URBAN SERVICES

Frank M. Anechiarico

Submitted to the faculty of the Graduate School in partial fulfillment of the requirements for the degree Doctor of Philosophy in the Department of Political Science, Indiana University.

August, 1978

Accepted by the Faculty of the Graduate School,
Department of Political Science, Indiana University,
in partial fulfillment of the requirements for the
degree Doctor of Philosophy.

Doctoral Committee:

William J. Siffin, Ph.D., Chairman

Elinor Ostrom, Ph.D. *

York Willbern, Ph.D.

Mary Michelle U. Hirschoff, J.D.

* This Committee member did not concur with the decision of the majority to accept the dissertation.

For

Lucia Conte Sassano

ACKNOWLEDGEMENTS

This project began as independent research under the direction of Mary-Michelle Hirschoff. I am indebted to her for her criticism of the early drafts. I have incurred many other intellectual debts in the development of this dissertation. David J. Olson encouraged my early interest in the political position of blacks. The constitutional aspects of that position were shown to me by Vincent Ostrom. The empirical research on urban service delivery that is drawn upon here was directed by Elinor Ostrom, Roger Parks and Dennis Smith; I owe each of them a great deal for the assistance and support they have given me all along. York Willbern and William Siffin have been patient critics and advisors, and their help has been very much appreciated.

My colleagues at Hamilton College have also contributed very much to my progress. My good friends Eugene Lewis and Alphonse Sallett have given me aid and encouragement in every phase of this project. I could not have done without their help. Robert Simon, R.P. Suttmeier and Richard Werner spent time reading my early drafts and discussing them with me. Their comments have been very useful to me. I would also like to thank the Dean of the College, W.L. Gulick for the financial support of his office in the preparation of the manuscript. Typing of the manuscript was done very efficiently by June Darrow and Carolyn Erdener.

I am indebted to many others besides--especially to my family and to my friends in New York and Indiana.

F.M.A.

PREFACE

The topic of this dissertation, constitutional litigation for racial equality in urban services, is both narrow and complex. The litigation in question is fairly recent, and the number of instances in which constitutional litigation for service equality has been used by urban blacks is small enough to be studied completely. These aspects of the topic make it amenable to focused analysis. However, it is the political questions raised by the litigation that make the inquiry quite complex.

If this were simply an essay on the same topic ("The Urban Poor and the Courts") a general explanation of the legal options available to minorities and the limits of those options might suffice. However, once the topic is known and that it is to be a thesis in political science, a series of questions arises. Why should urban minority groups use a strategy that involves the time and expense of Federal litigation? What do urban blacks have to gain from such a strategy? This question raises two others. What is it about the current political position of urban blacks that makes constitutional litigation necessary or desirable? Is the strategy likely to provide any significant political benefit to urban blacks? One additional question is necessary to place this discussion in the context of ongoing scholarship in political science. That is, what theoretical framework, or set of ideas familiar in the discipline, will accommodate the answers to these questions and also give them meaning beyond the topic itself?

Each of the above questions is the nucleus of a section of this thesis. The first chapter articulates the theoretical context of the topic. The theory which is presented concerns the political position of the individual and of groups in a federal system. The outlines of the theory are drawn from several sources, but primarily from the work of Vincent Ostrom who

proposed an apt label for it, "the political theory of a compound republic." The first chapter will also include an explanation of the relevance of this theory to the use of the Federal Judiciary by urban blacks seeking a recourse from local service inequality.

The second chapter takes up the question of the political position of urban blacks. This will not be an empirical examination (that is the subject of the third chapter), but rather an analytic discussion of the way in which certain aspects of the public policy process influence the range of redress options available to individuals who are ascriptively categorized by society. This chapter, in essence, is an explanation of why blacks in some cases constitute a stable minority, unable to effectively present demands to local government.

Chapter III considers the empirical aspect of the position of blacks--the observable difference by race of citizen experience and evaluation of a municipal public service provided in a particular jurisdiction. The example that is offered to illustrate this difference is drawn from a study of police service in the St. Louis metropolitan area. It is a single example of a very complex phenomenon, but it serves to indicate, in some detail, the kind of situation from which blacks may seek recourse.

The fourth chapter examines the evolution of constitutional litigation for racial equality in the provision of urban services. The emphasis in this chapter is on the question of whether a showing by plaintiffs of discriminatory motivation on the part of the State is necessary to a violation of the Equal Protection clause. The two cases upon which this litigation is focused are Hawkins v. Town of Shaw (437 F. 2d 1286; 1971) in which plaintiffs alleging unequal treatment were granted relief by a Federal Appeals Court--and Washington v. Davis (96 S. Ct. 2040; 1976), a Supreme Court ruling on the role of State motivation in equal protection cases.

Chapter V considers the empirical and analytical consequences of the course of litigation described in Chapter IV. This is done by evaluating the analysis in Chapters II-IV in light of the premises and standards of the theoretical framework set out in Chapter I.

CONTENTS

LIST OF TABLES

LIST OF FIGURES

CHAPTER I

A FRAMEWORK FOR ANALYZING CONSTITUTIONAL LITIGATION FOR RACIAL EQUALITY IN THE PROVISION OF URBAN SERVICES: "THE POLITICAL THEORY OF A COMPOUND REPUBLIC"[1]

Introduction

This study examines an interesting question: What are the prospects that blacks and other ethnic minorities can successfully attack inequalities in the provision of urban services through recourse to litigation?

On the face of it, the question may seem simple and the answer obvious, given the Equal Protection Clause of the U.S. Constitution and the civil rights legislation of recent decades. However, the implications of this question turn out to be quite complicated. The answer is problematical. This effort to probe the question does not profess to be definitive. It does examine three fundamental and related dimensions of the issue: the theoretical basis for framing it; the empirical and operational dimensions of the problem; and the development of the litigation in question.

The theoretical perspective used is that of the compound republic, which emphasizes the structural and legal aspects of the design of the American political system. The compound republic theory serves to explain the position of

the Federal Judiciary as a recourse available to minorities alleging unequal service from local government. It also provides a democratic theorem, the any-one rules principle, as a standard for evaluating the judicial decisions on racial service equality.

The empirical and operational dimensions of the general issues are essentially those of establishing the need for litigation in the case of racially unequal urban service. This involves a discussion of the political position of blacks in cities, which raises the need for judicial recourse. It also involves the measurement of urban services in particular cases, in order to argue that litigation may be needed. A final dimension is the application of the criteria of equality derived from the compound republic theory. The litigation considered in this study, like most constitutional litigation, encompasses a variety of complex, unresolved issues. In the American political system, the eventual arena for a great many political issues is the Federal Judiciary. However, the solutions produced often contain the seeds of further conflicts, as the implications of particular decisions are worked out. For instance, it is now almost a quarter century since Brown v. Board of Education "settled" the school segregation question, and the problems attending the integration seem to multiply, rather than decrease.[2]

In order to understand the problem presented here, we must consider a range of issues broader than the litigation alone. Among these are three major political issues raised by the problem of racial equality in the provision of urban services: the authority of the Federal Judiciary to intervene in the provision of local public services; the potential of there being some recourse for urban blacks receiving inferior levels of service; and the demonstrability and measurement of racial inequality in the provision of urban services.

Each of these issues is conducive to a wide variety of interpretations. The interpretation presented here is by no means the only one or the best one possible. It is, instead, a comprehensive approach to these issues which more focused and specific perspectives on these issues might not allow. This should

not be surprising, and it is not meant to denigrate other approaches which may come to alternative conclusions. The approach selected, the compound republic theory, will be used because it provides the comprehensive perspective needed to examine all three topics and then relate them to the litigation in question. In doing so, this theory presumes some approaches, extends others, and conflicts with still others. By identifying the presumptions, extensions and conflicts this dissertaion will hopefully establish its position relative to similar works in political science.

The compound republic theory contains a central theorem about democratic government which may be used as a standard in examining the three major political issues above. This theorem is referred to below as the "any-one rules principle." Vincent Ostrom, from whom a great deal of the approach here is drawn, defines the principle:

> The claim which <u>any one</u> can exercise ... is the only basis for conceptualizing the possibility of political <u>equality</u> in a democratic republic. Public goods and services are available to everyone only if claims of any one are sustained.[3]

By applying and elaborating this principle each of the topics introduced above can be explored and then considered jointly in light of the constitutional litigation for service equality. This principle also provides an identifiable starting point for the consideration of the more general questions raised by the problem of racial equality in service provision. Are blacks as able as <u>anyone</u> to sustain their claims for public goods and services? In those cases where anyone is not able to sustain such a claim, what recourse is available? Is the available recourse effective?

As mentioned at the outset, the Federal Judiciary is one political structure that has become a recourse for a great many dissatisfied parties in American politics. In order to understand the role played by the Federal Judiciary in the controversy over racial service equality, this chapter will first explain the role of political structures, especially the Federal Judiciary, as the locus of

minority demands for redress of local service inequality. The chapter will then present the compound republic theory as a framework for analyzing the litigation over public service provision that has come to the Federal Judiciary in the past decade.

Political Structures as the Focus of Minority Redress Strategies

One of the goals of political science is the exposition of the political structure of society. That is the rules, norms and hierarchy that guide social action.[4] Whether the structure of a village or a nation-state is in question, the formal and informal rules governing decision-making will affect both the life-style of the individual and, to some extent, the general level of human welfare.[5] This dissertation is concerned with the potential use of one structure, the Federal Judiciary, to affect one aspect of human welfare, racial equality in the provision of public services. This topic necessarily entails an examination of questions concerned with structure. What limits the extent of the political options available to racial minorities? What is the context within which individuals and groups compete for public services?

It might be possible to begin answering these questions directly with a discussion of the empirical limits on the political power of minority racial groups. However, without first having an understanding of the design of political structure of American society, it is difficult to analyze redress strategies. Redress denotes a return to a pre-existing and/or generally more desirable state. Without some notion of the theory of design of a political system, a demand for redress has little meaning beyond the conflict in which it is presented. The theory of design of the system gives the analyst of a redress strategy a standard to judge whether the redress is a return to or departure from the central notion of the American design, that of a compound republic. Vincent Ostrom makes a similar point in The Intellectual Crisis in American Public Administration, "An appropriate theory of design is necessary both to understand how a system will work and how modifications or changes in a system will affect its performance."[6]

Following from Ostrom's point, the next section of this chapter will suggest a standard for evaluating various redress strategies. This standard may also be used to answer the more difficult question which will be posed in the final chapter. What are the consequences of various redress strategies for the constitutional structure of American government ?

The Foundation of American Political Structure

The idea of a "compound" political system is defined in "Federalist 51:"

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[7]

The compound republic was designed to solve two closely related problems. The more general problem dates in political analysis at least back to the writings of Thomas Hobbes; it is the problem of accommodating individual liberty to the need for social control.[8] The second, more specific problem is the status of non-governmental political organization--the standing of interest groups relative to the legitimate regime.

For Hobbes, allowing political autonomy to individuals or groups was one route to anarchy. For the good and prosperity of all, autonomy, he argued must be surrendered to the artificial god, Leviathan:

> (T)here must be some coercive power to compel men to the performance of their covenants by the terror of some punishment greater than the benefit they expect by the breach of their covenant, and to make good that propriety which by mutual contract men acquire in recompense of the universal right they abandon ...[9]

Like Rousseau, Hobbes found that an individual can only be free, that is, free from the constant fear of violent conflict, once he gives up his liberty to the sovereign or the moi commun.[10] Order, in which there is freedom, and liberty, the root of anarchy, are the Hobbesian alternatives, and they present the dilemma upon which the American system is founded. In "Federalist 9," Hamilton refers specifically to this dilemma:

> From the disorders that transfigure the annals of those republics the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty. They have decried all free government as inconsistent with the order of society, and have indulged themselves in malicious exaltation over its friends and partisans.[11]

As we see from what follows, Hamilton had more faith in the conscious design of republican political mechanisms than he had fear of the inexorable nature of conflict among free men. It is worthwhile quoting Hamilton at length on this point, since the efficacy of design is one of the points discussed in this dissertation:

> If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends to liberty would have been obliged to abandon the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.[12]

Thus, the constitutional rules chosen by the Philadelphia Convention were intentionally designed to solve or alleviate particular political

problems. These problems were phrased in language familiar to each generation of political scientists--that of the relative concentration of power in the various branches of government and at its various levels.

It is the latter problem, the relative concentration of authority at different levels of government, that is closer to the substance of this dissertation. What is the political position of the local magistrate and the local legislature? What burden do they bear in achieving distributive equality and what authority do they possess to redress inequality in the provision of public services? Each of these questions deals with the division of authority between levels of government in the United States. This division of authority is explained by the compound republic theory.

A Description of the Compound Republic Theory

A political theory may be defined as a structure of reasoning allowing the prediction of consequences which may flow from a specified set of institutional arrangements.[13] This section will specify the arrangement of institutions in a compound republic. The prime consequences which may be predicted on the basis of institutional arrangements in a compound republic are protection against and recourse from the tyranny of the majority and security from the violence of factions.[14] Significantly, the arrangements upon which these consequences may be predicted did not come about because of chance or tradition, but through the design of a constitutional structure.

To proceed, a definition of "constitution" is necessary. Lasswell and Kaplan define constitution as the "basic pattern of the polity."[15] Madison defined it as those rules "established by the people and

unalterable by the government."[16] A third definition, offered by Buchanan and Tullock, brings us closest to the notion of structure, "a set of rules agreed upon in advance and within which subsequent action will be conducted."[17] The rules, then, delineate the constitutional structure.

The set of rules indicated by Buchanan and Tullock may be viewed as distributing decision making capabilities (political power) among individuals within a particular political regime. A regime may be defined as the established structure of political institutions and the relations among them.[18] The political aspects of constitutional structure may, thus, be examined by comparing regimes. This is because it is within the framework of regimes that the distribution of decision making capabilities takes place and the rules governing political relations are in force.

Several early comparative analyses of regime structure may be referred to. Adams did an exhaustive study of republican regimes in order to justify the design component of "order" separation.[19] Likewise, in The Federalist and in Madison's Journal of the Federal Convention we are aware of a concerted effort to abstract the essential components of past governmental designs and tie those components to a consequent state of affairs.[20] It may be possible, therefore, to abstract from the work of Adams, Madison and Hamilton, the primary regime types which were compounded in the American system.

Primary regime types in a compound republic

The National Regime

This regime is the type that Madison, in "Federalist 10," identifies as leading to the tyranny of the majority.[21] This is so because the

National regime, generally the only legitimate government in an area defined by ethnicity or language (as opposed to city states, which are unitary, but not National regimes), allows no competing claim on its constitutional authority. It is possible, then, for a democracy with only a National regime to develop what Madison called the "Republican Disease," the evolution of a stable majority which governs in its own interests without the need to account for or defer to minority demands.

> When a majority is included in a faction, the form of popular government. . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.[22]

There are three regime design criteria presented by Hamilton in The Federalist which may be applied to the National regime and to the regimes yet to be discussed.[23] They are useful chiefly to expose the gross strengths and weaknesses of each regime. They are, first, stability, the regime's ability to endure in the face of internal dissent and potential civil violence. For this, the National regime is well suited. It has no legitimate rivals for power, so that any unauthorized political movement may be considered a threat to the state. The central coordination possible in a unitary regime also helps here, so that the coercive power of government can be brought to bear quickly and efficiently. It should be noted, however, that while the National regime is a stable one, its unitary nature may become a mixed blessing if significant minorities are unsatisfied for long periods of time.

The second criterion is safety, the regime's ability to respond to threats to its existence from forces beyond domestic control. Once again, centralized control and the rapid deployment of resources may be considered positive attributes of the National regime. One emphasis in the National regime is on the ability to calculate a foreign threat

and respond to it quickly with a well organized, armed force. However, safety, like stability, is not an unqualified blessing. National regimes have often found foreign wars an expedient distraction from domestic economic and political difficulties. And, with no regime competitor to check their evaluations, defense ministers in National regimes are often free to interpret the threat of foreign domination as they see fit. (It should be pointed out that in some unitary regimes, political party competition may take the place of regime competition. Great Britain is an example of this).

The third design criterion is energy, the regime's ability to innovate structurally and procedurally in response to changing political and socio-economic conditions. Unitary, non-competitive, centralized regimes are notoriously unenergetic. Since they maintain a monopoly, the leaders of National regimes are often persuaded that the environment ought to change in response to them, rather than the other way around.[24] Since the National regime may have no institutional responsibility to attend to diverse interests, it is possible that it will not.

The Federated Regime

This is the regime type characterizing the United States under the Articles of Confederation. Power of administration was interdependent and subject to minority control, since the Articles allowed each State a veto. Madison found this scheme to be admirable for its energy.[25] Each State was responsible for protecting the health and safety of its citizens under varying conditions. The variety of environments for government among the States guaranteed that there would be a variety of responses. However, since the broad goals of each State government were

substantially the same, it was possible for one State to adopt the innovation of another, modifying it to fit local conditions. This sequence of experimentation, innovation and diffusion indicates the potential energy of the Federated regime.[26]

The stability of the Federated regime is questionable. This regime provides no superior tribunal for the adjudication of conflict between the States; conflicts growing out of travel or commerce across State borders; or conflict between a stable minority and a State government. There is also no central force for use against local insurrections or against rebellions that spread from State to State. Each of these conflicts presents a threat to the political stability of the Federated regime.

The Federated regime is also at a disadvantage with respect to safety from foreign invasion. There being no central executive or provision for the common defense, a rapid, effective response to invasion is doubtful. As Hamilton put it, under such a regime "/w/e must receive the blow, before we /can/ even prepare to return it."[27]

The Non-Central Regime

This is a regime that just barely warrants the label. Any common structure or purpose is episodic. The Non-Central regime has no formal, central institutions, but, rather a series of informal institutions for reasons of economic exchange and the transfer of information. This description closely fits the regime structure of the British colonies in America until the British instituted more control from London in the mid-Eighteenth Century.[28]

As historians of the Colonial period point out, each colony was quite inventive in its response to environmental change, but there was

not sufficient communication among the colonies for the system itself to be considered energetic.[29] Still, there were several common efforts that denote the existence of a loose regime; most prominently, the Treaty of Fort Stanwix and the Albany Convention. These efforts, however, produced no enduring institutions for the common defense or for inter-colonial commerce.

As for safety and stability, the problems of the Federated regime are magnified by the lower degree of coordination possible in a Non-Central regime. Even though they had instituted some central controls, the British discovered the inherent instability and lack of safety in this regime in the late 1770's.

The Local-Autonomous Regime

This regime is similar to the National regime in that it is a unitary regime with no legitimate competition within an ascribed territory. However, unlike the National regime, Local-Autonomous regimes generally encompass a relatively small area and usually only one part of an ethnic or linguistic group. This is the regime type of each of the Greek and Italian city-states.

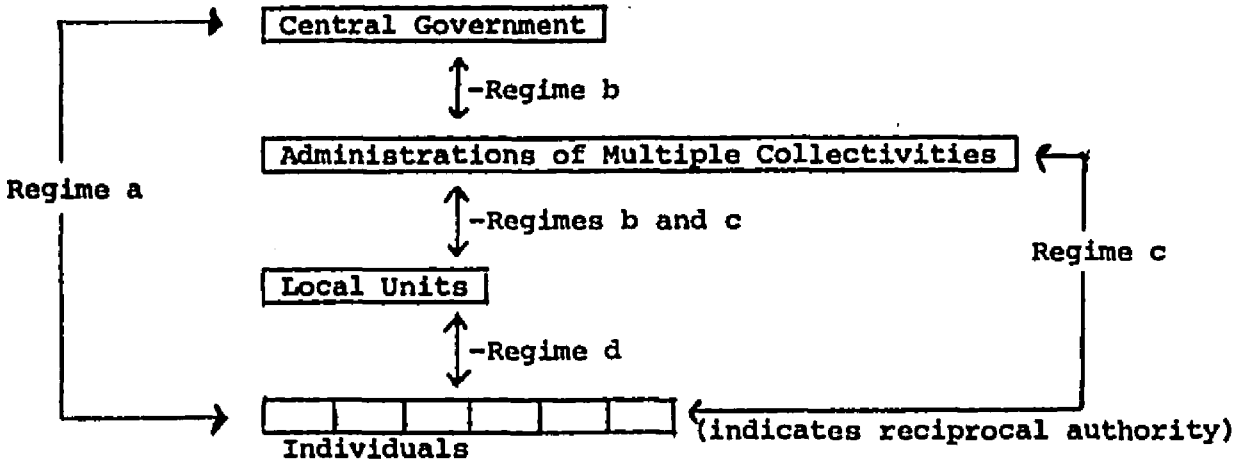
Among these states were some of history's most prodigiously inventive and liberal republics as well as some of its most oppressive garrisons. And, as Plato and Aristotle pointed out, a system of independent collectivities not only provides no common defense, but it also provides a plethora of potential enemies.[30] Thus the Local-Autonomous regime is potentially an exceptional and brilliant form of government, but surely an unstable and unsafe one.

<u>The structure of a compound republic</u>

By arranging a set of institutions which allows each of the above

regimes to operate concurrently, the theory of a compound republic predicts that many of each regime's positive characteristics will be maintained, while many negative consequences will be avoided.[31] At the risk of oversimplifying a complex and elegant structure, the concurrency of regimes in a compound republic may be diagrammed as follows:

Figure 1.1 Diagram of regime concurrency in a compound republic



Regime Types: a - National
b - Federated
c - Non-Central
d - Local-Autonomous

With this scheme, the compound republic allows for the potential energy and individual freedom associated with both the best of the classical city-states and with the best of the British colonial tradition. However, regimes c and d, alone, would be unsafe and unstable. In addition, minorities within regimes c and d are as exposed to oppression as they are open to largesse. In order to insure safety, stability and recourse from local oppression, it is important to add the more general regimes, a and b, to the republic.

Tocqueville saw the virtue of regime concurrency in the United States when he said that it was only through such concurrency that America avoided the undesirable combination of the safety functions (which he called "government") with the day to day concerns of citizen health and welfare (which he called "administration").[32] Tocqueville argued that the combination of government and administration would inevitably destroy democracy, since the requisites of a strong, efficient national defense are not congruent with the slow, complex process by which factional preferences are accommodated in providing the other public services. One process was bound to infect the other, either to the detriment of a strong defense or to the detriment of democratic policy-making.

The role of the National regime in a compound republic is a delicate balance between two responsibilities, both of which are usually considered requisites of democracy. One is the continuing protection of citizen's rights from the possible tyranny of local government. The other is the avoidance of centralized administration of the continuing concerns of citizen health and welfare. This is not an easy balance to maintain. The protection of rights may often seem to entail the administration of health and welfare.[33] The way in which this balance is struck will have consequences for the state of democracy in America.

It is in light of this balance that the black demand for municipal service equalization becomes an interesting theoretical question. How does the granting or withholding of a remedy to blacks by the Federal Courts affect the concurrency of regimes? Does granting a remedy constitute centralized administration of a local problem? Does withholding it constitute denial of recourse from local tyranny?

These questions may be considered significant because of the emphasis on structure in the compound republic theory. As will be argued, they are not emphasized by another, widely held conception of American politics, pluralist theory. It is important to consider pluralist theory in the context of this dissertation because it has provided an explanation of the political position of blacks in urban areas, and because it has in some cases provided a guide for public policy in relation to the black community.

Selecting an Explanation of the Political Position of Urban Blacks

Pluralism in American political science is usually interpreted from the works of Robert Dahl, Nelson Polsby and some of the writings of Raymond Wolfinger.[34] The argument of the pluralist tradition is that it is less through constitutional structure that democracy and individual choice are guaranteed, than through the social dynamics of group interaction. It might seem logical that pluralist theory be used to analyze the political position of minorities as they interact with policy makers. The first step in pluralist analysis might be to discover the social balance with respect to issues of particular interest to black and other minorities. It is at this first step we find that while pluralism and the compound republic theory are similar in their focus on groups and the power of the individual, they differ in their emphasis on political structure and its design.[35] This difference makes pluralism, by itself, relatively less useful in considering the position of blacks _vis_. urban political structures that provide public services.

The argument made by Robert Dahl in _A Preface to Democratic Theory_

is that the plan laid out by Madison in "Federalist 10" is not a structural alternative to the Hobbesian dilemma, but rather a ratification of the competition between organized and unorganized interests.[36] This conception of American Federalism differs at several points from that of the compound republic theory. For the pluralist, most decisions of consequence in society are open to the participation of interested parties. Even an interest with no prior organization and few resources may have the opportunity to join the coalition that makes the decision. According to the pluralist argument, this opportunity is not secured by the design of the American political system. It is secured instead, by the competition between social forces which maintains political slack in the system. As Dahl puts it in his summary:

> /T/he Constitution survived only because it was frequently adapted to fit the changing social balance of power. Measured by the society that followed, the Constitution envisaged by the men at the Convention distributed its benefits and handicaps to the wrong groups. Fortunately, when the social balance of power they anticipated proved to be illusory, the constitutional system was altered to confer benefits and handicaps more in harmony with the social balance of power.[37]

An important point raised by Dahl which shows the emphasis of pluralist theory is that this "social balance of power" will be struck by "active and legitimate groups."

The difficulty with Dahl's analysis, especially for the discussion of the redress available to minorities, is the automatic nature of the balance. It is struck among groups which are both active and legitimate. Thus, once we discover a balance (which we may take to be any political decision) we must assume that the participants in the decision-making process were those active and legitimate groups interested in the outcome. Those individuals not involved in a particular decision fall into one of

three categories. They are either not interested, or if they are interested they are either insufficiently active or they are not legitimate.

Where, then, might pluralist theory alone take us in understanding the political position of blacks? First, it may be argued, as it will be in Chapter II, that even though blacks may be interested, the social balance respecting urban services has been struck without them in many instances. This argument is made by a number of observers who conclude that blacks often have only the option of post hoc protest over the level of urban services they receive.[38]

The lack of a legitimate bargaining position for the black community - up to now, at least - is also found in Who Governs?, the empirical study of decision making in New Haven upon which Dahl rests his interpretation of pluralism. There is no mention of New Haven's black community in any of the policy case studies in Who Governs? The fact that New Haven's black community was the scene of extensive rioting in the mid-1960's may indicate an explanatory gap in pluralist theory. Perhaps the system is slack, but the slack seems to be taken up only by active and legitimate interests, and these interests are defined by participation in the decision-making process. The tautological nature of this argument should be apparent; no participation without legitimacy and no legitimacy without participation. Of course the question of whether blacks have become more legitimate is open and will be addressed below in Chapter II.

Pluralist theory does not provide a complete explanation of the persistent exclusion of blacks from decision making about urban services, nor does it provide a framework for analyzing the potential of a redress strategy. According to pluralist theory, redress of any perceived

injustice will come most often from a shift in the social balance so as to redefine legitimacy and thus include the outgroup. Such an approach to redress does not easily include both the complainant and the policy maker in the same political system. This being the case, the compound republic theory, with its emphasis on regime structure, provides a more convenient way to evaluate the structural modifications to the system which are possible through constitutional litigation on service equality.

The Compound Republic Theory in Relation to a Redress Strategy of Constitutional Litigation

The compound republic theory will be used to analyze the political costs and benefits associated with a redress strategy of constitutional litigation for two major reasons. First, constitutional litigation raises several primarily structural questions. What are the limits on the availability and use of constitutional law to redress public service inequalities? What is the relationship between the arrangement of public service provision and the potential need for intervention by the Federal courts? - and - What will be the impact of such intervention upon the political position of successful plaintiffs? The compound republic theory is well suited for examining these questions because of its emphasis on the design of American political structure.

The second reason for using the compound republic theory is related to the desire expressed in the Preface for making this dissertation applicable to issues broader than the topic alone--that is, assessing some aspects of the design of the republic as it applies to urban blacks. Examining the reasons for its use in some detail will help explain the relevance of the compound republic theory to later sections of the thesis.

The Compound Republic Theory as a Delineator of Structural Constraints

All doctrines of constitutional law have limitations. Some doctrines seem to be specific and quite clearly stated, such as the requirement in the delegation doctrine that the Federal courts not intervene until plaintiffs have exhausted administrative remedies.[39] Others are more indeterminate, like the distinction between each State's responsibility to provide for the health and safety of its citizens and the Federal responsibility for the free flow of national commerce in spite of state regulations.[40]

The Equal Protection doctrine, which is the basis of the redress litigation discussed in Chapter IV, is of the latter type. There is a variety of definitions and distinctions that determine whether the Equal Protection guarantee of the Fourteenth Amendment may be used. However, simply fitting a definition does not automatically provide relief to plaintiffs alleging unequal treatment by government. The shadings of legal distinctions and the application of definitions to specific situations are problems of judicial interpretation. Chapter IV describes the development of judicial interpretation of the Equal Protection Clause as it applies to racial distinctions in urban service delivery. At present, though, it is necessary to explain the relevance of the Equal Protection Clause to the compound republic theory.

It is argued here that the compound republic theory is appropriate to the discussion of political structure . This is due, in large part, to the emphasis the theory places on the structure of the U.S. Constitution and particularly on structural safeguards that have been developed against arbitrary governance. The Equal Protection Clause is one

of the most explicit guarantees in the Constitution against the preferential or abusive use of official authority. As it states:

> No State shall make or enforce any law which shall. . . deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause is a critical, structural safeguard in the American political system. It is critical because it guarantees that the concurrent authority of the Federal government as a safeguard against local oppression will be available to blacks--the category of individuals that was excluded from the safeguards in the original document. Since it applies the anyone-rules principle to blacks and other minorities, the exposition of the Equal Protection Clause is fundamental to understanding and elaborating the compound republic theory. As Tussman and ten Broek put it; the Equal Protection Clause is a guarantee that persons similarly situated will be similarly treated.[41] Thus, what any State chooses to do or not do must be done or not done without prejudice which may disadvantage a category of citizens.

The compound republic theory has, by now, been elaborated in a variety of empirical studies.[42] The goal of these studies (whether articulated or not) has been to complete the work begun in Vincent Ostrom's The Intellectual Crisis in American Public Administration.[43] In this work, Ostrom assesses the current state of the compound republic design. He finds that the theory which informed the original design has been supplanted by a paradigm based on the perfection of hierarchy and the separation of politics from administration. This newer paradigm, first articulated by Woodrow Wilson, has had a profound effect upon the structure of political institutions and their ability to respond to various publics.[44] In fact, according to Ostrom, the Wilsonian paradigm may make democratic

administration an impossibility.

The studies growing out of Ostrom's work have assessed, in specific, the impact of the newer paradigm on urban service delivery and related problems of professionalism, responsiveness and corruption. As of yet, however, no direct effort has been made to use the compound republic theory to analyze any changes in basic structural (Constitutional) guarantees such as security "against unreasonable searches and seizures;" "the right to a speedy and public trial;" and the Fourteenth Amendment guarantees of "equal protection," "due process," and the "privileges and immunities of citizenship." In general, the realm of constitutional law as it reflects or opposes the design of the republic has yet to be studied in a systematic, theoretical fashion. By examining the application of the Equal Protection doctrine to the distribution of urban services, this dissertation will be a preliminary effort to bring the study of specific constitutional safeguards within the framework of the compound republic theory.

The Compound Republic Theory and Federal Judicial Intervention into Urban Service Delivery

Without judicial standards, the constitutional safeguards just discussed might be subject to the separate and interested interpretation of executive officials. Therefore, the Federal Courts play a pivotal role in a compound republic. They provide an institutional recourse for minorities suffering from local tyranny. This recourse is provided by the Federal Courts in their position as the most disinterested of the functional branches; the Courts are the branch least interested in either initiating policy or executing policy decisions although they have engaged in both.[45] Their relatively disinterested position very often makes the

Federal Courts both the last and the best hope of oppressed minorities. Thus, one might expect the political role of the Federal Courts to be of some interest to political analysts in a variety of fields, especially since the changing demeanor of the Courts is so readily researched. For the Federal Courts not only say "what the law is," in Marshall's phrase, but they also attempt to lay down doctrines for long-term constitutional law-making; doctrines that are written and modified over the years. Unfortunately, however, there has been little effort made by political scientists to evaluate judicial doctrines in terms of political theory.

A survey of works on the politics of constitutional law shows them to be concerned primarily with the political situations contemporary to a given decision or with the immediate distribution of costs and benefits produced by a new or changed judicial standard.[46] It is argued here, however, that political theory may be used to explain and analyze constitutional law. Therefore, the compound republic theory will be used in later chapters to evaluate the standard used by the courts to judge complaints of racial inequality in the delivery of urban services.

However, even before the substantive issues are discussed it will be helpful to set out criteria that might be used to evaluate any standard in this line of cases. The criteria are set out here as they relate to key elements of the compound republic theory. Each criterion and its relationship to the corresponding element will be discussed in succeeding sections of this chapter.

Criteria for the evaluation of judicial decisions on urban service equality	Elements of the compound republic theory corresponding to the evaluative criteria
1) The provision of inferior levels of public services to a racial group violates the guarantee of equal protection.	1) Categorical differentiation resulting in racially unequal public service blunts the rights and prerogatives of the individual before the state.
2) The output of a public service delivery system is discernible, in part, through the experience and evaluation of citizens.	2) Democratic administration is premised on the ability of the individual to express preferences as a consumer of public services.
3) The state bears some responsibility for categorically (racially) unequal service delivery arrangements, both de facto and de jure.	3) Some political consequences of organizational arrangements are knowable, and political structures may be redesigned in light of that knowledge.
4) The Federal courts have the positive authority to intervene in state and local government in order to redress racial inequality in the delivery of public services.	4) An individual deprived of his or her right by "accident or force" has recourse to more general levels of government for redress of the deprivation.

Categorical differentiation by race[47]

It should be pointed out that racial inequality in State action is not universally accepted as a deprivation of equal protection of the laws. In fact, in this century it was not until Brown v. Board of Education[48] that the Equal Protection Clause of the Fourteenth Amendment was used as a positive tool to redress racial inequality in the delivery of public service. Before Brown, the Supreme Court in several instances did recognize racial differentiation in public service provision as a legislative or administrative category forbidden to the States by the Constitution. However, Brown may be distinguished from earlier uses of equal protection by virtue of the extensive and continuous nature of the remedy prescribed.[49]

The decision in the Civil Rights Cases of 1883 provides an example of the logic often used by the U.S. Supreme Court before Brown which enabled lower Federal Courts to allow the racial distinctions made by the States. At issue in the Civil Rights Cases was the constitutionality of the Civil Rights Act of 1875. (The 1875 Act was substantially similar to the "public accommodations" provisions of the 1964 Civil Rights Act. However, the Congress based the 1875 Act on the Fourteenth Amendment and the 1964 Act on the Commerce Clause.) In voiding the 1875 law, Justice Bradley argued for the majority that Federal anti-discrimination legislation is inappropriate absent some identifiable, discriminatory act by one of the States. Blacks, he argued, must be left to find their own way in the political system. As Bradley phrased it:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be a special favorite of the law . . .[50]

This is an early expression of the benign neglect doctrine.[51] Whether blacks were able to behave politically like other "mere citizens" does not appear to be a concern of the Court. Rather, Justice Bradley and the majority in the Civil Rights Cases decided that in spite of the difficulties ahead for blacks, the Constitution did not provide for Federal protection of any particular category of citizens.

At first glance, Justice Bradley's opinion may appear congruent with the corresponding element of the compound republic theory. The Civil Rights Cases do recognize the individual citizenship of each former slave and enjoin lower courts and the Congress from treating any black citizen as a member of a collectivity. Vincent Ostrom relates the element in question:

> Where collectivities are the exclusive object of political resolutions, and when sanctions are applied to a collectivity, there is no capacity to discriminate between the innocent persons and the wrong-doers who comprise the population of a collectivity. Guilt by association is a necessary consequence of applying sanctions against collectivities, per se.[52]

The logic of Justice Bradley's decision neglects several points that may make the position of the black citizen considerably more difficult to reconcile with the U.S. Constitution. First, the color-blindness which the Court enforced on the Federal government did not broadly extend to the States. Second, the States, with discretion over police and common welfare services, were making legislative and racial distinctions (e.g. Jim Crow laws) that made U.S. citizenship nugatory for blacks. With these points in mind we find that a Federal judicial standard which holds blacks to be "mere citizens" allows blacks to be treated as less than citizens by lower governments. Without some Federal recognition of the impact on the individual of racial categorization by the States, Federal color-blindness becomes highly ironic, because it allows negation of what it seems to uphold--citizenship. The irony of Bradley's logic endures and can be found among the post-Brown decisions dealing with municipal services which will be discussed in Chapter IV.

Discerning output from the measurement of citizen perceptions of their experience and citizen evaluation[53]

One of the major controversies in the litigation on urban service equality is over the point at which the product of public service can and should be measured. Any notion of "equality of service" depends on the resolution of this question. Most definitions of public service product fall into the two main categories that are set out in Judge Friendly's decision in Beal v. Lindsay[54]; product as effort and product as result.

The argument in favor of confining the definition of product to effort rests on a claim that the deployment of resources is all that government can reasonably be held responsible for. This claim rests on two further assumptions: that the results of urban service cannot be measured reliably; and that there is no way to connect service results to any factor over which government has control.

This claim establishes a definition of constitutional equal protection based upon effort. As we shall see in Chapter IV, this definition has largely dominated the litigation on public service equality. The question is whether this is necessarily the case. A generally wise course in discussing the current interpretation of any constitutional provision is to avoid considering it immutable. The Federal Judiciary has been persuaded to modify decisional standards for a variety of reasons. In the Brown decision, for instance, the Court accepted a series of social-psychological arguments in changing the prior "separate but equal" standard. The goal of this discussion is not to change the current definition of equal protection, neither is it to refute the reasonable argument just presented in favor of the "effort standard." Instead, what will be suggested is an argument on the definition of service product. This argument is based on the compound republic theory, and it includes in the definition some aspects of service output as well as effort.

There is something to be gained by extending the definition of service product to include some aspects of output. This is because limiting the evaluation of service equality to effort a priori may relieve public service providers of the need to consider the preferences and demands of those whom they serve. This is not to say that it is impossible for a system discounting the measurement of results to provide satisfactory

service. Effort can correspond to demand. However, without an acceptable way of determining whether the results of effort are matching citizen demands, the correspondence cannot be easily supported or continued. And because there is no standard of performance to match with citizen expectation, the citizen is in the position of having to either accept the government's assessment of its own performance (loyalty) or of having to organize to develop a competing measure of adequacy (voice).

The choice between "loyalty and voice" is not conducive to formal, institutional redress of service inadequacy or inequality.[55] The probable lack of institutionalized redress makes it difficult for citizens to enforce the law as it applies to the government, a central element in the compound republic theory. According to the theory one way to begin overcoming this difficulty is to consider the relationship between service provider and citizen to be analogous to an economic one. In this way the citizen may gain some of the reciprocal power inherent in the consumer role. The economic analogy does not work perfectly here, since the service "consumer" will have a range of options narrower than that provided in actual markets. However, the goal of this approach, more competition among service producers, may be achieved through service contracting arrangements and through overlapping service provision among jurisdictions of different scope and at different levels.

The producer-consumer analogy does several things that schemes which may ignore the result of service do not. Most importantly, it provides a standard, consumer satisfaction, which is outside of the immediate control of the service producer. This in turn allows for a consideration of government efficiency in the provision of service which officially defined criteria may not. Once again, Vincent Ostrom sums up this element of the

theory succinctly, "Producer efficiency in the absence of consumer utility is without economic meaning."[56] Therefore, in assessing the adequacy of service provision arrangements it is useful to discern service output by measuring citizen experience and evaluation of the service. In this way the consumption side of the economic equation may in some way be considered.

Holding the state responsible for some aspects of categorical service inequality

"The wrong side of the tracks" is an American institution. So too is the ethnic and economic homogeneity of its residents. In most cases, the State cannot be found directly culpable for residential patterns that are deeply rooted in social custom, nor for the complex social and economic factors that make a ghetto a slum.

Whether in Northern or Southern cities, the black ghetto, from its first settlement as slave or freedmen quarters, has been among the poorest parts of town. Because of the sharp, categorical difference rooted in slavery that had been established in every phase of American life for blacks, the conditions on the wrong-side of the tracks have been considered by many whites to be irreversable. This is not because the technological problems of finance and renovation were insurmountable, but because it came to be widely accepted that "blacks just live that way." The culture and life-style of "darktown" is part of American folk-lore.[57] In fact, the category, "Negro," was so firmly connected with slum conditions that renewing black slums in the 1960's seemed most often to proceed by removing the blacks.[58]

This connection of category to condition has had important consequences for service provision in many cities. If the black community's life style

and culture were categorically different, then a distinction in service policy was warranted. This was not usually an articulated assumption. It did not have to be said. It simply appeared to be logical not to spend money paving streets that ran by hovels and tenements and not to plan educational or public safety policy that would not make a difference. St. Clair Drake and Horace Cayton have extensively documented the feeling that black neighborhoods will tolerate (and, in fact, deserve) lower levels of city services.[59]

Clearly, each generation of policy makers need not decide, de novo, to contribute to the cycle of black neighborhood decay in some cities by providing inferior public services to blacks. As will be seen in the discussion of constitutional litigation in Chapter IV, the historical nature of inferior service in black neighborhoods is often used as a defense by cities being sued for redress of service inferiority. How can one generation of taxpayers and policy makers redress an historical social condition? The compound republic theory addresses this question with the premise that public organizational arrangements are not to be taken for granted but should be considered social experiments; the consequences and side effects of which are to some extent discoverable and, to some extent, mutable.

One element of the compound republic theory is that the State's officers can consider, if they want, some of the consequences of their actions, and, what is more, they are capable of altering those actions to some extent in order to produce different consequences. This is what Hamilton meant by government from "reflection and choice."[60] Once this is accepted, government achieves "adulthood." It becomes responsible at least for some aspects of its actions. The innocence of a supposed lack

of control is lost. This is not to say that all consequences can be known or that control will be absolute. This is not the case for adult persons and it should not be expected of collective enterprises. However, once we add the systematic discovery of some consequences to the discernment of citizen-consumer preferences we begin to see a more rational mechanism. . . one that can be held responsible for inequality in some results of its actions because it is capable of changing those actions, at least in some degree.

However, does the ability to correct errors and the failure to do so imply negligence that maintains the socio-economic and political position of urban blacks? Working from the theoretical elements already stated, we may argue that in some cases it does. The mediation of conflicting factional-interests requires that rules be established for making allocative decisions. Some decision rules, we may hypothesize, can be isolated, with appropriate experimental control, and their effect on society may be studied. This is a difficult task, since a great many variables must be held constant. It has been attempted in a limited way, however, by the comparative analysis of systems which are "most similar" except for the decision rule in question.[61] This enables the researcher to simulate the effect of a change in decision rules within a single system. In an unpublished manuscript entitled, Conjectures on Institutional Analysis and Design, Vincent Ostrom defines the contribution of governmental institutions to general social conditions:

> Since decision rules are not self-generating, nor self-enforcing, any pattern of social organization established by reference to decision rules must have reference to decision-making arrangements which are concerned with determining, enforcing and altering decision rules. This condition . . . is the basis for distinguishing governmental institutions from other institutional arrangements in any

> society. Governmental institutions are those decision-making arrangements which are specialized to determining conflicts, enforcing decisions, and altering decision rules that affect patterns of social organization. (emphasis in original)[62]

Decision rules do not determine social organization, but they do affect it. It follows that the effect may be for better or for worse. It is not unreasonable, therefore, to hold the state responsible for the part it plays in improving or worsening social conditions. That part is, largely, the provision of public services.

The intervention of the Federal Courts

The previous section argues that governmental decision-making arrangements are in part responsible for inequalities in service provision. By what institution or set of actors, then, might the arrangements be changed so as to reduce inequalities? There are three obvious responses to this question: by the jurisdiction responsible for the inequality, by those most directly affected by the inequality, or by a more general level of government. The effectiveness of either of the first two alternatives is somewhat doubtful, if the empirical research of the past decade on urban service delivery is considered.

Relying on the jurisdiction responsible for the inequality

Even though some jurisdictional responsibility for service inequality is analytically defensible, it is a concept which may not be accepted by all urban policy makers. It may be in the interest of some urban policy-makers to claim that the historical conditions which created ghetto-slums are beyond their control and that the level of service provided to ghetto-slums is commensurate with their needs. This is an argument we will find has been made by cities in the service litigation discussed in Chapter IV.

Further, many cities can demonstrate equality of effort for the majority of services that they provide. The fact that racial minorities may be dissatisfied with the results of the public effort has been dealt with in several ways. The city may claim that it would like to improve its effort in the black community but lacks the resources to do so, or an effort to decentralize administration of the service may be made by establishing a multi-service center or little city hall in the black community. Finally, policy-makers may ignore altogether demands made by dissatisfied minorities.

Michael Parenti's research on the political position of the black community in Newark, New Jersey, demonstrates the effectiveness of ignoring the demands of unsatisfied citizens.[63] For Newark policy-makers, the simple demand by black community leaders for a traffic signal at a dangerous intersection had the potential of a foot in the door. If the city installed the light it would appear responsible for a variety of other repairs and improvements on public facilities in black neighborhoods. The dilatory tactics used by the city over this and other seemingly insignificant issues indicated to Parenti the uselessness of formal representative and administrative channels for the redress of black community grievances. Arguments parallel to Parenti's are made by Greenstone and Peterson, in their negative evaluation of the ability of poverty programs to improve service quality in black communities;[64] and by Michael Lipsky, in his analysis of the necessity of rent strikers channelling their demands through more legitimate third-parties.[65]

The empirical research that has been done on administrative decentralization produces no example other than short-term experiments in which public resource allocation is delegated to black communities. In a review of this research, H. Paul Friesema concludes that there is simply no

compelling political reason for city government to delegate authority to black communities.[66] (Political control is not usually relinquished by those who have it, without a compelling reason.) Even the new black electoral majority in several cities may turn out to be a hollow prize, because of the State and Federal emphasis on metropolitan and regional service provision. As Piven and Cloward put it:

> The Federal government is beginning to force localities to subordinate themselves to new area-wide planning bureaucracies. Localities which do not come together to establish cross-jurisdictional agencies will soon find it difficult to obtain in Federal grants-in-aid. In this way, a new domain of government is emerging. . . . As blacks rise to power in the city, the city will lose power to the metropolis.[67]

Self reliance by the black community

The literature on black community control and its prospects has produced no major work since the publication in 1970 of Alan Altshuler's Community Control: The Black Demand for Participation in Large American Cities.[68] Likewise, there have been very few optimistic predictions about black community control made by social scientists since Altshuler and Milton Kotler (whose work on this subject is now a decade old). This is due in large part to the fact that in spite of arguments, demands, and careful plans for black community control at the neighborhood level, it has not happened anywhere in the past decade. Even the most stalwart proponents of community control must begin to doubt its feasibility.

Since it has not occurred in spite of all efforts and arguments, should it be pursued, still? From the perspective of the anyone-rules principle, the answer would seem to be, yes, it should be pursued. The goal of self-determined community preference for services is fully congruent with the compound republic theory's emphasis on political structures which are sensitive to the differences in demands for service within a

jurisdiction. According to the theory, if the black community has distinct problems and demands concerning the distribution of a service, there ought to be a political structure which applies to the distinction.

However, such a political structure is not likely to rise from the black community, unhindered, and it is not likely to be given to the black community by urban policy-makers, unless they are compelled to do so. Given these political realities it is still appropriate, theoretically, for blacks to attempt to wrest allocative authority from city governments, but it is a somewhat doubtful, long-term strategy. However, the compound republic theory, through the structure of American Federalism, provides a third alternative: recourse to the Federal Judiciary, which guarantees the "equal protection of the laws."

Recourse to the Federal Courts

Article III, Section 2, of the U.S. Constitution grants the Supreme Court appellate jurisdiction over a variety of cases involving the individual citizen's claims and grievances against the authority of the States. As spelled out in Section 2, these include "controversies between . . . a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming lands under Grants of different States."

The controversies specified for appellate review deal primarily with problems arising from the complexity of the Federal structure, but what recourse is there for the citizen who feels he or she is abused by the action of his or her own State? The Constitution established a federation of sovereign states, or as Tocqueville called them, American Republics. The compound republic theory is based on a system of overlapping jurisdiction--concurrent regimes--for the purpose, among others,

of allowing individuals recourse from potential abuse of State and local authority. However, is the element of concurrency a value to be imposed post hoc which will ebb and flow with convenience, or is it a more basic part of the theory of the Constitution? If we consider Section 2 of Article III along with Articles II and VI, it may be argued that judicial concurrency is a value inherent in the Constitution.

The beginning of Article III, Section 2 sets out the extent of Federal judicial authority: "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority . . ." However, the "Laws of the United States" made by the Congress cover several policy areas that are recognized as concurrent interest of States. The most prominent example of these is the power to regulate commerce. The commercial codes of each State remained in force after the ratification of the Constitution. However, regulation of commerce "among the several States" implied the authority to over-rule local practices in the interest of establishing and maintaining a national market. Inevitably, the States and the Congress would be making laws about the same things, including transportation, labor and capital financing.

Conflict is natural among concurrent regimes, and Article VI of the Constitution was designed to establish the relative position of Federal and State law on the same issue:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

If the Supremacy Clause is considered in light of the concurrency of policy areas and the extent of Federal judicial authority, the system of Federal and State courts may be considered a unitary one. This is especially the case in matters dealing with individual rights, since one of the most important reasons for regime concurrency, historically, has been relief for the individual from the factional domination of localities.

Since the Federal interest, which is supreme, overlaps the States' interests, a regular flow of cases to the Federal level should be expected. This, of course, has been the case, and increasingly so, since industrialization and national expansion have extended the range of potential conflicts. As Hamilton put it in "Federalist 82:"

> /T/he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.[69]

In order to deal with numerous requests for the exercise of Federal supremacy over a great variety of substantive issues, "that tribunal" referred to by Hamilton, the Supreme Court, has developed criteria for granting discretionary appeal under Writs of Certiorari. Review will be granted in these cases when at least four members of the Court agree that the issue satisfies each of the following conditions:[70]

- Presents a broad, non-technical issue, involving an unresolved Federal question.
- No further appeal is possible.
- Resolution of the issue may not be supported by State law.
- The dimensions of the issue have become clear through prior adjudication.

"Certiorari" formalizes the unitary nature of the judiciary and thus institutionalizes recourse from alleged local oppression. In terms of the

issue being raised in this dissertation, "Certiorari" allows for the redress of a grievance which may begin locally, but which raises a Federal constitutional question. The next chapter will describe the general political position of blacks in localities in order to argue that in some cases they may need recourse to the Federal Courts.

Summary

This chapter has made three arguments which will be used in the political analysis of constitutional litigation for racial equality in urban service provision. They may be summarized as follows:

- The compound republic theory, as the basis of American constitutional design and because of its focus on the concurrency of local and national regimes, may be used to examine the allegations by blacks of unequal treatment by local government.

- The safeguards in the Constitution, particularly the Equal Protection Clause of the Fourteenth Amendment, establish the Federal government as a potential recourse for citizens alleging unequal treatment by local government.

- In the American system of concurrent regimes, the Federal Judiciary provides an institutional recourse for blacks or other citizens demanding redress of unequal treatment by local government.

These arguments form a framework for considering the wide range of issues that will be introduced in the next three chapters. This framework has been created by beginning with the problem of republican government and the structure of the American political system, and then narrowing the focus to one particular structure, the Federal Judiciary, and one particular problem, that of blacks alleging inferior levels of public service. Having moved from the theoretical to the specific in the first chapter, we have a basis for examining the specific issues in the next three chapters, and then returning to the theoretical level at the conclusion.

Notes

1. The phrase, "compound republic," is used in several places in The Federalist, most prominently in 51, by Madison. Vincent Ostrom presents the theoretical framework for the compound republic idea in The Political Theory of a Compound Republic (Blacksburg, Va.: Public Choice Society, 1971).

2. The recurrence and magnification of problems resulting from the de-segregation mandate of Brown (347 U.S. 483; 1954) are illustrated by the controversy over court ordered busing of 9555 black students from the Indianapolis city school district to school districts in surrounding suburbs. Federal Judge S. Hugh Dillion's original ruling that the Indianapolis district was unconstitutionally segregated was handed down in 1971. The interjurisdictional busing remedy dates from 1975. At this writing another complication has developed involving the costs of the remedy and who should pay them. According to the Indianapolis Star (July 12, 1978) p. 1:

> "City school officials say such a remedy would cost the system $7 million a year in state aid, teacher jobs, emptied buildings and other losses."

3. Vincent Ostrom, The Political Theory of a Compound Republic, pp. 101-102.

4. This definition of structure is an elaboration of Parson's discussion of structure in social systems; Talcott Parsons, The Social System (Glencoe, N.Y.: Free Press, 1951), pp. 20, 21.

5. The effect of political structure on life-style and the level of human welfare is discussed by Vincent Ostrom, The Intellectual Crisis in American Public Administration (University Ala.: University of Alabama Press, 1974), Ch. I, passim.

6. Ibid., p. 120.

7. Alexander Hamilton, John Jay and James Madison, o.p. 1787, The Federalist (Cambridge, Mass.: Harvard University Press, 1961), p. 357.

8. Thomas Hobbes, Leviathan, o.p. 1651 (Indianapolis, Ind.: Bobbs-Merrill Co., 1958), II, passim.

9. Ibid., p. 120.

10. Rousseau's moi commun in the context of modern social theory is explained by Sheldon Wolin, Politics and Vision (Boston: Little, Brown Co., 1950), Ch. 10, passim.

11. "Federalist 9," p. 125. (This and all further notations from The Federalist refer to the 1961 Harvard University Press edition.)

12. Ibid.

13. This definition is drawn from a general discussion of politics and theory by Vincent Ostrom, The Intellectual Crisis in American Public Administration, p. 2.

14. "Federalist 10," passim.

15. Harold D. Lasswell and Abraham Kaplan, Power and Society (New Haven, Conn.: Yale University Press, 1950), p. 216.

16. "Federalist 53," p. 365.

17. James M. Buchanan and Gordon Tullock, The Calculus of Consent (Ann Arbor, Mich.: University of Michigan Press, 1965), p. viii.

18. This use of "regime" is adapted from Lasswell and Kaplan, Power and Society, p. 132, and from Vincent Ostrom, The Political Theory of a Compound Republic, p. 12.

19. John Adams, A Defense of the Constitutions of the United States (London: J. Stockdale, 1794).

20. James Madison, Journal of the Federal Convention, ed., E. H. Scott, (Chicago: Albert, Scott Co., 1893).

21. "Federalist 10," passim.

22. Ibid., p. 132.

23. "Federalist 1," p. 91.

24. The tendency of centralized regimes to attempt changing their environment is graphically explained by Aleksandr Solzhenitsyn, The First Circle (New York: Harper and Row, 1968).

25. "Federalist 18, 19," passim.

26. See especially: Jack L. Walker, "The Diffusion of Innovations Among the American States," American Political Science Review, 63 (September, 1969), pp. 880-899; and Virginia Gray, "Innovations in the States: A Diffusion Study," American Political Science Review, 67 (December, 1973), pp. 1174-1185.

27. "Federalist 25," p. 211.

28. Charles Sellers and Henry May, A Synopsis of American History (Chicago: Rand McNally Co., 1963), pp. 45-48.

29. Ibid., Ch. III, passim.

30. See especially: "The Citizen," Book III of Aristotle's Politics and also Book V of The Republic by Plato.

31. The concept of concurrent regimes and the relationship of regime types in a compound republic is drawn from Vincent Ostrom, The Political Theory of a Compound Republic, Ch. VI, passim.

32. Alexis de Tocqueville makes this distinction in a section on "Administration in New England," and in "General Ideas Concerning Administration in the United States," in Democracy in America (Garden City, N.Y.: Doubleday Co., 1969), Ch. V.

33. The connection often made between the protection of rights and the administration of public welfare is well explained by Eugene Lewis, American Politics in a Bureaucratic Age (Cambridge, Mass.: Winthrop, 1977), p. 15; Ch. I, passim.

34. Among the works in the pluralist tradition are the following: Robert A. Dahl, Who Governs? (New Haven, Conn.: Yale University Press, 1961); Nelson Polsby, Community Power and Political Theory (New Haven, Conn.: Yale University Press, 1963); and Raymond Wolfinger, "Reputation and Reality in the Study of 'Community Power'," American Sociological Review, 25 (October, 1964), pp. 15-41.

35. The similarity between pluralism and the compound republic theory is evident in other ways as well. Both Dahl and Ostrom begin their studies of American politics with an analysis of The Federalist and "Federalist 10," especially. In A Preface to Democratic Theory and in The Political Theory of a Compound Republic, respectively, Dahl and Ostrom draw conclusions similar to Madison's about the conflictual nature of groups and the mediating role of government. While several of the premises of these two approaches may be similar, as the text above argues, they produce differing interpretations when applied to the questions of political participation and the status of minority groups. It is their difference on the latter issue that warrants distinguishing them, whereas for other purposes it may not be necessary.

36. Robert A. Dahl, A Preface to Democratic Theory (Chicago: University of Chicago Press, 1956), ch. 1.

37. Ibid., p. 143.

38. Michael Lipsky, Protest in City Politics (Chicago: Rand McNally Co., 1970); Michael Parenti, Democracy for the Few (New York: St. Martin's Press, 1974); also on this point: David J. Olson, "Politicians, Professionals, and the Poor," prepared for the 1970 symposium of the New York Academy of Medicine.

39. The "exhaustion doctrine" in administrative law is defined in Spanish International Broadcasting Co. v. FCC, 385 F. 2d 615 (1967).

40. Two Supreme Court cases asserting Federal supremacy in the regulation of commerce are: Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) and Huron Portland Cement Co. v. City of Detroit 362 U.S. 440 (1960).

41. Joseph Tussman and Jacobus ten Broek, "The Equal Protection of the Laws," California Law Review, 37 (1949), p. 341.

42. The empirical works stemming from Vincent Ostrom's propositions are listed and discussed in his reply to a critique of the concepts of democratic administration: Vincent Ostrom, "Some Problems in Doing Political Theory," American Political Science Review, 71 (December, 1977), pp. 1518-1520.

43. Vincent Ostrom, The Intellectual Crisis in American Public Administration (University, Ala.: University of Alabama Press, 1974).

44. Woodrow Wilson, "The Study of Administration," Political Science Quarterly, 2 (June, 1887), pp. 197-220.

45. Hamilton's defense of the Judiciary's political neutrality due to lack of "influence over either the sword or the purse," is in "Federalist 78," p. 490. For contrast, a good example of judicial policy execution may be found in Roe v. Wade, 410 U.S. 113 (1973).

46. A recent example of the narrow interpretation of constitutional issues by political scientists is; Martin Shapiro and Douglas S. Hobbs, The Politics of Constitutional Law (Cambridge, Mass.: Winthrop, 1974).

47. An analysis of the political position of black Americans will be taken up in Chapter II.

48. 347 U.S. 483 (1954).

49. Several U.S. Supreme Court decisions before 1954 indicated the possibility of a positive redress burden being imposed on the States. None of these, however, goes as far as does the Brown Court, here, in using the Equal Protection Clause to order restructuring of public service delivery:

> "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our . . . decision.
> . . . During this period of transition, the courts will retain jurisdiction of these cases. (349 U.S. at 300,301).

A much earlier decision, Yick Wo v. Hopkins (118 U.S. 356; 1886) also dealt with racial differences -- in this case the minority was Chinese -- in the provision of a public service, the enforcement of the municipal building code to places of business. The Court in Yick Wo found that Sheriff Hopkins' enforcement of the code had the effect of closing down the many Chinese laundries in San Francisco. The Court's ruling struck down the building code ordinance of the City. This, like much other Supreme Court action under The Fourteenth Amendment, is a negative tool. It voids the existing rule but does not either replace it or supervise its replacement. The positive nature of the Brown Court's intervention, which is noted in the text, was a departure from earlier uses of the Equal Protection Clause.

A second decision which indicates the direction of this departure was Buchanan v. Warley (245 U.S. 60; 1917). Here also, the Supreme Court uses the Fourteenth Amendment to intervene in local policies on race relations. However, what is at question in Buchanan is not accurately a public service. It is a "state police regulation" of the City of Louisville, closer in nature to a health or traffic ordinance than it is to the provision of an urban service. The ordinance made it illegal for any black to take up residence on a block having a majority of white residents. In addition, the finding of the Court was based on the Due Process Clause and was, like Yick Wo, used as a negative, not a positive, tool.

50. 109 U.S. 25 (1883).

51. Daniel P. Moynihan, then Counselor to the President, formulated what has become known as the "benign neglect doctrine" for Federal relations with the black community. The context of this "doctrine" is a policy memorandum from Moynihan to President Nixon. The memorandum, printed in The New York Times, (March 1, 1970), p. 69, stated in part:

> "The time may have come when the issue of race could benefit from a period of 'benign neglect.' The subject has been too much talked about. The forum has been too much taken over to hysterics, paranoids and boodlers on all sides. We may need a period in which Negro progress continues and racial rhetoric fades."

52. Vincent Ostrom, The Political Theory of a Compound Republic, p. 19.

53. This criterion is more fully discussed in Chapter III by way of an empirical examination of the distribution of an urban service between races in one community.

54. 468 F.2d 287 (1970).

55. A more complete discussion of this choice may be found in: Albert O. Hirschman, Exit, Voice, and Loyalty (Cambridge, Mass.: Harvard University Press, 1970).

56. Vincent Ostrom, The Intellectual Crisis in American Public Administration, p. 62.

57. The term "darktown" was popularized as a label for the black ghetto through songs and minstrel shows, primarily. "Darktown" was an unexplored place, where, at the price of some risk, whites might observe an exotic and distinct culture. The label, "darktown," was applied colloquially, through the 1940's largely due to the popularity of a single song. "The Darktown Strutter's Ball," by Sheldon Brooks (Chicago: Will Rossiter, 1917), was one of the 16 songs selected by ASCAP in 1963 for its all-time hit-parade. It was also featured in four different motion pictures in the 1930's and early 1940's.

58. The displacement of black neighborhoods through urban renewal is documented by: Scott Greer, Urban Renewal and American Cities (Indianapolis, Ind.: Bobbs-Merrill Co., 1965).

59. St. Clair Drake and Horace R. Cayton, Black Metropolis, vol. I (New York: Harper and Row, 1962), p. 111.

60. "Federalist 1," p. 89.

61. The method of most similar systems design is described by: Adam Prezeworski and H. Teune, The Logic of Comparative Social Inquiry (New York: John Wiley, 1970).

62. Vincent Ostrom and Timothy Hennessey, Conjectures on Institutional Analysis and Design (unpublished working paper, Bloomington, Indiana: Workshop in Political Theory and Policy Analysis, 1975), p. III-19.

63. Michael Parenti, Democracy for the Few, passim.

64. J. David Greenstone and Paul E. Peterson, Race and Authority in Urban Politics (New York: Russell Sage Foundation, 1973), passim.

65. Michael Lipsky, Protest in City Politics, passim.

66. H. Paul Friesema, "Black Control of Central Cities: The Hollow Prize," Journal of the American Institute of Planners (March, 1969), p. 77.

67. Francis F. Priven and Richard A. Cloward, "Black Control of Cities," The New Republic (Sept. 30, Oct. 7, 1967).

68. Alan Altshuler, Community Control (Indianapolis, Ind.: Pegasus, 1970); Milton Kotler, Neighborhood Government (Indianapolis, Ind.: Bobbs-Merrill Co., 1969).

69. "Federalist 82," p. 517.

70. These conditions are abstracted from a presentation by Professor M.U. Hirschoff, "Constitutional Law I," Indiana University School of Law, Bloomington, Fall Term, 1974.

CHAPTER II

THE POSITION OF BLACKS IN THE URBAN POLITICAL SYSTEM

Introduction

This chapter explains, in general terms, the need of urban blacks for some institutionalized recourse from instances of unequal treatment by local government. This explanation will proceed by making the following arguments:

- Race is an ascriptive category with identifiable political effects, which are worthy of analytic consideration.
- The political inferiority of urban blacks is due to historical factors in combination with the current lack of significant political resources in the black community.
- The role of urban governments in maintaining the political inferiority of blacks is not due to institutional racism. It is due to the bias of urban governments in favor of organizations endowed with the very resources that the black community lacks.

- Among the strategies available to blacks for the redress of urban service inequality, it is Constitutional litigation which is indicated by the design of the U.S. Constitution.

The thrust of this chapter, then, will be to identify and explain the political nature of race in urban areas. It is necessary to do this for two reasons. First, a focus on race is necessary because of the influence on American political science and on urban policy-makers of the de-emphasis of race in pluralistic analysis. A significant example of this de-emphasis, Edward Banfield's The Unheavenly City, will be considered here in some detail.[1] Second, a focus on race is needed because of the apparent inconsistency between the chronically inferior nature of the black community's political position and the guarantee of recourse from such a position in the design of the Constitution. Both of these reasons bear on the impact of race in the urban political system. However, before beginning a specific discussion of urban racial politics, it will be helpful to consider the position of blacks in a broad, social context.

Some Social Factors Affecting the Political Position of Blacks

The political position of a group is often affected by the image which society has developed of that group; by the socially perceived needs of a collectivity which may or may not reflect the actual needs of individuals. This image is socially constructed and, as Madison pointed out, need not be based upon any significant difference of intelligence or craft among individuals:

> So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.[2]

Madison argued that for whatever harm it may cause, the ascription of group characteristics is part of man's nature. These characteristics may be ascribed from the behavior of a subset of the group, from information, accurate or not, about the group's heritage or life-style, or on the basis of differences in belief and tradition. Determining the causes of ascriptive categorization has been a continuing concern of social psychology, and a great deal of insightful research has been published on theories of ascription.[3] However, the important point for political science is that the extent to which an individual exhibits the characteristics which define a group (e.g., accent, belief, education or race) is the extent to which that individual must bear the characteristics, positive or negative, which are ascribed to the group by society. If political power is taken to be decision making capability, it is evident that the abilities or disabilities which are ascribed to the individual have political consequences. An individual's discretion to decide about residence, employment, education and other significant elements in his or her life is strongly affected by social expectations and the willingness of social institutions to accept or reject the individual. The extent to which social and institutional expectations are affected by ascriptive categorization is the extent to which a person loses his or her political individuality.

Such a loss can be a positive benefit. The cachet of an Ivy League degree or a widely recognized surname has provided benefits to individuals that they might not have received otherwise. The reverse, of course, is also the case. This point has been belabored far more elegantly by Mark Twain in <u>The Prince and the Pauper</u>.[4] But isn't such a system of categories far less likely in modern-day America, than it was in Tudor England? And, further, won't incompetence or merit come through in time regardless of initial advantages or disadvantages due to ascription? The answer to the

first question depends on the answer to the second.

It is perhaps the case that merit will show through eventually, but in most cases it is difficult to demonstrate empirically. This is because many categorical descriptors can be successfully hidden, thus breaking the link to the associated ascriptive characteristics. The popular term for this concealment is "passing." There are a variety of techniques available to the individual wanting to pass out of his or her category; among them are facial surgery, change of surname, conscious repression of accent and modification of dress and hair styles. None of these, however, works very well for blacks. Skin color is the most immediate and least mutable descriptor. Therefore, if the argument that individuality will surmount ascription is to be tested, it should be tested in the case of blacks who are least able to alter their group classification. Such a test is relevant, theoretically, because, if urban blacks <u>as a group</u> are relatively unable to assert their political individuality, they may be in the position of a stable minority faction.[5] In that case, the compound republic theory should provide both an <u>explanation</u> of the position of urban blacks and a <u>prescription</u> for changing it.

Race as an Ascriptive Classification

In his much discussed book, <u>The Unheavenly City</u> (and in the revised edition) Edward Banfield argues against an emphasis on racial prejudice in the identification of major urban problems. His point rests on acceptance of the argument that welfare, housing and educational problems stem from differences of class, not of race. Banfield defines class not in terms of socio-economic strata, but in terms of personal time-horizon; "ability or willingness to provide for the future . . . thus, the traits that constitute what is called lower-class culture or life style are

consequences of the extreme present orientation of that class."[6]

The logic of Banfield's argument is relevant to this discussion since it may be considered an argument against the goal of the litigation described in Chapter IV; that is, racially oriented, judicial intervention. An equally important reason for considering Banfield's work is his implicit rejection, in The Unheavenly City, of the premise that urban blacks constitute a stable minority faction. This premise is a central one for an analysis of the political position of urban blacks based on the compound republic theory. Banfield's rejection of this premise is prominent in the recent political science literature on urban politics, and it stands as a counter-explanation to the one presented here. For these reasons, Banfield's arguments will be considered in some detail in this chapter.

However, before proceeding to the major assumptions about race in The Unheavenly City, a qualification is necessary. Banfield does not argue that government may abdicate all responsibility for injustice done to racial minorities. He argues that government's true responsibility to blacks is to lower their expectations about the possibility of reforming society and to deal with individual claims of injustice. In a very important way, Banfield's argument here is congruent with the position on political change held by pluralist theorists--that social factors such as class and the balance among social groups are the determinants of political position; and further, that change in political position will not come through efforts to structure or design justice, but instead will come through changes in non-formal social relations. For Banfield, these non-formal social relations are rooted in the individual's time horizon.

Banfield's propositions, discussed below, represent a very influential application of pluralist theory to the problem of resource equality in cities. As attested by the remarkable response to its publication,

The Unheavenly City stated and clarified many difficult policy questions confronting public officials[7]--questions that coincide with those raised in this dissertaion. Is there empirically demonstrable racial inequality in governmental action in cities? Are the inequalities that do exist amenable to governmental intervention and correction? Banfield's answers to both of these questions are negative. Rooted in these answers is one of Banfield's most controversial and strongly held positions; that race is not significant in explaining resource distribution in urban areas; and that such inequalities as do exist are less amenable to governmental correction than is conventionally believed. As he puts it:

> Although it is easy to exaggerate the importance, either for good or ill, of the measures that government has adopted or might adopt, there does appear to be a danger to the good health of the society in the tendency of the public to define so many situations as "critical problems"--a definition that implies (1) that "solutions" exist or can be found and (2) that unless they are found and applied at once, disaster will befall. The import of what has been said in this book is that although there are many difficulties to be coped with, dilemmas to be faced, and afflictions to be endured, there are very few problems that can be solved. . .[8]

Banfield's book leaves us with the impression that "few problems can be solved," and most likely, none of the big ones. But acceptance of Banfield's conclusions depends upon acceptance of his definition of the problem, particularly his de-emphasis of race as an explanatory factor. Two major assumptions about race may be abstracted from The Unheavenly City Revisited. Their validity will be examined in the two sections that follow.

The extent of discrimination and the significance of the "color factor"

Banfield's first assumption on race (in two parts)

- Racial discrimination still exists, but "the change of attitudes in the last two decades has been so widespread and profound as to make meaningless comparisons between the two periods."[9]

- Color is not a central factor in determining the political and economic position of blacks. "That physically distinguishing racial characteristics do not necessarily stand in the way of acceptance and upward mobility is evident from the example of Orientals."[10]

As Banfield states at the outset, The Unheavenly City is not to be considered an empirical study of the problems of American cities. In keeping with this statement, there is no objective support provided for assertions about the change of "attitudes" or the relative position of blacks. However, Banfield should not be expected to present socio-economic data on racial distinctions since he has made them irrelevant by his definition of class. By way of contrast, a study done by the New York Times on the "Bicentennial" socio-economic position of blacks provides a basis, not for the rejection of the racial distinction, but for further inquiry into its political effects. The New York Times study reported the following:

> While blacks have made substantial gains in their average income over the last 16 years, as have their white counterparts, the average income gap between blacks and whites has widened significantly during this period. . . In 1969, according to the Census, whites earned an average $2,846 more than blacks. But by 1974, despite the economic advancement efforts, whites were earning an average of $5,548 more than blacks. The average income for whites, as of the 1974 study was $13,356. For blacks it was $7,808.[11]

For the argument Banfield makes about "the example of Orientals," he presents figures comparable to those in the New York Times study in order to show that Japanese-Americans have, in fact, higher average incomes than whites. Banfield, however, neglects the black-white comparison. Thus, while some racial distinctions do not seem to matter, economically, others apparently do.

Another factor important to considering the above assumption is racial segregation. The physical separation of the races is one indicator of social barriers to "acceptance and upward mobility." Adequate measurement of segregation is very difficult. It involves analysis of Census data

down to the block-level and also a knowledge of the physical and social characteristics that define neighborhoods. This has not been done on a large scale since the Taeubers' work with the 1960 census.[12] The Taeubers developed a separation index by political jurisdiction in which 100 is the extreme of complete separation. For the 109 cities surveyed in 1960, the Taeubers found overall segregation to be quite high, producing a score of 86.1.[13] While no comparable index has been developed for the 1970 census, several studies of the black population done by the Census Bureau indicate that if the metropolitan area is taken as the analytic unit, segregation may be found to have increased since 1960.

As shown in Table 2.1, the change in the concentration of the black population over the past fourteen years has been in the direction of central cities, and large cities particularly. Over the same period, the overall increase of black residence in suburbia has been negligible. Not all of this change in concentration is due to black in-migration. An equally significant factor is the movement of whites to where other whites live. From 1960 to 1970, 14.6 million whites moved to the region outside central cities in metropolitan areas, while there was an increase of only 64 thousand whites in central cities over the same period. During the most recent period the change became more dramatic. From 1970 to 1974 there was a net decline of 2.2 million whites in central cities.

Contrary to Banfield's assertions, the increasing separation of the races in metropolitan areas indicates that color remains an important factor in the social structure of the city. But is this the result of discrimination, or the simple desire of like to live with like as Banfield suggests? Is the ghetto formed by communalism? Banfield presents survey research data which indicate the desire of blacks to live with blacks.[14] These data are used to reject discrimination as an explanation of the

Table 2.1 Blacks as a Percent of Total Population, Inside and Outside Metropolitan Areas, by Size of Metropolitan Area: 1960, 1970, and 1974

(Data shown according to the definition and size of metropolitan area in 1970)

Type of residence	1960	1970	1974
United States	10.6	11.1	11.3
Metropolitan areas[1]	10.7	11.9	12.5
Central cities	16.4	20.5	22.3
Central cities in metropolitan areas of--			
1,000,000 or more	18.8	25.2	27.0
Less than 1,000,000	13.2	14.9	16.9
Suburbs	4.8	4.6	5.0
Suburbs in metropolitan areas of--			
1,000,000 or more	4.0	4.5	4.9
Less than 1,000,000	5.9	4.8	5.1
Nonmetropolitan areas	10.3	9.1	8.8
In counties designated metropolitan since 1970	(X)	7.7	8.6

X Not applicable.

[1]Excludes Middlesex and Somerset Counties in New Jersey.

Source: U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of the Census.

maintenance of the ghetto. However, a brief consideration of the history of ghettos shows that the discrimination/communalism dichotomy is a false one.

The well documented history of several American black ghettos as well as the history of European Jewish ghettos brings us to several conclusions about the relevance of discrimination.[15] The primary conclusion is that a recognizable linguistic, cultural or racial minority will, after time, recognize the futility and risk involved in integration, and will form its own ghetto. Secondly, the dominant social group need interact very little with an ascriptively classified minority before rejecting it. Thus, when encountering a long standing social division like Jew/Gentile or black/white, the analyst may well mistake the automatic nature of the separation for voluntarism. It follows that the positive evaluation given to homogenous neighborhoods by blacks should not be confused with a preference based on free choice. Kenneth Clark, perhaps the most thorough student of black social attitudes, provides an explanation of the black choice of the ghetto:

> The invisible walls of a segregated society are not only damaging but protective in a debilitating way. There is considerable psychological safety in the ghetto; there one lives among one's own and does not risk rejection among strangers. One first becomes aware of the psychological damage of such "safety" when the walls of the ghetto are breached and the Negro ventures out into the repressive, frightening white world. Some Negroes prefer to stay in the ghetto, particularly those who have developed seemingly effective defenses to protect themselves against hurt, those who fear for their children, and those who have profited from the less competitive segregated society.[16]

If Clark is right in characterizing the black ghetto as a psychological defense, then it is not quite accurate to say that blacks reside in homogeneous communities by <u>choice</u>. At the very least, the communalism Banfield refers to must be qualified with reference to both psychological factors and also to the relative economic position of blacks in increasingly

segregated metropolitan areas.

The distinction between "historical" and "presently operating" causes of the political inferiority of blacks

Banfield's second assumption on race:

> - "There is no a priori reason to assume (as is too often done) that the causes operating in the evolution of a problem over time ('historical' causes) must be identical with those operating to perpetuate that problem at any given time ('presently operating' causes)."[17]

The poor, it is said, will always be with us.[18] And so they shall, if two points are conceded; first, that poverty is relative, not absolute, and second, that resources can never be equally distributed. Therefore, while policy-makers may rid the cities of Dickensian slums, they can never rid the cities of relative disadvantage. The previous section dealt with relative disadvantage and argued that since it is borne differentially by race and since it is increasing, relatively, there is some reason to consider the political aspects of race further.

The question raised in this section is whether it is possible to explain the political position of blacks without reference to their history in the American polity. Banfield's second assumption implies that blacks may be considered, politically, outside of their history, so that analysts and policy-makers need only identify the immediate problems affecting individuals who happen to be black. This is a necessary change of focus, Banfield explains, since "presently operating causes" are generalizable across races. The effect of this argument is to deny the current political significance of American black history. Banfield explains this point by showing that blacks are less distinguishable from whites statistically when certain key factors are controlled.

Relying on a study of racial effects done by O.D. Duncan, Banfield

attempts to identify the difference between black and white income that must be attributed to race.

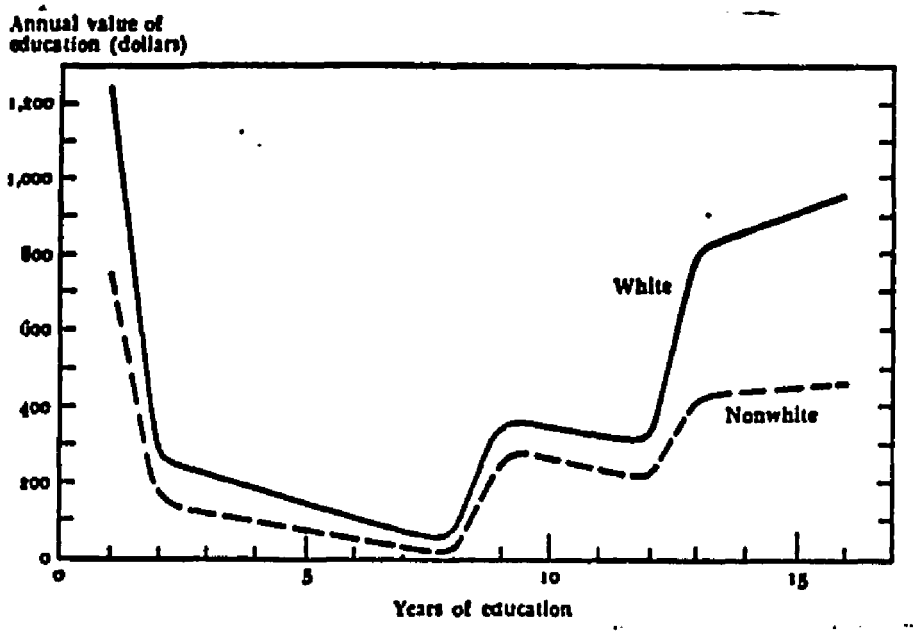
> The average income of the census white in 1962 was $7,070 and that of the census Negro $3,280. By the technique of regression analysis the sociologist O.D. Duncan finds that $940 of the differences in "family background" . . . controlling for "number of siblings" reduced the difference by another $70, for "educational level" by still another $520, and for "occupational prestige level" by yet another $830.[19]

The residue which can be attributable to race (but possibly to non-racial factors, Banfield argues) is an income difference of $1,430. Duncan's regression analysis eliminates half of the income difference between blacks and whites, if it is agreed that family background, educational level and occupational prestige level are to no extent influenced by race. However, there is reason to disagree with the isolation of these factors from race.

Figure 2.1 presents Lester Thurow's analysis of the relative monetary value of education between the races, controlling for job experience at a single point.[20] Thurow shows quite plainly that race has a distinctive effect on the relation of educational level to income; an effect which is ignored by Banfield in his use of Duncan's analysis. Thurow concludes that individuals of similar educational attainment can be distinguished by race, statistically.

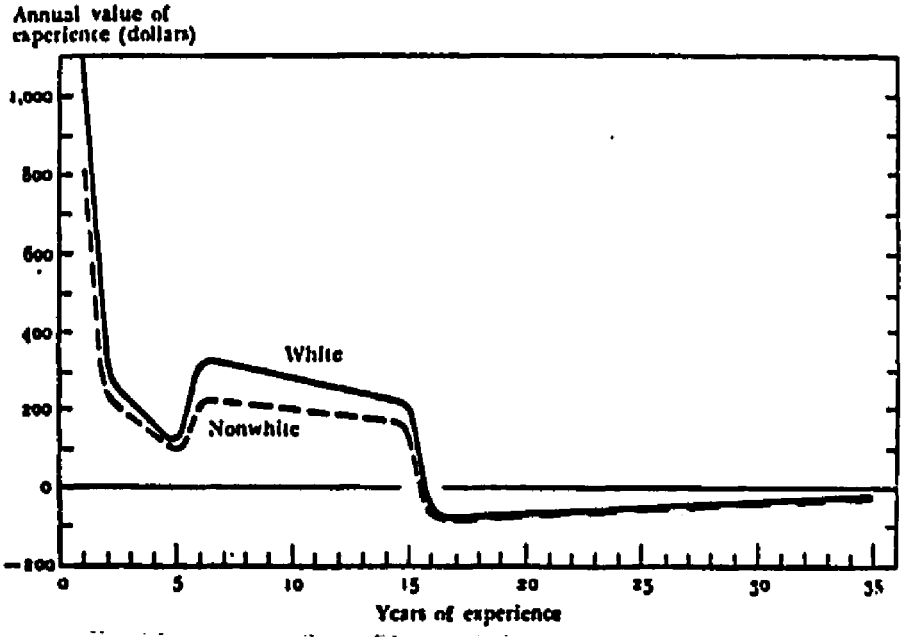
As to occupational prestige, Thurow's analysis of experience may be considered a partial reply to Banfield. Figure 2.2 shows the racial difference in the marginal product of experience, an indicator of occupational prestige for a constant level of education.[21] The racial difference is most evident at two important points in the career pattern; first at the initial evaluation of employees and then at the usual point of promotion to managerial or supervisory rank. At both points we find experience doing more good economically for whites than for blacks.

Figure 2.1 Marginal Product of Education for White and Nonwhite Males with Twenty Years of Experience in 1960



Source: Lester C. Thurow, Poverty and Discrimination (Washington, D.C.: Brookings Institution, 1969), p. 78.

Figure 2.2 Marginal Product of Experience for White and Nonwhite Males with Ten and One-half Years of Education in 1960



Source: Lester C. Thurow, Poverty and Discrimination (Washington, D.C.: Brookings Institution, 1969), p. 81.

There is one additional and persuasive reason to question Banfield's interpretation of Duncan's data. That is, Duncan's analysis of his own data. While it is true that the investigator is by no means the best interpreter of his findings, we should expect secondary analysis to address at least the logic of the investigator's taxonomies and the validity of his conclusions. Banfield does not deal with the fact that Duncan, using control variables that eliminate ethnic and cultural differences entirely among whites, finds that "at least one-third of the income gap arises because Negro and white men in the same line of work, with the same amount of formal schooling, with equal ability, from the families of the same size and same socio-economic level, simply do not draw the same wages and salaries."[22] This is the residual that Banfield implies can also be explained since he finds it "most implausible--that the four variables treated by Duncan are the only non-racial ones of importance."[23] But this makes Duncan appear a less careful scholar than he is.

Before giving his final evaluation of the salience of race, Duncan examines the residuals related to each of the primary variables. His second analysis includes a measure of mental ability and of the quality of schooling. While these close the racial gap for education, they cannot do so for occupation and earnings. After concluding an analysis with the second set of factors, Duncan draws a conclusion diametrically opposed to that which Banfield bases on the same data:

> It is true, of course, that in American society one is well advised to "pick his parents" so that he begins life on a favorable socio-economic level. . . It is, however, of vital importance to choose parents of the "right" skin color if one wants to avoid a high risk of ending up at a low level on the income scale. In general, the supposition that the "poor are poor because they are poor" is not only an intellectual obfuscation, but also a feeble guide to policy in what is obviously the most disparate and refractory sector of the "poverty problem." That is, the "race problem."[24]

Thus, the case for disregarding race in social analysis and public policy formulation is fundamentally weak. The racial differences which are dismissed can be demonstrated, and the non-racial explanation which is hypothesized by Banfield has been neither demonstrated nor indicated. What, then, are the significant factors contributing to the differences found by Duncan between the races? Particularly, what role does urban government play, if any, in maintaining or increasing these differences?

Identifying Factors Contributing to Racial Discrimination: The Role of Urban Governments

A Review of the Literature on Urban Service Distribution

Is there an empirically verifiable difference in the levels of service provided to the black community in cities? If so, how much and for which services? There is a small body of literature in political science which has attempted to answer these questions. Before any statement can be made in this dissertation about the need for redress of service inequality, this literature should be considered. Three leading studies in this field will be reviewed here in order to assess the general direction the discipline has taken in considering the question of service equality, and in order to explain the position of this dissertation in relation to similar works.

Equality in San Antonio

Robert Lineberry has written specifically on the subject of service equality. In fact his study, Equality and Urban Policy parallels this dissertation quite closely at several points.[25] He also is concerned with the relative political position of blacks and whether "constitutionally proscribed" service inequality can be demonstrated empirically.

Lineberry studies a variety of services, from those involving "stable" capital investments such as public libraries to those involving more mobile

resources such as police patrol. His study focuses on one city only, San Antonio, which has a small black population and quite a large minority of Mexican-Americans.

On the question of service provision among the various ethnic and racial groups, Lineberry finds that the "distribution of urban public service provision can be characterized as one of 'unpatterned inequality.'" He concludes that:

> Neither neighborhood ethnicity, nor political power, nor socio-economic status are very satisfactory predictors of service allocations. . .[26]

However, Lineberry points out that "service allocations" is only one-half of the question of equality (whether the point of the discussion is the warrantability of constitutional redress or not). Specifically to this point is his examination of police manpower allocation. Lineberry's analysis shows that "there is 'overpolicing' of neighborhoods in the 50-74 percentage (minority population) range."[27] Lineberry qualifies this finding by noting that several minority neighborhoods overlap the commercial district. Even so, it is apparent from Table 2.2 that markedly inferior allocation of this service cannot be claimed by minorities in San Antonio. This finding corresponds to relatively higher levels of police patrol reported in the black neighborhood in the St. Louis City comparison in Chapter III, below. However, as mentioned, Lineberry is aware that he has told only part of the story:

> Obviously, there is much to which these data do not speak. They say nothing about the <u>quality</u> of police protection, as opposed to its quantity, nothing about the <u>conduct</u> of police officers, and nothing about the efficacy of police patrol.[28]

Measures of service quality and efficacy are called for by the argument in Chapter I in favor of the producer/consumer analogy for service provision. The conclusion of Lineberry's study indicates the utility of

Table 2.2 Lineberry's Analysis of Police Service Allocation

Distribution of Sampled Police Man-Units, by Percentage Minority

Percentage Minority	Man-Units per Sector	Man-Units per Capita	Man-Units per Sector/Number Major Crimes	Man-Units per Sector/Number Radio Calls
100%-75%	7973.70	.09	1.80	.20
74%-50%	6990.48	.17	1.13	.17
49%-25%	6894.72	.08	1.17	.18
24%-0%	7359.84	.08	1.31	.23

Source: Robert L. Lineberry, Equality and Urban Policy (Beverly Hills, Calif.: Sage Publications, 1977), p. 141.

a perspective on the urban citizen as a consumer of public services. However, he is far from sanguine about the possible application of social scientific measures of consumer need and preference to questions of service equality brought to the Federal Courts. As he puts it, "To those who favor a strategy of legal redress, this conclusion will be disquieting. . ."[29]

The goal of this dissertation is not to quiet the fears of those who favor legal redress. The goal, instead, is similar to Lineberry's; to examine the warrantability of constitutional litigation for service equalization. In pursuing the same goal, this dissertation may be considered an extension of Lineberry's study. However, where Lineberry concludes with an assessment of allocative equality, this dissertation will go on to consider, albeit in a limited way, some of the effects or outcomes of service allocation. Where Lineberry concludes with the U.S. Supreme Court ruling on what constitutes unequal protection, this dissertation will evaluate both the legal and theoretical background of the court's ruling.

Outcomes in Oakland

A second major study of service distribution is an analysis of library, school and street services in Oakland, California, by Frank Levy, Arnold Meltsner and Aaron Wildavsky which they call Urban Outcomes.[30] The Oakland Study preceded Lineberry's by several years, and while Levy, et al. focus on service "outcomes," their unit of analysis is actually the same as Lineberry's unit--service "distribution." As is the case in many fields of social science, the analysis of public service has produced a great variety of definitions for a single term. In this case, the term is "outcome." In fact, Levy, et al. carefully document the prevailing uses of "output" and "outcome" in their introduction. However, whatever else outcome might mean, the operational definition used in the Oakland

Study is similar to Lineberry's use of "distribution." The following are included by Levy et al. in their introduction as examples of service "outcomes:" "The distribution of street resources between Oakland's rich hills and poor flatlands, student/teacher ratios by income and percent minority, and library expenditure by branch. . ."[31] These measures are much the same as those used by Lineberry in San Antonio.

Empirical analyses based upon these operational definitions bring Levy et al. to the conclusion that "/s/ome mechanisms were biased toward the rich. Other mechanisms favored the poor."[32] Again like Lineberry, Levy et al. qualify their study by noting the difficulty of connecting their operational definitions to any notion of service result:

> There is no theory for relating educational resources to results, and we are just beginning to learn the effects of air pollution. Moreover, as the study of impacts is pushed further down the chain of cause and effect, too many antecedents enter the picture, antecedents which we understand little and can control less.[33]

To be sure, no effort will be made in this dissertation to establish a grand connection between the great variety of potential causes of service distribution and the great variety of consequences. Instead, the next chapter will, in a modest way, consider citizen experience and evaluation of one service, in one city.

As argued in Chapter I, the compound republic theory allows the use of citizen experience and evaluation as an indicator--not the only indicator--of the results of service provision. Thus, this dissertation may be considered an argument for the consideration of this indicator of service equality in the context of the larger question of constitutional recourse. As such, it supplements the "outcome" and "distribution" analyses of Lineberry and Levy, et al. It does this by considering the questions about equality which they have raised, in light of citizen experience and evaluation.

Responsiveness in Chicago/Cook County

If the empirical analysis in Chapter III extends the analyses of Lineberry and Levy, et al., it may be said to follow directly from the third work to be discussed here, Elinor Ostrom and Gordon Whitaker's analysis of police responsiveness in black neighborhoods.[34] (It is from a subsequent, and broader, study by Ostrom, et al. of police responsiveness in St. Louis/St. Louis County that the data in Chapter III are drawn.)

It should be noted that the study done by Ostrom and Whitaker is part of that body of work referred to in Chapter I which has articulated the compound republic theory. This is evident from the focus on citizen experience and evaluation in Ostrom and Whitaker's operational definition of service output:

> Because of our interest in services provided to citizens, we have utilized survey methods to obtain two types of indicators of police output. The first type of indicator is the police-related experiences which respondents have had. Levels of criminal victimization and the quality of a variety of police actions are assessed in this way. The second type of indicator consists of citizens' evaluations of service levels. In eight items, citizens were requested to evaluate various aspects of police service.[35]

Ostrom and Whitaker do not make inter-racial comparisons in the Chicago/Cook County study. Instead, they consider, intra-racially, the experience and evaluation of blacks receiving police service from the City of Chicago compared to blacks receiving police service from two predominantly black, independent villages outside Chicago. Ostrom and Whitaker found that in spite of much higher per capita expenditure on police service in Chicago, the residents of the two independent black villages were "more likely to indicate higher levels of service."[36]

These findings lead Ostrom and Whitaker to suggest that "locally controlled police agencies could be established within the boundaries of a larger police jurisdiction to serve the particular needs of the large

city's diverse neighborhoods."[37] As argued above, while this recommendation is in keeping with the logic of regime concurrency, it is a doubtful, long-term proposition for most black neighborhoods.

This pessimism about community control leaves the Chicago neighborhoods high and dry, unless they are able to bring a claim of inferior police service against the City of Chicago. Ostrom and Whitaker's inter-jurisdictional, intra-racial study does not allow the intra-jurisdictional, inter-racial analysis that is needed to assess such a claim. However, the data collected in St. Louis/St. Louis County by Ostrom and her associates do provide the opportunity to make an intra-jurisdictional, inter-racial case study of service output. By making such a study in the next chapter, this dissertation will contribute to the literature described here, by using Ostrom and Whitaker's "citizen-oriented" research methodology to answer the questions about service equality posed by Lineberry and Levy, et al. This hybrid analysis will enable us to evaluate--as promised above--the empirical warrantability of constitutional litigation for racial equality in service provision.

Clearly, the question of service delivery measurement and the possibility of demonstrating racial inequality are central to the argument in this dissertation. However, it is apparent that the leading works on service delivery address only certain aspects of service discrimination in urban areas. Once again, is urban government in any way responsible for the inferior economic and political position of urban blacks? Some inferiority, obviously, is caused by individual racial discrimination; distinctions brought to bear on discrete choices, such as the choice among candidates for a job or a promotion. Are similar, racial distinctions brought to bear on the collective choices made by urban governments?

Tocqueville cautioned us not to expect our collective decisions to be any better than our individual decisions.[38] The reflection of individual bias in collective decision-making has been called institutional racism by some scholars.[39] Such a term, however, over-simplifies the elegant series of barriers that affect the political position of urban blacks. The next section of this chapter examines the barriers between urban blacks and participation in the policy making process.

Barriers to Black Political Participation: The Bias in Favor of Organization in Urban Politics

The main point to be made in this section is that the barriers to more complete black political participation derive from a bias in urban politics in favor of formal group organization. It is this more general bias, rather than an exclusively racial one, which underlies the skew in public resource allocation that has been unfavorable to blacks.

But how is it that a bias in favor of organization consistently works against blacks, and, in fact, may be mistaken for institutional racism? This is because the resources necessary to compete successfully in the urban system of organizations are in short supply in the black community. The necessary resources are:

- professional expertise applicable to specific policy areas
- the ability to deprive policy makers of critical support
- the promised benefit and/or the legal authority needed to shape a disciplined interest-constituency
- unencumbered, informal access to policy makers

Each of these resources has public bureaucracy as its focus, not electoral politics, the city council or the courts. This is because of the shift to public bureaucracies--the "new machines," as Lowi calls them--of allocative authority as a result of the Progressive movement reforms.[40] The shift of allocative authority has made public bureaucracies both the

locus of citizen demand for service and also the providers of that service. Lineberry explains the results of this shift:

> . . .[T]he public bureaucracies offer a kind of "missing link" in the analysis of allocative processes and outcomes in urban government. Because the public bureaucracies represent monopolistic policies of both production and pricing, their decisional principles become of necessity major determinants of the quality and quantity of public goods and services delivered within the urban area.[41]

The discussion of resources which follows is an exploration of the principles which affect public bureaucratic decision-making with respect to the black community.

Professional expertise applicable to specific policy areas

The importance of professionalism in urban politics has come to the fore in a series of works since the mid-1960s.[42] Perhaps the clearest statement on the effect of professionalism on the political position of urban blacks is made by Eugene Lewis.[43] According to Lewis, it matters very little anymore who is affected by a problem in determining who should be involved in its solution. Instead, those involved are those with the credentials and expertise that match the credentials and expertise of the appropriate "functional bureaucracy" at city hall;[44] so that school system bureaucrats are influenced by teachers' groups, educational psychologists and professional school administrators, and possibly less so by parents, who have an interest, but no formal expertise. It is much the same with "housing and development" bureaucrats and their traditional relationship with real estate and corporate interests in the city. Lawyers influence lawyers; economists influence economists; doctors influence other doctors, etc.

Blacks, however, while they have some of the more pressing interests in urban society, have very little of the professional expertise needed to

transform those interests into influence. First, and most obviously, blacks do not constitute a single, homogeneous interest group. While there may be agreement on the general state of affairs in urban black neighborhoods, the problems themselves are not clearly focused; they are pervasive and interrelated. Second, a gross measurement of professional skills among blacks shows that even if we were discussing a single minded, well organized group, the expert cadre would be very small.[45]

Expertise and professional conduct may be considered positive attributes of the public service. But, they must also be seen as limitations on the access available to non-experts. As Lewis argues, professionalism is becoming the lingua franca of urban politics, almost literally. The way in which issues are presented, the sophistication of relevant evidence, and the general demeanor of the policy process all establish a realm of discourse that is foreign to the average citizen.

In fact, the disjunction caused by this separate discourse can allow functional bureaucrats to proceed in spite of discontented minority communities. The more highly professional a functional bureaucracy becomes, the fewer outside actors will be admissible to the process by which problems are identified and analyzed. Thus, the social and political reality of the city may be internally constructed by professionals, citizen demand notwithstanding. In many policy areas such as housing, education, and public safety, professional policy makers are not consciously discriminating, racially, in allocating resources. They are instead, responding to priorities which they themselves have set and which, in some cases, will exclude the complex and volatile problems of the black community.

The ability to deprive policy makers of critical support

Organizations, much like individuals, seek to decrease the uncertainty

in their task environments.[46] The more uncertainty in the environment, the less good that long-term plans and long-term capital outlays will do. Given this basic premise, a rational strategy for organizations, public and private, is to give priority response to those environmental elements which are most threatening. Thus, rationality may be defined by behavior oriented toward minimizing the maximum loss to the organization.[47]

What has been broadly called the Reform Movement removed several important strategies available to minorities for threatening policy makers.[48] Primarily, fewer municipal officials now serve at the pleasure of elected officials. Civil service and the emphasis on academic credentials have removed the link between the neighborhood constituency, the ward representative and the officials responsible for delivering services to the neighborhood. Those officials no longer need to fear the immediate displeasure of neighborhood leaders, since a withdrawal of neighborhood support does not necessarily mean a threat to their jobs or their organizational resources.

Along with the reduction in accountability of public service officials to elected representatives came a general increase in the size of the councilmanic districts in municipalities. The justification for this was to de-emphasize the particularistic interests of neighborhoods. At large elections and elimination of single-member districts were designed to enable elected officals to make policy in the broad public interest and according to the principles of modern business management. The compromises and horse-trading that went on among ward representatives were thought to be inefficient and "political", while the civil service and city-wide representation were efficient and "administrative".

The black community in American cities is the political heir of the limited accountability of public service officials. Having a small professional cadre, low union membership and little business proprietorship

the most obvious and convenient organizational principle for blacks is geography. The neighborhood, however, remains an ad hoc unit for pressing demands against municipal governments.[49] An important political resource traditionally relied upon by urban minorities--numbers and geographic concentration--has been effectively limited by the Reform Movement. The threat they were once able to marshall is no longer very effective.

The promised benefit and/or the legal authority needed to shape a disciplined interest constituency[50]

How do we account for the fact that some urban interests have maintained the ability to threaten policy makers in spite of the Reform Movement? Retail merchants and labor unions, for instance, do not seem to have lost the ability to influence urban policy makers. How do these interests differ from the black community? The elements indicated in the heading of this section: the promise of private benefit to group members and/or the legal authority to compel group membership--are what distinguishes merchants, unions and other private interests from the black community. These premises of group action are not easily established in a community that lacks sufficient professional expertise and lacks also the ability to deprive policy makers of critical support. The impetus needed to organize such a community is much greater than for a group with an easily identified, specific set of goals.

For example, the private benefits available to workers through collective action are obvious; better working conditions and higher pay. Even so, large collectivities of workers, as Mancur Olson explains, will have trouble organizing because of the possibility of some workers riding free on the efforts of others. Thus unions have adopted the closed shop, a coercive device, to insure the strength of their position vis a vis

management.

Efforts at black community organization have the same free-rider problem indicated by Olson with the added disability of not being able to provide immediate, private benefit. The other organizational principle, the ability to coerce participation, is available to only a very few community organizations in black neighborhoods such as the Mafia and contraband drug rings. (However, this coercion is not sanctioned by the state and is generally less effective than the closed shop.)

Unencumbered, informal access to policy makers

Lack of the above three resources encumbers access to policy makers. And because of these encumbrances, the manner in which demands are presented often reflects frustration in the black community about a whole series of issues. Michael Lipsky portrays the diffuse, general nature of black demands very well in his analysis of protest as a political resource. Lipsky also describes the reaction of policy makers to this sort of demand:

> /A/dmission to policy-making councils is frequently barred because of the angry, militant rhetorical style adopted by protest leaders. People in power do not like to sit down with rogues.[51]

Whether they are considered rogues or simply annoyances, dissatisfied citizens with few resources will get a less satisfactory response from public service bureaucrats than will petitioners with many resources. This is an elementary political theorem, but it has been widely ignored in the analysis of the black political position. The pluralists (as argued in the previous chapter) do not credit the resource differences between the races as having much relevance to policy making, and Banfield ignores the difference entirely in favor of his time-horizon classification.

But these analyses are more than mistaken or incomplete perspectives. As Theodore Lowi points out, pluralism has become an ideology upon which policy is based. Pluralism in general, and The Unheavenly City in particular, provide a potential justification for ignoring instances of black political inferiority in cities. The low levels of key resources discussed above make the promise of pluralism a hollow one. At the same time, the lack of these resources creates a political sub-set which includes the great majority of blacks due to the joint disabilities of ascriptive categorization and geographic concentration.

If instances of black political inferiority can be demonstrated--for instance , in the case of urban service provision--such instances, together with a lack of critical resources will place blacks in the classic position of a stable minority. Given this eventuality, the concurrency of regimes in the American constitutional design should provide blacks with legal recourse. By way of summary, the last section of this chapter will indicate constitutional litigation as a potential recourse for blacks in those cases where they are found to be in such a minority.

Summary

As Duncan points out, one is well advised to choose not to be black in American society, since the "accident" of race has measurable economic effects. These effects are reinforced and multiplied by the political disadvantages of living in all-black communities, as most blacks do. Because of three factors indicated above; ascriptive categorization, the structural changes of the Reform Movement, and the urban bias in favor of organization, blacks in all-black urban neighborhoods may become an inferior class.

The words "inferior political class" do not fit well with the compound

republic theory. When the accident and force that cause such classification deprive a single individual of liberty, various civil remedies are available. However, because black community inferiority has been widely considered part of the order of things in urban politics, there are few obvious remedies. This is particularly true because of the bias in favor of organization in urban politics. This bias, in terms of pluralist theory, requires no specific counteraction, since pluralism does not recognize the structural barriers to political participation by blacks. Therefore, if we are willing to accept the pluralists' argument about the potential mobilization of relevant resources, then we need not be so concerned about black political inferiority. The political inferiority of any group in a pluralistic system is much the same as economic inferiority in a capitalist system--advantage and disadvantage are functions of competition and the demand for goods and services. Such a view is fundamentally weak, according to Lowi, because it considers the sovereign power of government to be just another competing group. Lowi argues that if we accept the idea of balance and competition among all groups, at a certain point we will create "an all-encompassing, ideally self-correcting, providentially automatic political process."[52]

The argument of this chapter has been that there are chronic losers in the urban political process and that they are racially identifiable. The process does not appear to be self-correcting. Instead, there appear to be structural impediments to black access to the urban policy process. The question that suggests itself in the context of the compound republic theory is, what remedy is available to blacks in situations where their political inferiority may be demonstrated? From the perspective of the compound republic theory, this is a constitutional question.

The Federal Constitution by establishing regime concurrency not only limits the violence of faction, but also provides for recourse to a broader authority for individuals in the face of a stable, self-interested local majority. Thus the stable dominance or inferiority of a faction should not endure in a system of concurrent regimes. As Vincent Ostrom puts it:

> If a majority faction should usurp the public authority of one particular regime to the detriment of other citizens, those citizens would have legitimate recourse to alternative regimes and alternative decision structures to advance their contentions and to seek resolution of their grievances.[53]

The next chapter will explore, in specific, the "detriment" Ostrom refers to, in relation to service delivery in an urban black community. Chapter IV will then examine the "recourse" available to blacks through Federal Constitutional litigation.

Notes

1. Edward C. Banfield, The Unheavenly City Revisited (Boston: Little, Brown Co., 1974).

2. James Madison, "Federalist 10," in Alexander Hamilton, James Madison and John Jay, The Federalist (Cambridge, Mass.: Harvard University Press, 1961), p. 131.

3. For the point raised here one may refer to Leonard Broom and Philip Selznick, Sociology (New York: Harper and Row, 5th ed., 1973), p. 466: "The importance of race . . . lies not in physical appearance or genetics, but in the social valuation placed on it." The basis of current discussion in the social sciences of theories of ascription is not the work of a sociologist, but of an anthropologist, Ralph Linton, The Study of Man (New York: Appleton-Century, 1936). Other important work on ascription includes Gerhard Lenski, Power and Privilege (New York: McGraw-Hill, 1966), S.N. Eisenstadt, Social Differentiation and Stratification (Glenview, Ill.: Scott-Foresman, 1971), and Peter Bachrach and Morton Baratz, Power and Poverty (New York: Oxford University Press, 1970).

4. Samuel L. Clemens, The Prince and the Pauper (Boston: J.R. Osgood, 1882).

5. The problem that stable minority and majority factions present for a democracy is well described in Vincent Ostrom, The Political Theory of a Compound Republic (Blacksburg, Va.: Public Choice Society, 1971), pp. 63-67.

6. Banfield, The Unheavenly City Revisited, pp. 54, 79-80.

7. Ibid., appendix B, "Selected References of Writings Pertaining to The Unheavenly City."

8. Ibid., p. 285.

9. Ibid., p. 78.

10. Ibid.

11. New York Times, May 31, 1976, pp. 20, 21.

12. Karl and Alma E. Taeuber, Negroes in Cities (New York: Atheneum, 1972).

13. Ibid., p. 44.

14. Banfield, The Unheavenly City Revisited, p. 90; reference made to, Angus Campbell and Howard Suchman, Racial Attitudes in Fifteen American Cities (Ann Arbor: Survey Research Center, University of Michigan, 1968).

15. Two excellent histories of black communities are: Gilbert Osofsky, Harlem: The Making of a Ghetto (New York: Harper and Row, 1966) and St. Clair Drake and Horace R. Cayton, Black Metropolis, vols. I and II (New York: Harper and Row, 1962). Two histories of European Jewish ghettos that provide parallel analyses are: Werner Keller, Diaspora (New York: Harcourt,

Brace and World, 1969) and Salo W. Baron, A Social and Religious History of the Jews, vol. II (New York: Columbia University Press, 1937).

16. Kenneth Clark, Dark Ghetto (New York: Harper and Row, 1965), p. 19.

17. Banfield, The Unheavenly City Revisited, p. 80.

18. 12 John 8: "The poor always ye have with you."

19. Banfield, The Unheavenly City Revisited, pp. 81, 82.

20. Lester C. Thurow, Poverty and Discrimination (Washington, D.C.: Brookings Institution, 1969), p. 78.

21. Ibid., p. 81.

22. Otis D. Duncan, "Inheritance of Poverty or Inheritance of Race?" in Daniel P. Moynihan, ed., On Understanding Poverty (New York: Basic Books, 1969), p. 108.

23. Banfield, The Unheavenly City Revisited, p. 82.

24. Duncan, "Inheritance of Poverty or Inheritance of Race?" p. 108.

25. Robert L. Lineberry, Equality and Urban Policy (Beverly Hills, Calif.: Sage Publications, 1977).

26. Ibid., p. 183.

27. Ibid., p. 141.

28. Ibid.

29. Ibid., p. 181.

30. Frank Levy, Arnold Meltsner and Aaron Wildavsky, Urban Outcomes (Berkeley, Calif.: University of California Press, 1974).

31. Ibid., p. 31.

32. Ibid., p. 219.

33. Ibid., p. 21.

34. Elinor Ostrom and Gordon P. Whitaker, "Community Control and Governmental Responsiveness: The Case of Police in Black Neighborhoods," in Willis D. Hawley and David Rogers, eds., Improving the Quality of Urban Management (Beverly Hills, Calif.: Sage Publications, 1974), pp. 303-334.

35. Ibid., p. 322.

36. Ibid.

37. Ibid., p. 328.

38. Alexis de Tocqueville, Democracy in America (Garden City, N.Y.: Doubleday Co., 1969), p. 356.

39. See especially: Kenneth Prewitt, ed., Institutional Racism in America (Englewood Cliffs, N.J.: Prentice-Hall, 1970).

40. Theodore Lowi, "Machine Politics--Old and New," The Public Interest (Fall, 1967), pp. 86.

41. Lineberry, Equality and Urban Policy, p. 146.

42. See especially: Eugene Lewis, The Urban Political System (Hinsdale, Ill.: Dryden Press, 1973): Grant McConnell, Private Power and American Democracy (New York: Knopf, 1966); Theodore Lowi, The End of Liberalism (New York: Norton, 1969); Anthony Downs, Inside Bureaucracy (Boston: Little, Brown, 1967); and Gordon Tullock, The Politics of Bureaucracy (Washington, D.C.: Public Affairs Press, 1965).

43. Lewis, The Urban Political System.

44. Ibid., Ch. 7, passim.

45. U.S. Department of Commerce, Bureau of the Census, "The Social and Economic Status of the Black Population in the United States," Special Studies Series P-23, no. 54, 1974, pp. 73-75.

46. James D. Thompson, Organizations in Action (New York: McGraw-Hill, 1967), p. 1: "Uncertainties pose major problems to rationality. . . technologies and environments are basic sources of uncertainty for organizations."

47. The "minimax" theorem and its relationship to individual choice and rationality is set out fully in John von Neumann and Oskar Morgenstern, Theory of Games and Economic Behavior (Princeton, N.J.: Princeton University Press, 1944). The theorem is described by Morgenstern as follows: "Each player is assumed to choose a strategy independently, and in ignorance of his opponent's choice. Selection of an optimal strategy is shown to involve the selection of proper probabilities of adopting each of the pure strategies available." International Encyclopedia of the Social Sciences (New York: Collier and MacMillan, 1968), p. 385.

48. Lewis, The Urban Political System, Ch. 4, passim.

49. Michael Lipsky, Protest in City Politics (Chicago: Rand McNally, 1970), Ch. 7.

50. A discussion of benefit and coercion as organizational principles may be found in Mancur Olson, The Logic of Collective Action (Cambridge, Mass.: Harvard University Press, 1971).

51. Lipsky, Protest in City Politics, p. 174.

52. Lowi, The End of Liberalism, p. 54.

53. V. Ostrom, The Political Theory of a Compound Republic, p. 66.

CHAPTER III

THE EMPIRICAL WARRANTABILITY OF CONSTITUTIONAL LITIGATION FOR SERVICE EQUALITY: THE PROVISION OF POLICE SERVICES IN THE CITY OF ST. LOUIS

Review and Introduction

Up to this point, this dissertation has argued analytically in favor of two propositions:

- Among other safeguards of individual political power in the compound republic scheme is a series of civil rights designed to prevent (and redress) categorical political inequalities
- The Federal Judiciary, under the Equal Protection Clause of the Fourteenth Amendment, has the institutional responsibility for redressing categorical inequality resulting from state action.

The substantive focus of this dissertation and of these propositions is the political position of blacks with respect to urban service provision. Therefore, Chapter II introduced the question of the political salience of race in urban areas. The discussion in Chapter II concluded that race was salient in terms of three analytical points: the political impact of ascriptive categorization, the enduring economic and residential distinctions between the races, and the bias in favor of organization in urban politics.

These points, where they apply, place blacks in the position of a stable minority.

However, a stable minority is not necessarily categorically unequal as the term is used in the above propositions. In order for blacks to bring the Equal Protection Clause into play there must be some identifiable racial inequality in the results of state action. This chapter will make a limited examination of the racial equality in some results of state action in the provision of police services. As noted in the review of service delivery literature in Chapter II, an empirical examination of equality is necessary to the argument about the warrantability of constitutional litigation. Even if the two above propositions are accepted, without some kind of empirical demonstration of inequality, the utility of constitutional litigation for service equality can be asserted, but not explained. The first step in an empirical examination of service equality is an explanation of what constitutes a result or output of state action. The next section of this chapter will define service output in the context of the compound republic theory.

Defining Urban Service Output

A "citizen orientation" in defining output, referred to by Ostrom and Whitaker, will be used here since it also derives from the compound republic theory. The citizen-orientation grows out of a negative reaction to the public administration Reform Tradition among a group of economists and political scientists. This reaction has become a tradition in its own right under the label "public choice." A number of recent theoretical and empirical studies may be referred to for its full exposition.[1]

The important element from the Public Choice tradition for the definition of output is its reaction against an exclusive reliance upon measures

of input efficiency and agency activity in the assessment of government performance. As many have observed, using measures of efficiency and activity for assessing the performance of a monopoly service provider creates a closed analytic system. Without competition and detectible shifts in demand, definitions of efficiency and adequate activity may be tailored without reference to the public. Vincent Ostrom finds this situation detrimental to democratic administration.[2] We may extend Ostrom's point and say that any assessment of governmental performance without reference to citizen preferences is counter to constitutional design of the American compound republic. This is because, as Bish and Ostrom put it, "performance of governments . . . should be evaluated in terms of criteria which can be applied by citizens as well as officials."[3] This is a statement of the "anyone rules" principle cited in Chapter I. What Elinor Ostrom and Gordon Whitaker do in the Chicago/Cook County study, and what will be done here, is to operationalize the "anyone rules" principle by defining service output in terms of citizen experience and evaluation.

As Elinor Ostrom has pointed out, the conception of service output in terms of citizen experience and evaluation is no longer as exotic as it once seemed. The following interpretation of the use of citizen experience and evaluations is from a report of the National Advisory Commission on Criminal Justice Standards and Goals:

> Perhaps the most controversial group of new indicators of police effectiveness are those that are products of citizen feelings toward the police. The extent to which the police are successful in alleviating citizens' fear of crime reflects police productivity. Consequently, the percentage of the population having feelings of insecurity about police protection should be measured, perhaps as part of a victimization survey.
>
> Conversely, public acceptance of the police could enable the agency to be more effective in deterring crime and apprending criminals. Citizen satisfaction with police services thus should be evaluated. As such surveys are undertaken, it would

> be desirable to measure attitudes among various population groups, based on age, income, race, sex and other variables. It should also be understood that such citizen perceptions are often swayed by conditions totally unrelated to police behavior, performance or effectiveness.[4]

The next section will take up, specifically, the problem of measuring the output of urban police services.

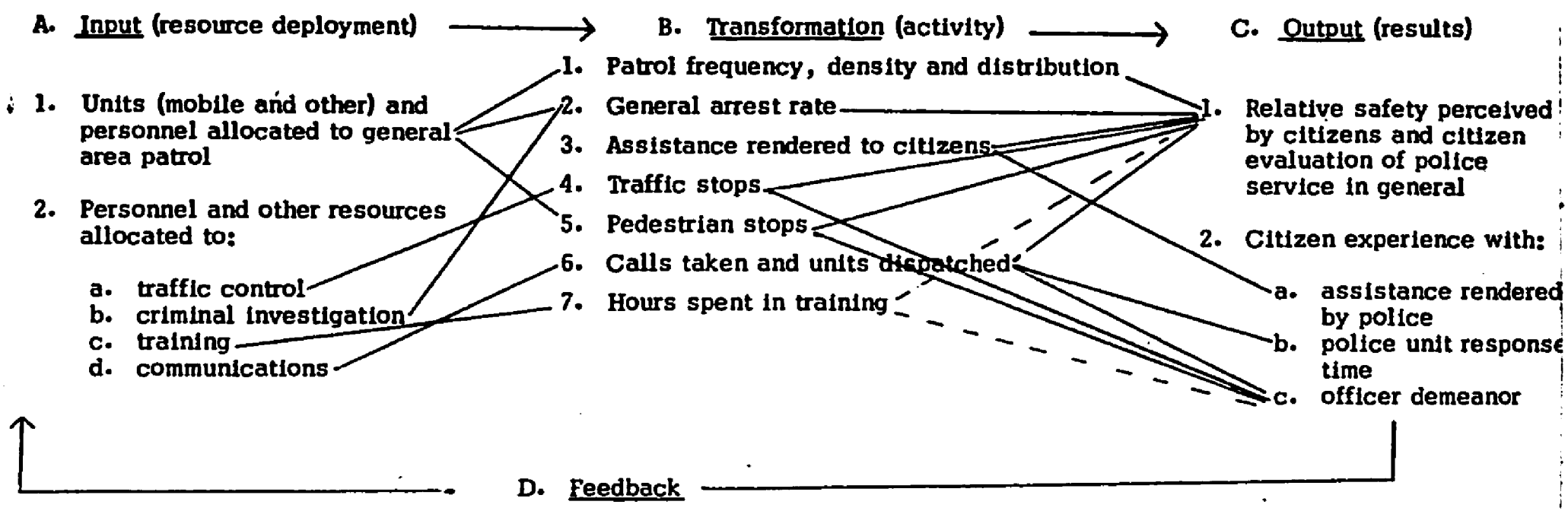
The Output of Police Services

Operationalizing a citizen-orientation in the measurement of police agency output requires us to make a distinction between measures of activity and measures of citizen experience and evaluation. This distinction is not always as clear as it might seem. For example, police agency statistics on calls for service, pedestrian and vehicular stops, and follow-up investigations are--from a perspective centered on the agency--measures of citizen experience of police service. The critical point, of course, is that none of these measures involves any assessment by citizens of their own perceptions. Such an assessment is critical to a citizen-orientation in measuring police agency output.

According to the example just given, an analytic distinction may be made between measures of activity and measures of output based on citizen experience and evaluation. Figure 3.1 describes this distinction in the context of the entire police service system. The system diagram, set out in Eastonian terms, indicates the general way in which inputs, the deployment of resources, are transformed into outputs or results by means of the activities of the actors producing the service.[5]

As noted in Figure 3.1, the connections between resources and activities, and between activities and results are indications of <u>functional</u>, not causal, relationships.[6] For instance, it is at best misleading to claim that the relative safety perceived by citizens is caused by the six police

Figure 3.1 An Analytic Scheme of the Police Service System*



*Connecting lines indicate a functional relationship between elements. Broken lines indicate a projected relationship.

activities indicated in the diagram. In order to offer a causal explanation of relative safety, a plethora of social factors exogenous to the police system would have to be introduced. It may be said, however, that relative safety is a function of--among other factors--police resource deployment and activity.

In addition, it is clear that of the output measures included in Column C, relative safety is the least directly related to any specific action of the police, and thereby, of the State. It would be unfair, therefore, to base a constitutional finding of unequal protection upon a racial distinction found on this variable alone. However, it will be used in the empirical illustrations below for purposes of comparison with the other, more direct indicators of police output. There is a logical connection between this and the other measures because it is commonly believed by the public that the police have or should have something to do with the level of crime or safety in a community. We might expect, then, that a citizen's rating of his relative safety and his overall rating of police service would be quite similar. This, in fact, turns out to be the case for the areas in St. Louis studied here (Table 3.1).

But can't the variation in citizen perception be explained by examining activity levels? If it can--and it is at least plausible--then a reading of patrol activity should suffice as one measure of output. The line of logic goes like this: people will feel safer if they are better protected; and they will be better protected if their neighborhoods are more frequently patrolled. Let's examine the patrol frequency levels in two neighborhoods in St. Louis City--one black and one white--that are served by the same police district (no. 6).[7]

Respondents in both areas were asked, "How many times do you think the police patrol this neighborhood during an average eight hour shift. . .

once every shift, twice a shift, or how often?" Respondents in the predominantly black community, Penrose, perceived a significantly higher frequency of patrol than did the citizens of predominantly white Baden. If we compare the percentage of those in each area perceiving a frequency of three or more times per shift, we find 17.2% (n=19) in Baden and over twice the proportion, 38% (n=19) in Penrose. If activity levels are congruent with output measured by citizen experience and evaluation, these figures would suggest that blacks served by District 6 of the St. Louis Metropolitan Police were receiving at least an equal, if not a higher level of service than whites.

However, as the following discussion will show, activity levels and citizen experience and evaluation are not always congruent. This is an especially important point in light of the litigation for service equality discussed in the next chapter. As will be apparent from the cases reviewed, the Federal Courts and also black plaintiffs have relied in most cases on measures of activity or "effort," as they have termed it. It will be useful, then, to go past the point where the Courts have stopped, and see if the question of equality is resolved in the same way. We can do this by considering a situation in which activity measures favor blacks, and then introducing measures of output based on citizen experience and evaluation. Such a situation is presented by the comparison between Penrose and Baden in the City of St. Louis..

Citizen Experience and Evaluation of Police Services in Two Racially Homogeneous Neighborhoods

Several measures of citizen evaluation and experience were developed in the 1972 St. Louis police services survey conducted by Elinor Ostrom, et al. Since these measures indicate to some extent, the impact of police service on the individual citizen, they can be used as the basis of com-

parison of service levels available to citizens of different races within a single jurisdiction. The indicators are drawn from a citizen survey instrument, and they parallel the output elements in Figure 3.1 as follows:

Output Element	Survey Questions
1. a) An indicator of relative safety perceived by citizens	1. a) Do you think crime in your neighborhood is increasing; about the same; decreasing?
b) Citizen evaluation of police service in general	b) What rating would you give police services in your neighborhood? (Outstanding; Good; Adequate; Inadequate; Very Poor; Non-existent)
2. Citizen experience with: a) Assistance rendered by police	2. a) (Description of situation to which police responded)- What did the police do? Were you satisfied with what the police did?
b) Police unit response time	b) (In general) - When the police are called in your neighborhood, in your opinion, how fast do they come?
c) Officer demeanor	c) Do you think that police serving your neighborhood sometimes use more force than is necessary?

A comparison of the responses given to these questions in Baden and Penrose reveals uniformly lower evaluation and less favorable experience in the black area. It is important to note that between the two neighborhoods, the only significant socio-economic characteristic in which there is variation is race. In both areas a majority of dwellings are owner occupied (Baden, 68.48% and Penrose, 64.20%). In both areas, also, the median value of housing is comparable (Baden, $15-20,000 and Penrose, $10-15,000). And, as previously mentioned, both areas are served by the same St. Louis Metropolitan Police district.

The differences, presented in Table 3.1, indicate at least some inequality in the output of police service in the two neighborhoods: Forty-eight percent of the Penrose sample felt that crime was increasing in their neighborhood, compared with 29.8% of the sample in Baden. The over-all rating of police showed an even sharper discrepancy between the areas with 61% of the Baden sample rating police services better than average compared with 20% in Penrose. Police-community relations received the same rating in Penrose as police service over-all, while 70.4% of the Baden sample rated police-community relations above average.

The three experiential measures also showed a tendency more favorable to the white community. Thirty-two percent of the Penrose sample had been victims of criminal activity as opposed to 23.8% in Baden. With respect to perception of response time, an element which the police in most jurisdictions regard as an important measure of the service they provide, 36% of the black respondents perceived the police as responding "slowly" to "not at all," compared to 14.4% in the same category in the Baden sample. Once the police had responded, 88.9 % of those who had called them in Baden reported being satisfied with the action taken by the police. The comparable figure among those having called for service in Penrose is somewhat lower, 64.3%. One more evaluative measure was included as an indicator of officer demeanor toward citizens, that is a question on whether the police in the respondent's neighborhood use "more force than is necessary." There was a ten percent difference between the two communities on this question with a larger portion of the Penrose sample, 26.5%, finding that the police use more force than necessary.

Another measure of the difference in citizen experience and evaluation between these two neighborhoods is the coefficient of association, Yule's Q, shown at the left of each comparison.[8] The computations were done so

that a perfect positive score (+1.0) would reflect perfect association between being a resident of Baden and giving an answer fitting into the top half of each dichotomy. Thus, the high Q scores for overall rating of police, rating of police community relations, rating of response time and satisfaction with specific response indicate a strong association between being a resident of Baden and having positive evaluations of or favorable experiences with the police. Conversely, the negative scores on the crime trend, victimization and "police use too much force" variables show some association between being a resident of Penrose and giving the unfavorable answers in the top half of each of those dichotomies, e.g. perceiving an increase in crime, having been victimized, and finding that the police use too much force.

The Q scores show that there is a significant difference between output measures based on activity levels like patrol-frequency and output measures based on citizen experience and evaluation. However, can the racial distinction be justifiably linked to police performance? Might not the racial distinction have more to do with cultural differences between blacks and whites, than anything for which the police are responsible? The hypothesis presented by these questions is that blacks are inevitably dissatisfied with police services. Therefore, adjusting police service procedurally or structurally in response to black complaints will do no good. This hypothesis will be taken up in the next section.

An alternative explanation of inequality in experience and evaluation: the cultural distinctiveness of blacks

The intrajurisdictional comparison in St. Louis of Baden and Penrose reveals a difference in citizen experience and evaluation favoring the predominately white area, Baden. However, since this finding is based on the difference of race, the possibility that it may reflect not output

Table 3.1 Measures of Police Service Output in Two St. Louis City Neighborhoods

Variable[a]	Baden (P.A. 69) (1.4% black pop.) %	(N)	Values[b]	Penrose (P.A. 33) (98.4% black pop.) %	(N)
Crime Trend	29.8	(31)	Increasing	48.0	(24)
	38.5	(40)	Same	30.0	(15)
	21.2	(22)	Decreasing	18.0	(9)
	1.0	(1)	No Crime	-	
Q = -.33	6.7	(7)	Don't know	4.0	(2)
Overall Rating of Public Service					
	14.3	(15)	Outstanding	2.0	(1)
	46.7	(49)	Good	18.0	(9)
	26.7	(28)	Adequate	54.0	(27)
	2.9	(3)	Inadequate	6.0	(3)
	-		Very Poor	10.0	(5)
Q = .76	6.7	(7)	Don't know	8.0	(4)
Rating of Police-Community Relations	13.3	(14)	Outstanding	2.0	(1)
	57.1	(60)	Good	18.0	(9)
	12.4	(13)	Adequate	30.0	(15)
	3.8	(4)	Inadequate	10.0	(5)
	1.0	(1)	Very Poor	10.0	(5)
	-		Non-Existent	2.0	(1)
Q = .83	10.5	(11)	Don't know	22.0	(11)

[a] Broken lines indicate the points of dichotomy drawn in the computation of Yule's

[b] Values often do not sum to 100% due to a number of non-categorical responses.

Variable	Baden (P.A. 69) %	Baden (P.A. 69) (N)	Values	Penrose (P.A. 33) %	Penrose (P.A. 33) (N)
Response-Time Rating	26.9	(28)	Very Rapidly	14.0	(7)
	39.4	(41)	Quickly Enough	38.0	(19)
	9.6	(10)	Slowly	26.0	(13)
	3.8	(4)	Very Slowly	8.0	(4)
	1.0	(1)	Not at all	2.0	(1)
Q = .52	16.3	(17)	Don't know	8.0	(4)
Victimization	23.8	(25)	Yes	32.0	(16)
Q = -.20	76.2	(80)	No	68.0	(34)
"Police use too much force"	16.7	(11)	Yes	26.5	(13)
	77.3	(51)	No	57.1	(28)
Q = -.37	6.1	(4)	Don't know	16.3	(8)
Satisfied with Police Response to Specific Situations	88.9	(24)	Yes	64.3	(9)
Q = .63	11.1	(3)	No	35.7	(5)

differences but rather differences in culturally determined perceptions must be considered. Much has been made by proponents of independent black political power of the culturally distinct nature of the black citizen.[9] This causes us to ask whether the police should be held responsible for differences in experience and evaluation that cannot be separated from cultural values. In order to consider this question a study was made comparing the responses of whites and blacks in sample areas in University City, a municipal jurisdiction outside the City of St. Louis. The measures that were taken in University City are the same as those taken in the comparison between Baden and Penrose.

As we see in Table 3.2, on several socio-economic and demographic measures, blacks in University City survey areas are somewhat better off, but comparable to blacks in Penrose. If we are to rely on cultural distinctiveness as an explanation of black experience and evaluation of the police, we should find some similarity between the survey answers given by blacks in University City and the answers given by blacks in Penrose. This is not the case.

To begin with the main finding, there is far less difference between the responses of blacks and whites in University City than there is in the St. Louis comparison. Among the more experiencial measures presented in Table 3.3, there is very little difference between the races. The difference in victimization rate for the two groups is slightly less than two percent. Similarly, there was little difference by race in University City respecting experience of response time. Among black respondents, 83.9% found that the police arrive quickly enough or very rapidly. The comparable figure for whites is 85.5%. The same measure in the St. Louis neighborhoods showed a difference of nearly 15% between the races. The racial differences in the third experiencial measure, satisfaction with police response to calls for service, is slightly less than the difference on this measure in the St.

Table 3.2 Some Socio-Economic Comparisons of Blacks in Penrose (St. Louis City) with Blacks in University City Survey Areas[a]

Variables	Penrose[b] (98.4% black) N = 5689	Blacks in University City Survey Areas[c] N = 6980
Median Income of Families	$9444	$10,331
Percent High School Graduates	49.0	56.0
Percent Families Below Poverty Level	9.0	5.6
Percent Unemployed	5.0	4.6
Percent Over 65 Years of Age	8.0	3.0
Percent 15-19 Year Old Males	4.0	7.2

[a] Compiled from the "1970 Census of Population and Housing," U.S. Department of Commerce, Bureau of the Census, PHCCI) - 181.

[b] "Penrose" is a neighborhood designation. These figures are drawn from a combination of Census Tracts.

[c] The University City citizen survey was taken in three Census Tracts, 2157, 2159, and 2160. They contain 42.7% of the City's total population and 75.2% of its black population.

Table 3.3 Measures of Police Service Output in University City - Racial Comparison

Variable[a]	White Respondents		Values[b]	Non-white Respondents	
	%	(N)		%	(N)
Crime Trend	47.2	(67)	Increasing	27.9	(N)
	38.0	(54)	Same	31.5	(35)
	2.1	(3)	Decreasing	13.5	(15)
	5.6	(8)	No Crime	11.7	(13)
Q = .35	7.0	(10)	Don't know	15.3	(17)
Overall Rating of Police Service	43.0	(61)	Outstanding	29.2	(33)
	36.6	(52)	Good	44.2	(50)
	14.1	(20)	Adequate	18.6	(21)
	2.1	(3)	Inadequate	2.7	(3)
	-		Very Poor	2.7	(3)
	-		Non-Existent	-	
Q = .23	2.1	(6)	Don't know	2.7	(3)
Rating of Police-Community Relations	15.8	(22)	Outstanding	16.8	(19)
	54.0	(75)	Good	37.2	(42)
	10.8	(15)	Adequate	20.4	(23)
	3.0	(4)	Inadequate	3.5	(4)
	1.4	(2)	Very Poor	4.4	(5)
	0.7	(1)	Non-Existent	1.8	(2)
Q = .42	14.4	(20)	Don't know	16.0	(18)

[a] Broken lines indicate the points of dichotomy drawn in the computation of Yule's Q.

[b] Values often do not sum to 100% due to a number of non-categorical responses.

Table 3.3 (continued)

Variable	White Respondents %	White Respondents (N)	Values	Non-white Respondents %	Non-white Respondents (N)
Response-Time Rating	63.8	(90)	Very Rapidly	58.0	(65)
	22.0	(31)	Quickly Enough	25.9	(29)
	3.5	(5)	Slowly	4.5	(5)
	0.7	(1)	Very Slowly	1.8	(2)
	-		Not at All	-	
Q = .20	10.0	(14)	Don't know	9.8	(11)
Victimization	27.5	(39)	Yes	29.2	(33)
Q = -.04	72.5	(103)	No	70.8	(80)
"Police use too much force"	7.7	(9)	Yes	21.1	(20)
	74.4	(87)	No	65.3	(62)
Q = -.51	18.0	(21)	Don't know	13.7	(13)
Satisfied with Police Response to Specific Situations	92.2	(47)	Yes	74.4	(32)
	7.8	(4)	No	23.3	(10)
Q = .57	-		Don't know	2.3	(1)

Louis neighborhoods. Also, positive ratings given by respondents of each race on this measure were higher than those given in Baden and Penrose.

The two main evaluative output measures also show far less racial difference in University City than they do in Baden and Penrose. While 93.7% of the white respondents in University City give the police an overall rating of adequate or better, a similarly high proportion, 92% of their black neighbors do also. The evaluation of police-community relations by whites and blacks is similar though lower in both cases than it is for the overall ratings of police. Whites rated police community relations as adequate or better in 80.6% of the cases, while the comparable number for blacks is 74.4%.

Table 3.4 juxtaposes the Q values obtained in both comparisons. On all measures, [illegible] black experience and evaluation of police services was more favorable and closer to that of whites in University City than in the St. Louis comparison.

Table 3.4 Comparison of Measures of Association

Variable	Q Values	
	St. Louis City Comparison (Table 3.1)	University City Comparison (Table 3.3)
Crime Trend	-.33	.35
Overall Rating of Police Service	.76	.23
Rating of Police-Community Relations	.83	.42
Response-Time Rating	.52	.20
Victimization	-.20	-.04
"Police use too much force"	-.37	-.51
Satisfied with Police Responses to Specific Situations	.63	.57

Summary

The purpose of this chapter has been to consider racial differences in some aspects of the output of a public service in a specific case. The indicators of output that have been used included a measure of effort, patrol frequency, and several measures of result as perceived by citizens. These indicators showed some difference between the races. The argument that this difference is due to the distinctive nature of black culture is addressed, though it cannot be dismissed entirely. The illustration of some inequality in the output of service in the St. Louis City example adds an empirical dimension to the discussion of constitutional litigation in the next chapter. Without this illustration, the grievances of the black community brought to the courts would remain abstract and supposed.

Nonetheless, it might be argued that the actual level of service deprivation in Penrose as well as the gross amount of deprivation nationally is insignificant. Such an argument, however, would have to address the proposition established in Chapter II: that a democratic system based on the governing capacity of the individual cannot tolerate distinctions drawn by ascriptive characteristics and at the same time safeguard the individual. It is upon the value of this proposition that the utility of the illustration must rest.

This chapter has analyzed the distribution of one service, police protection, in terms of the characteristic of race. As the comparison of measures indicates, race may be related to different levels of citizen experience and evaluation within the same service jurisdiction. Using a citizen-orientation to consider some aspects of output, it may be said that one racial group seems to benefit from the provision of public service, in this case, more than another. This difference is significant in light of a concern for the capacity of government to provide non-prejudicial service.

More generally, such a concern may be important to American political science. Vincent Ostrom indicates such a concern in The Intellectual Crisis in American Public Administration. As Ostrom argues, the force of ideas and the relative focus of attention in the social sciences may have an impact on the conduct and structure of public policy making--and perhaps, therefore, an impact on the advancement of human welfare. The important challenge in Ostrom's book for political scientists is to identify the non-democratic anomalies in American political life and examine the costs and benefits of structural alternatives to the status quo.[10]

This chapter has examined one potentially anomalous situation; that of a public service which seems to benefit the citizens of one race more than the citizens of another. The next chapter examines the potential costs and benefits associated with one structural alternative, the intervention of the Federal Courts into urban service delivery systems.

Notes

1. The development of the public choice approach is described in Vincent Ostrom and Elinor Ostrom, "Public Choice: A Different Approach to the Study of Public Administration," Public Administration Review, 31 (March/April 1971), pp. 203-216.

2. Perhaps the best statement of this point is made by Vincent Ostrom in The Intellectual Crisis in American Public Administration (University, Alabama: University of Alabama Press, 1973), p. 62:

> "If public agencies are organized in a way that does not allow for the expression of a diversity of preferences among different communities of people, then producers of public goods and services will be taking action without information as to the changing preferences of the persons they serve. Expenditures will be made with little reference to consumer utility. Producer efficiency in the absence of consumer utility is without economic meaning."

3. Robert L. Bish and Vincent Ostrom, Understanding Urban Government (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1973), p. 21.

4. Cited in Elinor Ostrom, "Scale of Production and the Problems of Service Delivery in a Federal System," Workshop in Political Theory and Policy Analysis, Bloomington, Indiana, n.d., p. 81.

5. David Easton, A Framework for Political Analysis (Englewood Cliffs, N.J.: Prentice-Hall, 1965).

6. The difference between causal and functional relationships is well established in the social sciences. The distinction is best maintained by anthropologists and sociologists using a structural-functional approach to culture and society. Marion Levy summarizes the use of "function" as follows, in: International Encyclopedia of the Social Sciences (New York: Macmillan and the Free Press, 1968), vol. 6, p. 22:

> " . . . 'function' may be defined as any condition, any state of affairs, resultant from the operation . . . of a unit of the type under consideration in terms of a structure(s)."

Most conventional definitions of causality include the elements in Levy's definition. However, a causal relationship does more than connect an antecedent to a consequent; it indicates a continuous pattern. David Hume established this additional condition when he replaced Locke's idea of "cause as power" with a definition of cause as constant conjunction. (cf. "An Enquiry Concerning Human Understanding, in Hume on Human Nature (New York: Collier Books, 1962)). The data presented in this chapter represent a single, consequent state of affairs for which no claim of constancy may be made. Thus, the structure/result relationship of functional analysis is an appropriate characterization, but a causal relationship is not.

7. The design and scope of the study from which these data are drawn is explained in Elinor Ostrom, Roger Parks and Dennis C. Smith, "A Multi-strata, Similar Systems Design for Measuring Police Performance," Workshop in Political Theory and Policy Analysis, Bloomington, Indiana, W73-6 (1973).

8. The method of computation, here, and the analysis of Q values is based upon a paper by George U. Yule, "On the Association of Attributes in Statistics," in Alan Stuart and Maurice Kendall, eds., Statistical Papers of George Udny Yule (New York: Hafner Publishing Col, 1971), pp. 7-69.

9. The best example of this position remains: Stokely Carmichael and Charles V. Hamilton, Black Power: The Politics of Liberation in America (New York, N.Y.: Vintage Press, 1967).

10. The question of structural change and the social role of political analysis is taken up by Vincent Ostrom, The Intellectual Crisis in American Public Administration, pp. 113-133.

CHAPTER IV

THE DEVELOPMENT OF CONSTITUTIONAL LITIGATION AS A STRATEGY AVAILABLE TO URBAN BLACKS SEEKING PUBLIC SERVICE EQUALITY

Introduction

The purpose of this chapter is to describe and criticize the litigation brought by urban blacks alleging public service inequality. The consistent focus of this litigation has been the Federal Judiciary. The consistent basis of the litigation has been a charge of racially differential state action under the Equal Protection Clause of the Fourteenth Amendment. There is a variety of complex issues involved in considering this litigation, and some criterion is necessary for selecting among them. The following topics will be examined here for two reasons; in order to expose the logic behind the litigation, and in order to fit this litigation into the explanatory framework of the compound republic theory:

- The applicability of the Equal Protection Clause to the provision of municipal services.
- The need to show discriminatory motivation on the part of the State in equal protection cases.

- The legal basis of the current service equalization standard.
- The role of plaintiffs and of the Federal Judiciary in the decline of service equalization litigation.

The focus of this dissertation has been on the line of cases that will be discussed here. These cases have been placed at the crux of the dissertation by, first, the argument in Chapter I asserting the role of the Federal Judiciary as a recourse available to stable minorities receiving unequal treatment from local governments--this argument was made in the context of the compound republic theory--second, by considering the characteristics of the political position of urban blacks which may make them a stable minority, and third, by examining one case in which urban blacks, according to their experience and evaluation, are benefitting less from a public service than are whites.

The key role of the Federal Courts, the minority position of blacks and the existence of some service inequality all indicate the importance of the litigation depends, ultimately, not on the substantive arguments made above, but on the significance of these cases for the structural integrity of the American political system. That integrity has been defined here in terms of the compound republic theory. One of the measures of integrity in a compound republic is the ability of individuals to enforce the law against the official agents of the state. The argument that has been made here is that for urban blacks receiving inferior levels of public service such enforcement depends, largely, upon recourse to the Federal Courts under the Equal Protection Clasue of the Fourteenth Amendment. The thrust of this chapter, then, is to determine whether such recourse exists.

The Applicability of the Equal Protection Clause to the Provision of Municipal Services other than Education

No clear right has been established, legislatively or judicially, for minorities that think they are not getting a fair share of municipal services other than education. There have been, however, several Federal cases which have applied the equal protection provision of the Fourteenth Amendment to these other municipal actions, but the only hearing given the issue by the U.S. Supreme Court thus far was indirect and is generally considered to have a negative impact on efforts to expand the use of the Fourteenth Amendment in municipal service litigation.[1]

A landmark case establishing the application of the Equal Protection Clause to public services was Brown v. Board of Education.[2] In the Brown case, the quality of a public service--education--was called to question even though the distribution of resources such as buildings, qualifications and salaries of teachers, and curricula were either equal or being equalized. It was the very fact of separation that engendered the inequality of service quality. As the court held:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[3]

The implications of this decision and its reliance on the social-psychological impact of segregation on the black pupil especially, were far reaching. As Sidney Verba pointed out shortly after the Brown decision, by relying on social-psychological factors, the Court recognized the essential problem presented by segregation in a democracy; that is, the derrogation of persons to an ascriptive category that makes it difficult, if not impossible, for those persons to express preferences or demand justice as individuals.[4]

While the fact of segregation in schools--separate facilities--has been enough since Brown to trigger the equal protection guarantee, this has not been the case for other public services. The explanation for this distinction is that the Brown Court established a broad basis for later rulings on school segregation with its findings on the psychological effects of segregated education. With these findings, the Court at least implied that black school children, simply by being separated, were receiving a public product that would not be as useful to them as to their white counterparts. With respect to education, therefore, the very fact of separation was considered to have a racially unequal impact, harmful enough to be unconstitutional. As Chief Justice Warren put it:

> To separate them /black school children/ from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.[5]

Since the Brown decision, therefore, it has not been necessary for black plaintiffs to show racial difference in the output or impact of educational service provision. The Brown decision made such a showing unnecessary by its connection of racial separation to negative social and psychological effects. The Court found the evidence of this connection persuasive enough to presume that it was the case wherever schools were found to be segregated. Therefore, a deprivation of the equal protection of the laws might be found "by reason of the segregation complained of . . ."[6]

The Federal Courts have found no apparent similarity between the generalizable connection found in Brown and the provision of any other public service. By virtue of residential segregation in many urban places, it is probable that a number of services other than education may be provided

separately by race. And in some cases there may be a noticeable variation in some aspects of service provision by race. However, for no service other than education has racial separation been found to be connected to a generalizable negative effect. It has been necessary, in the case of complaints about the provision of services other than education between the races, to show that there is an inferiority in service provision which corresponds to the racial separation. It is the task of defining and identifying such inferiority that distinguishes the line of cases discussed here from the school segregation cases.

However, during the development of the service equalization cases after Brown, there appeared to be one commonality between the school decisions and those dealing with other services. That was that while a finding of relative inferiority was required in the non-school cases, they were similar to Brown in not requiring a demonstration of discriminatory intent on the part of the government. Thus, the fact of racial separation coupled with a corresponding inferiority in the level of service provided to each racial group became enough to raise the constitutional issue of equal protection. State intention was not relevant. In fact, as Daniel Fessler and Charles Haar indicate, a showing of segregation and corresponding service level disparity establishes a "prima facie case of forbidden discrimination" under the Equal Protection Clause.[7] In such a case the burden of proof shifts to the service producer to show non-discrimination.

This would seem, then, to establish a doctrine eminently favorable to those who have been ascriptively categorized. The reassertion of individuality in urban politics by blacks might seem to be insured. Nonetheless, the extension of the equal protection guarantee into other areas of municipal service has been slow and uncertain. This is not because segregation is difficult to demonstrate. Rather, the difficulty lies in proving that there

is an inferiority in the level of service that corresponds to racial separation. In addition, the irrelevance of a showing that the State bears responsibility for that inferiority has not been well established. The question of showing a disparity in service levels was taken up in Chapter III and will be considered in its legal context below. However, it is the latter issue, that of showing whether the State bears responsibility for any disparity that is at the center of the constitutional litigation on service equality.

Plaintiff's Need to Show Discriminatory Motivation on the Part of the State in Equal Protection Cases

The distinction drawn in Chapter II between the "presently operating" and "historical" causes of discrimination is pertinent here. It is this distinction that the Federal Courts have attempted to draw in determining whether the State bears responsibility for racial discrimination. The factor which distinguishes presently-operating from historical causes is motivation. If historical causes are admitted as proof of State responsibility, motivation may be either considered irrelevant or an "historical motive" may be presumed. However, if historical causes of discrimination are discounted, a finding of State responsibility will rest upon the motives presently-operating in State agencies. The choice between these alternatives was not clearly made in early municipal discrimination cases, and, as a result, later service equality litigation also lacked a clear motivation standard. An important early U.S. Supreme Court case dealing with the relevance of State motivation is Gomillion v. Lightfoot.[8]

In Gomillion v. Lightfoot the Court struck down an act of the Alabama Legislature which had changed the boundaries of the City of Tuskegee and thus removed 400 blacks, but no whites, from the city. This left three or four blacks in Tuskegee. Alabama defended its actions as rational since the Tuskegee jurisdiction after restructuring would form a simple square when

it had been "an uncouth twenty-eight sided figure."[9] The complaint against Alabama was dismissed by the District Court on the grounds that the boundaries of municipal corporations were not within the Federal purview. Writing for the U.S. Supreme Court majority, Justice Frankfurter agreed that municipalitites ought to be regulated by the States, but not past the point where such regulation becomes "an instrument for circumventing a federally protected right."[10] The right in this case was the franchise in municipal elections which is protected by the Fifteenth Amendment.

Gomillion has been cited, wrongly, it may be argued, as establishing the irrelevance of motive to a showing of state action in the deprivation of a civil right. While the Alabama statute was not labelled, "An Act to Disenfranchise 400 Negroes," the intent of the act could not have been more obvious. Gomillion cannot have much weight in later more complex cases since Alabama's "compelling state interest" was so feebly argued and the discrimination was so blatant. Intent in Gomillion was obvious and did not need to be shown, so the question of whether intent needs to be shown and how it should be shown was not resolved and arose once again in municipal service cases brought in the 1970's.

However, weren't there any significant Constitutional municipal service cases between Brown and the 1970's which dealt with race? The cases which are discussed in this chapter have been chosen because they form an identifiable line of cases leading up to the major service equalization victory, Hawkins v. Town of Shaw. They may be identified as a line of cases by mutual citation and the attempt in each succeeding case to interpret the legal basis of the relevant cases which have preceded it. The "line" here is established by the Shaw Court's referees and, where relevant, those cases cited by the referees.

Evidently, the identification of a line of cases, like any geneology, has a limit. (Past a distant point in the past, everyone is related to everyone else.) Luckily, the litigation under discussion provides a noticeable break in the lineage. It was not until the latter part of the 1960's that the actions of municipalities with regard to race were brought into question absent some overt racial distinction in an ordinance or State law.

In his exhaustive review of Federal Civil rights litigation from 1840-1970, Richard Bardolph documents the effect of the Brown decision on other service areas up to about 1965. Most civil rights litigation involving non-school services after Brown was concerned with State statutes that were passed after 1954 in an attempt to maintain segregation in the provision of these other services. As Bardolph describes it:

> Although it was widely assumed that the School Segregation cases foreshadowed the end of legally required separate public facilities, southern legislatures continued to buttress the wall of segregation. A 1956 Louisiana statute, for example, revising older laws, required that common carriers provide separate waiting rooms for white intrastate passengers and for Negro intrastate and interstate passengers. Birmingham, Alabama, acted to "reaffirm, reenact and continue in full force and effect" ordinances which prescribed segregated seating on city buses, for the declared purpose of preventing "incidents, tensions and disorder." Arkansas, early in 1959, passed a law requiring the assignment of passengers to seats on all intrastate buses and providing penalties for refusal to take such seats.[11]

In his discussion of the reaction to Brown, Bardolph indicates the central Supreme Court decision in this earlier line of service equalization case, Reitman v. Mulkey, decided in 1967.[12] Many of the post-Brown segregation ordinances simply fell into disuse rather than being struck down by a Federal Court. Reitman, however, established the Court's willingness to apply the Equal Protection Clause to actions of the States unrelated to education. The precedent it established for review of State action was quite strong, since what was at issue in Reitman was not just an ordinance

or statute, but an amendment to the California State Constitution.

The service involved in Reitman was State regulation of the housing market. A popular referendum ("Proposition 14") amended Article I, Section 26 of the California Constitution to read, in part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.[13]

This provision of the State Constitution was tested when a black couple brought suit for an injunction against an apartment house owner who had denied them a lease. The suit for injunction, brought under the Equal Protection Clause, was denied by a State superior court. The couple appealled the judgement of the superior court to the State supreme court which reversed the decision in their favor. In doing so, the State supreme court found that "/when the electorate assumes the law-making function, the electorate is as much a State agency as any of its elected officials."

The apartment owner, Reitman, then appealled the California Supreme Court's decision to the U.S. Supreme Court. In sustaining the California court, the U.S. Supreme Court held that no denial of equal protection by State action, whether in a town ordinance or a State constitution, could be found acceptable:

> The judgment of the California court was that /section/ 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.
>
> There is no sound reason for rejecting this judgment. . . . The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination. . . . could now invoke express constitutional authority, free from censure or interference of any kind from official sources. . . . Only the State is excluded with respect to property owned by it.

> Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations.
>
> /That Court's judgment is/ Affirmed.[14]

In the second generation of service equalization cases discussed below, plaintiff's target was less easily identified than in the earlier cases. This second generation brought into question patterns of service provision and the quality of the service provided. The later cases did not usually have reference to a specific State document as did Gomillion and Reitman. The question of State motivation to deprive a class of citizens of the equal protection of the laws is raised in the second generation cases in order to decide whether the deprivation involved State action. For a finding of State action, however defined, is necessary in applying the equal protection guarantee.

The municipal service case in which a resolution of the motivation question was attempted is Hawkins v. Town of Shaw.[15] Shaw also stands as the most successful attempt by blacks to use the Federal Courts as a recourse from unequal treatment by providers of local public services. For these reasons it will be useful to present the cases from Reitman to the present in chronological stages with Shaw as the focus.

Pre-Shaw Municipal Service Litigation and the Problem of Motivation

There was a period from about 1968 to 1975 during which a consensus grew among Federal District Courts that a showing of disproportionate racial impact in the provision of a municipal service without regard to motivation was sufficient to trigger the equal protection guarantee. The two cases

which have been most widely cited as precedents for the irrelevance of a showing of discriminatory intent are Norwalk CORE v. Norwalk Redevelopment Agency (1968)[16] dealing with urban renewal and Kennedy Park Homes Assn., Inc. v. City of Lackawanna (1970)[17] dealing with zoning authority. These cases will be taken up in turn in this section.

The Norwalk CORE case was not heard by, or appealled to, the U.S. Supreme Court. Its final disposition was made by the Second Circuit of the U.S. Court of Appeals in reversing a judgement of the U.S. District Court for the District of Connecticut. The decision of the District Court, by Judge Robert Zampano (42 F.R.D. 617) dismissed a class action by former residents of a Norwalk urban renewal area for relief from racial discrimination resulting from the negligence of the Norwalk Redevelopment Agency. The argument which Judge Zampano found unpersuasive was that due to racial and ethnic discrimination in the Norwalk private housing market, those black and Puerto Rican residents of the City's renewal area found it more difficult to find comparable housing elsewhere, than did displaced white residents.

In the decision of the Appeals Court, Judge Joseph Smith reversed the District Court in favor of the black and Puerto Rican plaintiffs on Constitutional grounds. Judge Zampano did not reach the equal protection question since he found the complaint of unequal relocation service to be after-the-fact and beyond the responsibility of the Agency. In reversing the lower court, Judge Smith indicates the following reasoning from Judge Zampano's decision as being in error:

> Members of the public, whether living inside or outside a project area, ordinarily have no standing to challenge planning of an urban renewal project. . . nor, by alleging civil rights violations, do they gain standing they would otherwise not have. . . If residents of a project area cannot challenge a project while it is in the planning stages and before construction has begun, certainly they can have no standing to assert the same kind of challenge at a time when planning has been implemented, most of the land has been pur-

> chased and conveyed to developers, and construction of new buildings has been almost completed.[18]

In contrast, Judge Smith reasoned that the service provided did not end with construction but with the resettlement of the population displaced by the project. By extending the scope of the service reviewed, Judge Smith brought a measure of service output into play--the ability of project area residents to find adequate housing regardless of race. Relocation in housing which is "not generally less desirable" was required by Federal law (noted below). Judge Smith used the Equal Protection Clause to hold the Agency's application of the Federal law was illegel. Thus, the Appeal Court's finding of racial inequality rested on Constitutional grounds.

> What plaintiff's complaint alleges, in substance, is that in planning and implementing the Project, the local defendent did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the /Federal/ Contract to the same extent as they did for whites; indeed, they intended through the combination of the Project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the City of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree. . . .
>
> Since the plaintiffs are admittedly displaced as a result of the Project, there is no question of the presence of "state action" within the meaning of the Fourteenth Amendment. Where the relocation standard set by Congress is met for those who have access to any housing in the community which they can afford, but not for those who, by reason of their race, are denied free access to housing they can afford and must pay more for what they can get, the state action affirms the discrimination in the housing market. This is not "equal protection of the laws."[19]

Thus, the Norwalk case hinged on the difficulty encountered by black and Puerto Rican residents of a redevelopment area in finding comparable housing elsewhere. Residents charged that while there may have been no overt, or written evidence of discriminatory motive in the administration of the redevelopment project, the fact that some of those seeking relocation bore a greater burden by virtue of race and ethnicity should have been

accounted for in the planning of the project.

The relationship between the construction of the project and the relocation of project site residents was specified by the Federal laws governing the loans and capital grants made to the Norwalk Redevelopment Agency. Under 42 U.S.C. Sec. 145 5(c), the Agency must "provide, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, decent, safe and sanitary dwellings within the means of the families displaced by the project." The Court of Appeals in reversing the District Court found that while the Agency had documentation of the lack of space in public housing and the discriminatory nature of the private housing market, it still made no plans for adequate relocation. In fact, CORE argued, the Agency had a six-acre tract of city land near the project site at its disposal, but the tract was used for moderate, not low-income housing.

The significance of Norwalk CORE is that it requires agents of the State to anticipate the differential racial output of their actions and make every effort to insure that the level of service resulting from State action be racially equal. This means that far from being color-blind, the State has a positive responsibility to recognize the historical position of racial and ethnic minorities, since an ostensibly neutral policy like relocation may be subverted by social forces like housing discrimination. The emphasis on policy output in the Norwalk CORE decision is significant, since it is congruent with the emphasis on citizen experience and evaluation in the compound republic theory. The Norwalk CORE decision is also in keeping with the theory's emphasis on government evaluation of policy impact, which is discussed in Chapter I.

The Norwalk CORE Court recognized that housing discrimination in the private sector was beyond the scope of the redevelopment project in question, but it held the Agency responsible for recognizing the problem of discrimination and considering its impact in planning its service strategy; in this case, how and where to relocate project-site residents. This is quite clearly what Judge Smith meant when he said for the Court in Norwalk CORE that "'equal protection of the laws' means more than merely the absence of governmental action designed to discriminate."[20]

The other widely cited Federal decision on the question of State motivation in equal protection cases is Kennedy Park Homes Assn., Inc. v. City of Lackawanna, N.Y. which was also decided by the Second Circuit of the U.S. Court of Appeals. The Appeals Court decided Kennedy Park in 1970. The Appeals Court decision stands as the disposition of the case since the U.S. Supreme Court denied certiorari in 1971 to the disappointed defendants, the City of Lackawanna.

In finding for the plaintiffs, Kennedy Park Homes Assn., Judge Clark for the Second Circuit affirmed the finding of the U.S. District Court for the Western District of New York. In the lower court decision, Judge John Curtin held that a variety of zoning and other ordinances passed by the Lackawanna City Council had the effect of making the planned construction of a low-income housing project by the Kennedy Parks Homes Assn. impossible. In evaluating the Constitutionality of the effect these ordinances had on the Association's plans, Judge Curtin reasoned as follows:

> This court has already held that the facts warrant a finding that the acts of the defendants were a wilful contrivance to deprive plaintiffs of their housing rights. That alone is sufficient to warrant relief to the plaintiffs, but it must be noted that some discrimination resulted from thoughtlessness or failure on the part of City officials to consider or plan for the housing needs of all Lackawanna residents. The defendants may not escape responsibility by ignoring community needs or by failing to consider alternative solutions to city-wide problems.

> If the plaintiffs are deprived of equal housing opportunity, the result is the same whether caused by open, purposeful conduct, by a subtle scheme, or by sheer neglect or thoughtlessness.[21]

After listing the zoning ordinance which would have made the proposed subdivision a park, and the utility service ordinances that made the planned subdivision illegal, Judge Clark substantially adopts the logic of Judge Curtin's decision:

> This panoply of events indicates State action amounting to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation. . . .
>
> In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality. . . . The City has failed to demonstrate an interest so compelling. None of the planning experts had recommended that the acreage included in the /recreational zoning/ ordinance be unavailable for residential use. Nor did either of the master plans so specify.[22]

These facts together with the City Council's moratorium on new subdivisions made it unnecessary, from the perspective of the Second Circuit, to consider the motivation of the City and its officers. It may be argued that with such blatant actions on the record as the zoning and moratorium ordinances that the Kennedy Park Court broke no new ground (at least not new since Gomillion) in finding the motivation of the City's officers to be irrelevant.

As Kennedy Park indicates, even though Norwalk CORE was widely accepted, Federal Courts still found it better to find a discriminatory motive and rule on its illegality, than to ignore intent and rest a finding of discrimination on differential impact. Indeed, the Kennedy Park case is often cited on the irrelevancy of intent because the Court held that even though the record leads "inescapably to the conclusion that racial motivation resulting in invidious discrimination guided the actions of the city," such a finding was not really necessary.[23] Likewise, in Norwalk CORE the Court had little

difficulty implicating the State, since the Agency acknowledged that it had information forecasting a differential racial impact of its relocation policy. In Gomillion as well, though the Court protests the irrelevance of intent, the facts leave little doubt about the motive of the Alabama legislature. We find, therefore, that up to 1971 there was no judicial standard on municipal service equality based solely on the impact of policy without demonstration or implication of discriminatory motive.

Since none of the early municipal service cases rested solely on policy impact, it might seem doubtful that policy impact could ever be both necessary and sufficient to a showing of unconstitutional discrimination. This is a problem that usually has been dealt with tangentially by legal scholars in discussions of prima facie discrimination. However, a thorough examination of the relevancy of governmental motivation has been done by John Hart Ely.[24] What Ely has done is to analyze the role of motivation in key discrimination cases over the past twenty years and then consider what would be lost or gained by ignoring the question of intent altogether. He claims first, that the consideration of motive or intent detracts from the rationality of arguments on discrimination. To make this claim he adopts and modifies the reasoning used by Chief Justice Warren in U.S. v. O'Brien[25] and by Tussman and ten Broek in their analysis of equal protection litigation.[26] The "case against considering motivation," Ely argues, is made by three factors; which may be paraphrased as follows.[27]

- Ascertainability. The reliance on speeches made in legislative sessions and committee reports to determine motive, raises more problems than it solves. A judicial decision should not rest on the persuasiveness of an argument which has no formal status as law. The problem may be phrased in terms of the connection between behavior (voting for or against the bill) and the attitudes to make a connection that involves at worst, parapsychology and at best, amateur sociology.

- Futility. The problem raised here is indicated by a hypothetical situation in which a legislature decides to reenact a law invalidated by the Courts for improper motivation. However, in the reenactment the same law will be put in the context of acceptable motivation. This promotes legislative subterfuge and undermines the equity function of the Federal Courts.

- Disutility. Considering motive makes it possible to invalidate a law which has a positive social effect because it was passed with bad intentions. It also makes possible the more common situation of a law with clear, discriminatory effects remaining out of judicial reach because no discriminatory intention is discoverable.

Ely's argument leads him to propose a "rationality" standard which, he argues, removes the problem of motivation from equal protection litigation:

> Standard formulations of constitutional doctrine. . . advise that when a governmental act does not by either its terms or its impact violate the Constitution one must conclude:
>
> First, that it can be related rationally to a power entrusted to the person or department which performed it;
>
> Second, that to the extent it inhibits anyone's liberties, the inhibition is justified by its other effects and has been effected in accord with whatever procedural safeguards the Constitution requires; and
>
> Third, that any distinctions or choices which have the effect of treating some persons better than others are legitimately defensible in terms of some permissible government goal.[28]

There are several important problems with Ely's rationality standard. The one of most concern is that it may not remove all aspects of motivation from consideration. The language of his third point makes this apparent: "Legitimately defensible" according to whom and a goal which is "permissible" by whose leave? Determining the legitimacy, defensibility and permissibility of governmental goals strongly implies an examination of motive. In addition to being a critique of the use of motivation in constitutional law, Ely's argument also shows that unless the Federal Courts are willing to accept evidence of differential impact of policy alone as proof of discrimination, it will remain logically useful to consider the motivation of State officers.

But, is a finding of discrimination possible without an investigation of motive? Semantically it is not. Discrimination is the active separation of qualities.[29] While one race may bear a disproportionate burden as the result of a policy, it has not been "discriminated against" unless some agent has consciously separated out the quality of race. And even then, the separation must be shown to be harmful, since legislative classification by race can be shown to be beneficial (e.g. the Fourteenth and Fifteenth Amendments themselves).

A finding of discrimination is tied, therefore, to the investigation of motive. However, is a finding of discrimination necessary to a finding of deprivation of equal protection of the laws under the Fourteenth Amendment? It may be that the Equal Protection Clause was designed to eliminate the need to investigate intent and purpose. Two principles can be discerned from this discussion that may be used to address this issue; the anti-discrimination principle,[30] which includes the consideration of motive; and the disproportionate impact principle, which pre-empts a consideration of motive.

The distinction between the anti-discrimination and disproportionate impact principles raises two important issues, one political and one theoretical. The political issue is the relative benefit to the black community from either of these principles. It should be clear, at this point, that a consideration of the intricacies of motivation makes a showing of unequal protection quite difficult. Thus, the black community stands to benefit more, if at all, from the use of the more easily demonstrated standard--disproportionate impact.

The theoretical issue involves the relation of these two principles to the compound republic theory. It should not require an exegesis of The Federalist to argue that where local services are concerned and the equity

of local government is in question, that constitutional principle which is accessible to the individual citizen should be favored. This does not establish an absolute judicial preference for the citizen over the State. Rather it makes it possible for the citizen to accuse the State of unequal protection of the laws on the basis of a demonstration of disparities in that protection. Such a demonstration is not a simple task and would have to meet prevailing judicial standards which would likely be designed to eliminate frivolous or unsubstantiated accusations. However, in terms of the any-one rules principle, even exacting standards for disproportionate impact are to be preferred to the social-psychological tangle of a required showing of contemporary State motivation.

From the political perspective of the black community alleging inferior service, a disproportionate impact standard would also be preferable. However, the Federal Courts have not found the disproportionate impact standard to be superior to the anti-discrimination standard. Several additional cases dealing with municipal service equality prior to Hawkins v. Town of Shaw demonstrate the difficulty confronting the courts in distinguishing these two principles.

The development of litigation for public service equality

After the Norwalk CORE decision, Federal District Courts began to move away from the anti-discrimination principle and look to the impact of policy decisions for violations of equal protection. The problems presented by this shift are evident in the cases decided before Shaw which considered the distribution of services in small Southern communities. One such case is Coleman v. Aycock.[31] Coleman is pertinent to this discussion because it turns on the definition of service impact which is offered by plaintiffs as compared to the definition used by the court. The dispositon of Coleman

was settled by the U.S. District Court for the Northern District of Mississippi. District Judge Orma Smith's decision for the defendants was not appealed.

In Coleman plaintiffs alleged racial inequality in the provision of police protection in the city of Belzoni, Mississippi. The unit of measurement of impact introduced by plaintiffs was patrol assignment. They argued that since only black officers had been assigned to the black area of town and only white officers to the white area, there was discrimination in the provision of the service. Plaintiffs, however, offered no evidence of the output or results of this policy in the black community. And it was policy output, in line with Norwalk CORE, that Judge Smith used as a standard of inquiry and which allowed him to find for the defendants.

However, a second look at the facts in Coleman reveals a line of argument which was available to plaintiffs, but not used. In Coleman, and in a similar case, Hadnot v. Prattville,[32] plaintiffs made arguments under the anti-discrimination principle while the courts were using the disproportionate impact principle as a decisional standard. It was not until Shaw that the elements were first pieced together successfully. That is, the plaintiffs in Shaw argued disproportionate impact and the court was disposed to give the argument weight. A similar argument was possible in Coleman, if we pause to consider some facts from the record:

> The police force of the city of Belzoni consists of the city marshal, elected by the people, and eight policemen, three of whom are colored. The force has one police car. This car is used by the white policemen. The marshal uses his own car, as do the Negro policemen. These private cars are not fully equipped police cars, and do not have police lights and insignia of the police force. The Negro policemen are primarily assigned to patrolling the Negro section, but patrol the white section of the city at times. They are authorized to and do arrest individuals of both races, when the circumstances warrant. The white policemen, on the other hand, use the regular patrol car of the force and go to the Negro section when their services are needed. . . . It is clear to the court that there is no difference

> between the police service which has been rendered the Negro section of the city from that rendered the white section.[33]

So Judge Smith did not find disproportionate impact even though, as his conclusion shows, he was willing to compare service levels between the white and black sections. It should also be noted that it is only an agency activity measure that is being offered by plaintiffs. There is no attempt to show a difference in the output of service policy in terms of indicators like victimization, response time and citizen evaluation which were introduced in Chapter III. Instead, the above facts are measures of effort or input, i.e., does the city make the same effort to protect black citizens as white citizens?

Again, remembering that they were not part of plaintiff's case, it is possible to anticipate the more successful arguments in Shaw by adding several facts from other parts of the Coleman record to what is shown above. First, at the time of litigation, Belzoni had a total population of 4142 of which 2528 or approximately 61% was black. However, only one-third--three of the nine sworn officers--patrolled the district containing 61% of the population. And, while the black officers also patrolled the white section at times, the white officers did not patrol the black district, but only went there when needed. Further, the one fully-equipped patrol car was used almost exclusively in the white district.

What we find in Belzoni is a significant difference in the effort made by the city in protecting the two neighborhoods. (This is called input inequality in later cases.) That the city discriminates is quite clear from its matching of officers to neighborhoods by race. Whether the result of this discrimination is a deprivation of equal protection of the laws is, however, a separate question involving the measurement of service output.

Thus the plaintiffs in Coleman were caught between the two equal protection

principles. The Court was not disposed to consider the obvious input inequality, and they, as plaintiffs, did not provide evidence of unequal output which the Court might have considered to be a deprivation of equal protection. It is necessary that the preceding sentence be in the conditional tense. The Court might have found a deprivation of equal protection, but as Coleman shows, perspectives vary on what constitutes effort and what constitutes a constitutionally prohibited racial distinction.

It becomes apparent from the discussion of Coleman that courts hearing municipal service cases up to the Supreme Court ruling in Washington v. Davis were using a two diminsional standard. The first dimension is the difference between the anti-discrimination principle and the disproportionate impact principle. These are described in Norwalk CORE as sides of a dichotomy, but they are more properly labelled polar types in a continuum, since both principles are used concurrently with varying emphasis in cases before and after Norwalk CORE. A second dimension developes from the ambiguity at the impact end of this continuum. The ambiguity is suggested by the measures of effort used in the Coleman case. Is disproportionate impact dependent upon a difference in the level of effort (input) in providing a service or on the result (output) of the policy designed to provide the service or on some combination of the two? The problem, then, is whether impact means effort or result.

The citizen-orientation in the compound republic theory should guide us to place as much weight on results as possible. Chapter III contained an explanation of a series of resultant indicators based on citizen experience and evaluation. These indicators show that in some cases it is possible to assess the results of service provision, and to include in those results some aspects of both agency performance and citizen welfare. As Lineberry, Elinor Ostrom and others have suggested, the measurement of all aspects of

performance and welfare is far off, or perhaps impossible. Nonetheless, it is a significant goal both theoretically and practically. It is significant because it breaks the closed circle of bureaucratic self-evaluation and places a positive burden on the State to evaluate its actions in terms of their effects as felt by citizens. A positive responsibility would also eliminate the confusion over motivation described above. This point is taken up by John Hart Ely:

> Were the government affirmatively obliged. . . to take intentional steps to ensure that its laws will not unusually disadvantage certain racial groups, reference to motivation would be out of place in cases involving alleged racial injustice; a simple look at statistics, the actual comparative deprivation, would suffice.[34]

Of course, as we have seen, no one thing seems to suffice in determining racial justice--and certainly nothing simple. Nonetheless, by the time of the Shaw decision a more simple service equality standard seemed possible to many (including Professors Fessler and Haar in their brief to the Court). When it was handed down, the Shaw decision was heralded as a resolution of the ambiguous equal protection standards in favor of the disproportionate impact principle and an emphasis on output equality. Shaw, however, has proven to be of little precedential value. What will be explored in the next section is why Shaw did not bear out the promise it held for the black community.

Hawkins v. Town of Shaw

The finding for the black plaintiffs in Shaw was a reversal by the Fifth Circuit of the U.S. Court of Appeals of the ruling by the U.S. District Court for the Northern District of Mississippi. (The Town did not appeal further.) In the lower court's decision, written by Judge William Keady, the distinctions in public service between the white and black communities in the Town of Shaw, which will be discussed below, did not constitute a deprivation of equal

protection of the laws. As Judge Keady put it:

> /I/t would seem that determination of the necessity and character of public improvements, the matter of their construction and the priority of accomplishment, ordinarily, are questions to be resolved by officials, usually elected, who constitute the governing authority of the municipality. . .
>
> If actions of public officials are shown to have rested upon rational considerations, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review.[35]

As we shall see, the Fifth Circuit differed with the District Court on whether the distribution of service in Shaw "rested upon rational considerations." The Appeals Court also took up the question of whether a finding of rational consideration can admit racial distinctions in the provision of public services under the Equal Protection Clause.

The factual basis

The pattern of residence in Shaw, Mississippi, is almost completely segregated racially. It is therefore representative of other and larger American cities.[36] Out of a total population of 2500, 1500 of Shaw's citizens are black. Ninety-seven percent of the blacks in Shaw live in all black areas. Plaintiff's central allegation in Shaw was that the areas receiving the poorest quality public service corresponded to the areas occupied by blacks. Specifically:[37]

- 98% of the homes fronting on unpaved streets were black occupied
- 97% of the homes not served by sanitary sewers were black occupied
- All new mercury vapor street lights had been installed in white areas.

No attempt was made to assess citizen evaluation or experience, since the impact of service policy was felt by plaintiffs to be obvious from a "simple look at the statistics," as Ely put it. Further, funds for utility extension and maintenance were drawn from the general municipal fund in Shaw

and not from individualized "curb assessments" as is usual in most other American municipalities. This made Shaw a good place to seek a favorable judgement for a plaintiff black community.

Shaw did, in fact, bring a service equalization victory, and it appeared to be a broad, portable victory from the language of Judge Tuttle's majority opinion. He settled the Court's finding squarely on the impact of utility policy and used comparative racial disadvantage as a standard of judgment. "We have. . . been able to utilize what we consider a most reliable yardstick--namely, the quality and quantity of municipal services in the white area of town."[38] Thus, the Shaw Court was holding the State to a positive obligation. The inferiority of services which attends the less affluent life style in black neighborhoods could not be taken as given. This finding was opposed to the point of view which allows the State to accept the historical inferiority of black neighborhoods without compelling the State to counteract it. This opposing view was well presented in a dissenting opinion in the Shaw en banc decision by Circuit Judge Clark, joined by Judge Simpson:

> The District Judge was not clearly wrong in refusing to base his findings upon statistics cast into a racial mold. In essence he found that because the people of the Town of Shaw had living standards that varied according to their individual financial condition and social values, some of them occupied properties which required and permitted a lower level of municipal service than other properties.[39]

Judge Clark is saying that an inferior level of service is all that the Shaw black community should expect. His appeal in making this statement is to the scholastic interpretation that the equal protection guarantee applies only to individuals "similarly situated," and that the State may be permitted to vary service levels along with the variation in situation.[40] The factual basis of Shaw looks much different from Judge Clark's perspective. The "financial condition" and "social values" of the black residents of Shaw are indicated as variables distinguishing the situation of black neighborhoods

sufficiently to require and permit lower service levels. It is, of course, permissible constitutionally for the State to differentiate in service levels among classes of citizens. But if the classification to which the difference applies is one which the Federal Courts find suspect, such as race, then the reason for the pattern of service must be more than rational. It must be compelling.

The Shaw Court, however, found no "compelling State interest" which would justify the disparity in service quality. The difference between Judge Clark's perspective and that of the majority of the Court indicates plainly that contrary to a maxim quoted by Judge Tuttle in the majority opinion, facts and figures do not speak in the same way to all jurists.[41]

The institutional structure argument made in Chapter II provides a way to explain the different interpretations of the facts in Shaw. For Judge Clark, or rather, the position he represents, the structural constraints which shape and limit individual welfare do not warrant consideration in equal protection litigation. From the language of Judge Clark's dissent, the political and economic position of the black community in Shaw might be construed to be voluntary. The majority opinion, however, takes into account at least two of the major factors affecting the structure of political relations discussed in Chapter II; the relative concentration of political resources among groups and the responsiveness of political institutions.

As Judge Tuttle put it in outlining the relief the Court was granting to the black residents of Shaw, "we do require, however, that the Town of Shaw, itself, submit a plan for the court's approval detailing how it proposes to cure the results of the long history of discrimination which the record reveals."[42] While the court in Shaw found the State's immediate motive irrelevant, it held the State responsible for rectifying past de facto and de jure discrimination. In essence, the Shaw decision admits the impossibility of

finding any official directly culpable for the pattern of service delivery, and then goes on to assert that breaking the pattern is the job of the Federal Courts under the Fourteenth Amendment. In the "Remedy" section of the opinion, Judge Tuttle seems to be saying, "We must start somewhere, and there is no place better than city hall." However, in order to hold city hall responsible, the Shaw decision, like the public service cases it follows, inferred a discriminatory intent on the part of the municipal government. This was done in part by making the current town government a part of "the long history of discrimination" in Shaw which the court claims to have discovered. Another emphasis on intent resulted from the court's examination of State interest which will be taken up in the next section. The facts of the case, therefore, did not automatically trigger the equal protection guarantee. According to the Shaw decision, the Federal Courts may impose a positive obligation on the State to redress historical inequality in the provision of services. This implies that motive may be historically derived. It must be remembered, however, that the Shaw case was not heard by the U.S. Supreme Court. Therefore, its utility as a model for public service litigation was dependent upon the adoption of its legal basis by other Federal District and Appeals Courts.

The legal basis

The foundation of the Shaw case is a prima facie case of forbidden discrimination and the historical derivation of motive. These are also the points upon which the diffusion of Shaw depends. The logic of the prima facie case was argued by Daniel Fessler and Charles Haar in an amicus curiae brief in the Shaw case. (Fessler and Haar expanded their argument in an article in the Harvard Civil Rights - Civil Liberties Law Review.)[43]

The argument for the warrantability of prima facie discrimination and

historical motive may be thought of as a justification for the disproportionate impact principle. According to Fessler and Haar, once the two elements of the prima facie case are established, not only may motive be presumed, but the burden of proof--to show proportionate impact--shifts to the State. The two elements of prima facie municipal service discrimination which were identified by Fessler and Haar and recognized in the Shaw decision are "statistical proof of segregated residential patterns and the corresponding inequality of municipal services between those sectors."[44]

The "State," in this case being the Town of Shaw, did not dispute the pattern of residential segregation. However, it did argue that the second point was coincidental. The Town's argument was that a State interest compelled the distribution of services in question. An argument of "compelling state interest" reintroduces the issue of motivation. The burden of such an argument is a description of the State as a service producer which must work within the parameters of settlement patterns and social values for which it bears no reasonable responsibility. And, indeed, Federal Courts have accepted this as a defense against the prima facie case.[45]

The Town of Shaw argued that its policy of utility service provision was designed in response to a rational assessment of needs. Thus, commercial streets and well-travelled thorough-fares were paved before other streets. Under most circumstances this would be an acceptable policy. However, the Court found that it was not until 1965 that any roads in the black community were paved, and by that time 96% of Shaw's white residents lived on streets paved in the 1930's. Similar arguments were made with respect to sewer services and street lights, and they were found similarly uncompelling, often because of testimony of the Town's engineer. Judge Tuttle concluded, "that Shaw's policies, which have resulted in such significant disparities between the black and white portions of town, are, in no way, justifiable."[46]

What becomes apparent in the section of the majority opinion rejecting compelling State interest is that despite protests of its irrelevance, motivation had become a central issue. The whole discussion of State's interest is an attempt by the Court to be certain that disproportionate impact is not just the unlucky result of an otherwise well-intentioned, logical policy. Only once this possibility is dispelled does the Court apply the equal protection guarantee. Consequently, while de jure discrimination, involving a showing of intent, was not demonstrated, it was implied by the showing of de facto discrimination. Just as the Norwalk CORE Court could not entirely disregard motive, neither could the Shaw Court. This should not be too surprising since, as noted earlier, discrimination is a conscious, cognitive process and naturally raises questions of motive. What is surprising, is that both Norwalk CORE and Shaw have been considered examples of equal protection litigation based on impact alone--and were mentioned disapprovingly by the U.S. Supreme Court for that reason.

To understand the fragility of the compromise worked out in Shaw through the prima facie case, a stronger standard of judgement may be posed for contrast; a standard that would admit only racial impact as evidence. This is what Norwalk CORE and Shaw claimed to do. Such a "pure impact" standard would not claim that motive is irrelevant to discrimination--which is to redefine discrimination--but, rather, that discrimination is irrelevant to a finding of racially unequal protection of the laws. However, a pure impact standard has not developed and equal protection cases continue to be discrimination cases.

The plaintiff's role in the extension of the Shaw decision

What has been argued in the previous section is that in spite of all disclaimers, the Shaw Court included motivation in its inquiry. This

inclusion, however, was not recognized by the civil rights groups that sought to extend Shaw as a precedent in other geographic areas and for other types of services. One of the first questions raised in this thesis was that of the feasibility of the constitutional litigation strategy. The success of any strategy is to some extent dependent on the strategist's knowledge of its parameters. Quite simply, the plaintiffs in later service equalization cases did not understand the parameters of the litigation. As this section will show, this ignorance--or, lack of analytic distance--resulted in several serious set-backs for proponents of service equalization through litigation. This section will explore the reason for these set-backs and how they affect future service equalization litigation.

In 1971, on the heels of the Shaw decision, an effort was made by minority group plaintiffs to apply Shaw to a dispute over the quality of recreational facilities in one area of New York City. That case, Beal v. Lindsay, was first heard by the U.S. District Court for the Southern District of New York. District Judge Edmund Palmieri issued an order dismissing the complaint by "black and Puerto Rican residents living in the neighborhood of Crotona Park alleging that New York City unconstitutionally discriminated against /them/ by failing to maintain the park in a condition equilalent to that of other multi-community parks in the Bronx."[47] Plaintiffs appealled Judge Palmieri's order to the Second Circuit of the U.S. Court of Appeals. The Court of Appeals, in Chief Judge Friendly's unanimous opinion, affirmed the District Court order. Disappointed plaintiffs did not appeal further.

Plaintiffs in Beal claimed that municipal resources devoted to maintaining and recapitalizing a particular park used predominantly by blacks were inferior to the resources devoted to a similar park used predominantly by whites. No attempt was made by plaintiffs to show discriminatory intent on

the part of the City. Instead, plaintiffs read Shaw as an affirmation of the disproportionate impact principle and cast their argument solely in terms of what they considered to be output measures; i.e., the functioning of facilities and the cleanliness of grounds relative to the white park. Plaintiffs accepted, however, that relative levels of resource input were equal; i.e., the number of maintenance personnel, scheduled park activities, and the purchase of facilities.

Answering plaintiff's claim of differential output, New York Parks Commissioner August Hechscher indicated several factors he considered to be beyond his department's control. Most of these factors involved the problem of vandalism. Plaintiffs offered no rebuttal. Instead, they rested their claim on the notion that the Shaw decision had established output equality and the irrelevance of motivation as portable principles. Chief Judge Friendly dispelled this notion by finding that the City had not violated the Equal Protection Clause. In dismissing the complaint he indicated that no specific State action or motive had been shown by plaintiffs. In addition he argued that there must be a limit to the scope of control of any State agency over the results of its efforts:

> Implicit in plaintiff's case is the proposition that the equal protection clause not merely prohibits less state effort on behalf of minority racial groups but demands the attainment of equal results. We very much doubt this when, as here, the factor requiring added effort is not the result of past illegal action. Nothing in Hawkins v. Town of Shaw . . . suggests that if the Town had installed modern street lamps in the black quarters and these were repeatedly vandalized, the town must go on and on, even though this would mean a greater unit expenditure than in other areas. In a case like this, the City has satisfied its constitutional obligations by equal input even though, because of conditions for which it is not responsible, it has not achieved the equal results it desires.[48]

With Beal v. Lindsay, equalization litigation crosses over into the realm of less easily quantified public services. There is not usually much

debate over the criteria that should be used to distinguish effort from output in utility service provision. There may be arguments of degree, dealing with pressure or main-line diameter, but the crucial output factor is the physical existence of pipes and connections. And if debate is possible over output definition for these more easily quantified services, it is inevitable in a dispute over the adequacy of yet more complex services, as Judge Friendly points out. We must return to the point raised in Norwalk CORE and disputed in every case reviewed thus far including Beal v. Lindsay; that is, what is the scope of governmental responsibility in the provision of services? Does it go past the effort involved in providing a service?

Any answer to the question of governmental responsibility will have a subjective value as a premise, since any answer will involve some idea of the relation between the individual and the State. Unfortunately, there is no direct identification of a central value in either the decisions or the academic commentary on them. Plainly stated, the legal literature on service equality has no obvious theoretical basis. As shown above, the questions of motivation and impact are argued from unclear and misunderstood precedents, rather than from any coherent structure of reasoning. Whether it is possible for Federal Courts to make constitutional law from constitutional theory is not at question here; although it indicates a significant field of inquiry. What is being examined here is the effect on further service equalization litigation of the lack of guiding principles. By examining the judicial role in this litigation, the next section of this chapter confirms this lack.

The judicial role in the extension of the Shaw decision

Instead of a conscious, direct decision by District and Appeals Courts to either facilitate or disapprove the assertion of black citizen preference,

the cumulative effect of the service equality cases was a slow constriction of the legal basis of judicial recourse. Thus, the complaint in Beal v. Lindsay fails not only because it is too narrowly presented--it relied on effort measures only--but because, even if a broader case had been made, the legal basis of service equalization litigation had so constricted by 1972 that only cases involving the most obvious and superficial sort of discrimination would trigger the equal protection guarantee. The reasons for the constriction of the standard by the courts may be labelled as follows: a sub-rosa standard of motivation; confusion of input and output equality;[49] isolation of services in litigation; and reluctance to consider historical factors. The sum of these reasons is the lack of a guiding principle or judicial theory for public service litigation and the consequent decline in the precedential value of the Shaw decision. But before exploring the consequences of all this, each element should be explained.

A sub-rosa standard of motivation

Most of the service equality cases deny it, but motivation, proof of intent to discriminate without "compelling State interest," has remained a pre-condition to a finding of State deprivation of equal protection. This is an important factor because the language of Norwalk CORE and Shaw raised hopes among advocates of service equalization across the country. The actual logic of the cases, however, did not sustain those hopes. Plaintiffs such as Beal did not see the necessity of arguing that there was some de facto connection between the condition in their complaint and a discretionary action of the State. Such a connection, whether it was called unconstitutional discrimination or not, was necessary to the findings for the plaintiffs in Norwalk CORE and Shaw, and the lack of the connection resulted in a finding

for the defendants in Beal v. Lindsay. This is because, as service equalization litigation developed, Federal Circuit Courts attempted to eliminate intention as a trigger of the Equal Protection Clause without discovering or proposing any other clear principle to replace it. The effort made to develop an impact standard, as argued above, was abortive, since as conceived, it too, was based on finding legally prohibited discrimination and a discriminator, even if indirectly.

Confusion of input and output equality

The question of whether the State ought to be held responsible for equality of the results of service policy or just the effort made was recently taken up by Robert Lineberry. He argues that while output equality is a laudable goal, there are two reasons why it will not and possibly should not be used by the courts as a standard of judgement. Firts, "(t)he present state of knowledge in the social sciences probably cannot support a challenge to service inequalities based on the output concept."[50] Second, "(a)ssuring equal output (for example, equivalence of crime rates, educational results, fire loss rates) is simply beyond the present capacity of most public authorities in the United States."[51]

Certainly one must agree with Lineberry and Judge Friendly, that the scope of governmental responsibility is limited and so is the ability of social science to determine or even identify the "result" of a policy. Nonetheless, Lineberry's argument against an output standard should be qualified somewhat. To begin with, his first point about the capacity of social science is dependent upon the second point. What social science can do is dependant to an extent upon what it is being asked to do. For example, it would be unjust to hold the police solely responsible for a differential crime rate between white and black neighborhoods. Any attempt to develop an empirical

explanation of the difference would run afoul of the complex social and psychological factors that cause crime. As the President's Commission on Law Enforcement and the Administration of Justice puts it: "The police are only one part of the criminal justice system; the criminal justice system is only one part of the government; and the government is only one part of society."[52]

However, calling the crime rate an output of police service is to fall into the trap of expecting a Pareto or one-best solution to the problem of agency performance measurement. Thus, to dismiss output equality because it cannot insure perfectly equal police service is to ignore the possibility of developing other useful output indicators such as those based on citizen experience and evaluation. For the instant case such indicators would be similar to those used in the illustrations in Chapter III.

The confusion between input and output equality lies (as do many confusions in service equalization litigation) in the tendency of analysts and judges to set the extremes of each concept in a dichotomy. Thus input is identified with the physical installation of utility lines and output is defined by long-range social welfare. As social scientists have found in using systems analysis, this is an oversimplification. Any output can be considered an input in a more broadly construed system and any input can be considered the output of a more narrowly construed system. This is the means/ends fallacy. For example, it is not impossible to consider the cleanliness of the park in Beal v. Lindsay as an input necessary to the healthful enjoyment of the facility. Nor is it impossible to conceive of the street lamps in Shaw as outputs of a decision making process of the Town's public works officials.[53]

Isolation of services in litigation

Service producers do not act in a vacuum in any city. Zoning regulations affect utility line extension. Street lighting and urban planning affect public safety. In municipal service litigation up to now, each service has been considered independently, even if inequality in more than one service has been alleged. There are two reasons for this. First, very often plaintiffs' information about the operation of the service bureaucracy is incomplete, and the connections between the alleged inequality and institutional structure is not apparent. This was the case in Beal v. Lindsay. In delivering his opinion in Beal, Judge Friendly noted that plaintiffs might have argued that police protection in the black park was lax and therefore, allowed vandalism.[54]

The second reason for the isolation of services (Judge Friendly's role aside) is the Federal Courts' reluctance to become involved too deeply in internal municipal affairs. This is a long standing detachment based on a belief in popular determination at the local level and what the Courts consider to be the principles of Federalism. Nevertheless, in several metropolitan areas, educational policy on pupil distribution and recently, on the need for remedial programs is now being made by Federal judges.[55] As argued in the opening section of this chapter, the special status given to educational policy under the equal protection guarantee was established by the Brown Court's broad, generalizable finding of racially inferior service. Such a basis most likely cannot be established for the provision of other public services.

Reluctance to consider historical factors

It was mentioned above that the Shaw decision seemed to indicate a way to hold city officials responsible for inequality in service distribution

without finding anyone directly culpable. The way indicated by Judge Tuttle was reliance on an historical record of unequal service. This technique has not been used in subsequent cases. In addition to isolating each service in space (from other services) the courts have sought to limit the scope of their inquiries into service inequality by isolating each case in time as well. The next two cases to be discussed--the last two in the service equalization line--illustrate time isolation. These two cases also bear the imprint of the other three factors: sub-rosa motivation, input/output confusion and service isolation. The analysis of these two cases will make it possible to assess the current status of service equalization litigation.

The Decline of Constitutional Litigation for Service Equality: Burner v. Washington and Washington v. Davis

Burner v. Washington[56] was heard by the U.S. District Court for the District of Columbia and was decided in July of 1975. The case originated in that court and was not appealled further by Burner, the disappointed party. In Burner plaintiffs alleged that in comparison to a wealthy white neighborhood near Rock Creek Park, the black Anacostia community was served inadequately by the Washington Metropolitan Police Department. Burner's complaint was dismissed by the District Court to a great extent, on the basis of research done by the Urban Institute. A publication of the Institute cites the following from the Court's decision:

> All parties accept the Urban Institute study as a valid and accurate evaluation of the current situation. That study indicates equality in police services. Any prior inequality has been remedied by the political and administrative machinery.[57]

In Burner the Court relied very heavily on data collected with social scientific methods. As the excerpt above states, the Urban Institute's study indicated no inequality in police service between the white and black

areas. Under other circumstances Burner might be considered a set-back for the proponents of equalization litigation, but perhaps an advance in the judicial application of social research. However, when the Urban Institute's study is more closely examined it is clear that it is also a set-back for the application of social research and that it may have caused an unwarranted set-back for equalization litigation. There are several reasons for this conclusion.

While the Urban Institute report does employ several output measures comparable to those discussed in the previous chapter, i.e., citizen satisfaction and police response time, the measurements are taken from a survey conducted three years prior to the Burner litigation. The areas surveyed in the original research do not match those under consideration in Burner, but overlap them at several points. Further, the survey was conducted "as part of an evaluation of policewomen as patrol officers in the District of Columbia." Such a special interest focus in survey research will often weight the respondent's attitudes on other issues according to his or her feelings about the central issue.[58] In spite of these limitations, the report finds some reason to suspect that the black neighborhood is receiving inferior service:

> Anacostia /the black area/ appears from a citizen survey to have relatively poorer services, in respect to police response time, than some other sections of the city. The data on this score are only suggestive of a difference, however, and they bear further investigation.[59]

This point was not explored further, nor was it emphasized in the report's conclusions. In fact, the Court takes no notice of the indicated suggestion of a difference and finds for the City. The apparent basis for the Court's finding was the summary statement of the Urban Institute report. This report, in addition to the above finding of some difference in citizen

experience and evaluation between the two areas, concluded the following:

> The District of Columbia is following acceptable management standards in its method of distributing police services between its relatively affluent area west of Rock Creek Park (District 2) and its relatively poor Anacostia community (Districts 6 and 7).
>
> - Police inputs /personnel assignment and ratio of officers to indexed crime/ are distributed equally;
> - Property crime rates have followed more favorable recent trends in Anacostia than west of the Park;
> - Violent crime, which includes crimes between acquaintances and relatives, is reported to the police more frequently in Anacostia;
> - Clearance rates--representing the success of the police in identifying and apprehending criminals--are roughly equal west of the Park and in Anacostia;
> - Citizen satisfaction with police services, as measured by a recent survey, indicates a high level of satisfaction with police services in the city, including Anacostia. . .[60]

District Judge Gasch incorporates these findings in his opinion for the Court in the brief statement cited above admitting the validity and accuracy of the Institute's evaluation.

Burner v. Washington is a pivotal case in this line not only because it was an attempt to apply Shaw to a service other than a utility, but because the District Court gave full credibility to social scientific analysis of the complaint. A study which had been tailored to the situation and designed by researchers familiar with the central factors in the litigation might have clarified or perhaps expanded the legal basis of service equalization, even if the instant complaint failed. This might have established a continuing role for social research in service equalization cases.

The relationship between public policy research in social science and judicial decision-making would seem to be a natural one. Federal Courts have made policy decisions ever since Marshall articulated the judicial review standard. Beginning with the school desegregation cases, the courts

included an additional aspect of public policy in their considerations; that is, the impact of policy decisions on various segments of society. The central problem introduced by the consideration of impact is measurement. If a plaintiff charges disproportionate impact, the court must have a standard for admitting evidence. Is the very fact of complaint and supporting testimony enough, or is some systematic, standardized measurement necessary?

In Brown v. Board of Education social scientific analysis of the negative impact of segregation on black students was accepted as evidence. It was accepted because the analysis fit the legal questions posed by the court.[61] And because the court had placed education in a special category above all other local public services:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[62]

It is not unreasonable to think of police protection and other services related to the health and safety of the population as being equally as important; so that when a State does provide them, they "must be made available to all on equal terms." Education has gained a special status because of the belief that it is the way for minorities to leave behind neighborhoods with inferior services. Like urban renewal, scatter-site housing, and open market codes, education emphasizes a way out of the black community. What is left behind--the ghetto slum--has taken on lower priority.

It is simply not clear to many jurists and other public officials--as Judge Clark indicated in Shaw--that there is any connection between the quality and organization of service provision and the quality of life. However, there is evidence that suggests there is such a connection. The arguments made in Chapter II and the research done on police protection discussed

in Chapter III show that service provision has implications for at least the nature of citizen experience of that service.

One important difference between the development of the school desegregation cases and the municipal service cases is that in the former the integration of substantively related social research and prevailing legal standards was achieved; in the latter, it was not. There are two reasons for this. First, the social science research substantively related to service policy impact and the litigation itself were developing concurrently. The research of Ostrom, et al. was published two years after Shaw, and concurrently with Burner. In contrast, a footnote in the Brown decision cites scholarship on the detrimental effects of segregation that goes back to Myrdal ten years earlier and up to Kenneth Clark's "Effect of Prejudice and Discrimination on Personality Development," published in 1950.[63]

Secondly, while it is possible that public policy research might have been used in post-Burner litigation, the U.S. Supreme Court has reduced further, the legal basis available to plaintiffs for service equalization. This means that there is less chance or incentive now, for an integration of legal analysis and social research. The case which may signal the end of service equalization litigation is Washington v. Davis, decided in June of 1976.[64]

In Washington v. Davis two unsuccessful applicants for positions on the Washington, D.C. Metropolitan Police Department alleged that the entrance test, administered by the U.S. Civil Service Commission, was racially discriminatory. The relation to service distribution came with the effort of the Metropolitan Police Department to recruit black officers in order to better reflect the racial make up of the city. However, the "critical fact"--and the one used by the Court of Appeals to sustain the complaint--was that "a far greater proportion of blacks--four times as many--failed the test than did whites."[65]

However, Davis was brought first to U.S. District Court for the District of Columbia which found that the Police Department's hiring practices did not deprive plaintiffs of the equal protection of the laws. In his Memorandum Opinion and Order, District Judge Gesell found as follows:

> Plaintiffs show that:
>
> (a) The number of black police officers, while substantial, is not proportionate to the population mix of the city.
>
> (b) A higher percentage of blacks fail the Test than whites.
>
> (c) The Test has not been validated to establish its reliability for measuring subsequent job performance. . .
>
> There is undisputed positive proof that the Department has followed a vigorous, systematic and persistent affirmative effort to enroll black policemen. The relatively higher percentage of black test failures must be appraised by taking into account this all-out effort to generate applications from blacks which may well have encouraged applicants with educational deficiencies to apply. . .
>
> The Metropolitan Police Department is a model nation-wide for its success in bridging racial barriers. It would be a setback for blacks and whites alike to lower standards of recruitment. The proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability.[66]

As is apparent from this excerpt, Judge Gesell rests his order on an assessment of the effort made by the Police Department. In doing so, the District Court did not reach the motivation question.

As previously noted, the U.S. Court of Appeals for the District of Columbia reversed the District Court. It did so in a majority opinion by Judge Robinson. (The dissent by Circuit Judge Robb would have substantially affirmed Judge Gesell's argument.) In his opinion for the Court, Judge Robinson, like the lower court, does not reach the motivation question, but for a different reason. Judge Robinson bases his ruling for the plaintiffs on what he calls "the racially disproportionate impact of Test 21."

> The /earlier/ cases hold, and we agree, that evidence establishing that significantly more blacks than whites fail a written entrance examination given to all applicants is sufficient, as a matter of law, to show the racially disproportionate impact of the examination.[67]

The Court then went on to find such disproportionate impact to be unconstitutional. As we shall see, the Supreme Court, to which the Police Department appealled, did not agree with Judge Robinson's use of the disproportionate impact principle.

In presenting their case to the high court, plaintiffs argued once again that the test was culturally slanted and that it did not test for job related skills. The U.S. Supreme Court in Justice White's majority opinion rejected both claims; the former, because, as Judge Gesell had found, a great many blacks had passed the test; and the latter because the test's emphasis on verbal and communication skills was found to be related to successful completion of academy training. The Court admitted that training-program relatedness and job performance relatedness were two different things. Nonetheless, it found the training-program validation study of the District Court to be a "much more sensible construction of the job relatedness requirement" than the claim that the test was irrelevant to actual performance.[68]

The debate over job-relatedness is not over, and it continues in the direction indicated by the dissent to White's majority opinion filed by Justice Brennan joined by Justice Marshall. However, job-relatedness and inherent cultural bias were not the only issues in the case. The question upon which the holding is based is one of motivation or purpose to discriminate on the part of the government. It was by indicating that no clear showing of discriminatory intent had been made that the Court was able to accept the fact that a disproportionate number of blacks failed the test. And, it was by way of affirming the necessity of demonstrating discriminatory intent that the Court specifically disapproved of Shaw and Norwalk CORE as precedents.

> /V/arious Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory

> purposes, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] The cases impressively demonstrate that there is another side to the issue; but with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.[69]

It is in footnote 12 (which is a list of the cases) that Shaw, Norwalk CORE and Kennedy Park are disapproved of to the extent that they rest on or express the irrelevance of purpose.[70] However, as argued above, while each of these cases does express the irrelevance of purpose, they nevertheless do rest on a showing of purpose or motivation. Whether it is called lack of "adequate anticipation" as in Norwalk CORE or a "long history of discrimination" as in Shaw, the service equalization cases did indeed consider purpose. In Washington v. Davis, the Supreme Court has dichotomized the issue of purpose into categories of explicit necessity and explicit irrelevance. In doing so, the court ignores the slightly more subtle methods available to plaintiffs for showing discriminatory motive.

Summary

Constitutional litigation for urban service equality has declined because of the lack of integration among three key elements: the judicial standard on motivation in equal protection cases, the form of unequal service cases brought by black plaintiffs, and the measurement of urban service output. The judicial standard was hard to find, much less integrate. It waivered between the irrelevance of state motivation and the implication of motivation in de facto discrimination. The uncertainty caused by the lack of a clear motivation standard was compounded by multiple definitions of service output. Without any guiding theory or principle informing their opinions, the Federal Courts handed down a number of service equalization decisions that failed to establish

any firm precedent on the question of racial differences in urban service provision. As a consequence, the judicial recourse called for by the compound republic theory was not made available.

For their part, black plaintiffs attempted to expand the victory they had won in the Shaw case, but failed because they did not recognize the main characteristics of this litigation up to Shaw; a sub-rosa standard of motivation, confusion of input and output equality, isolation of services in litigation, and reluctance to consider historical factors. As a result, they were unable to use the Federal Judiciary as a recourse from unequal treatment by local government.

One argument that might have helped to integrate these three elements did not receive much attention until it was too late. That argument concerns the citizen-orientation to the measurement of urban service output. This argument, with its analytical foundation in the compound republic theory, allows for an assessment of some aspects of government performance from the perspective of citizen welfare. If the connection between performance and welfare can be made at all--and this question cannot be fully answered here--then the question of motivation may become less important. Instead, judicial emphasis might shift somewhat to the empirical examination of citizen experience and evaluation. However, such a shift has not come about. This may be, to some degree, because the citizen-orientation did not become a significant part of the debate over urban service measurement until around the time of the Burner decision. Whatever the reason, the lack of judicial development of a citizen-orientation to the problem of service equality has also contributed to the decline of constitutional litigation as a recourse available to blacks.

The next chapter considers the analytical and empirical consequences of service equalization litigation. This is done primarily in terms of the compound republic theory. However, in order to place these consequences in

the context of the wide range of arguments in Chapters I-IV, the chapter begins with a summary and recapitulation of the major analytic assumptions and empirical findings in this dissertation.

Notes

1. Washington v. Davis, 96 S.Ct. 2040 (1976).

2. Brown v. Board of Education, Topeka, 346 U.S. 483 (1954).

3. Ibid., p. 495.

4. Sidney Verba, "The Supreme Court, Segregation, and Social Research," Temple Law Quarterly, 31, 1, p. 1.

5. Brown, p. 494.

6. Ibid., p. 495.

7. Daniel Fessler and Charles Haar, "Beyond the Wrong Side of the Tracks: Municipal Services at the Interstices of Procedure," Harvard Civil Rights--Civil Liberties Law Review, 6, p. 446.

8. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

9. Ibid., p. 340.

10. Ibid., p. 347.

11. Richard Bardolph, The Civil Rights Record: Black Americans and the Law (New York: Thomas Y. Crowell, Co., 1970), p. 373.

12. Reitman v. Mulkey, 387 U.S. 369 (1967).

13. California Constitution, Sec. 26, added to Art. I; see RRLR, 1894.

14. Reitman, p. 369.

15. Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (1971).

16. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (1968).

17. Kennedy Park Assn. Inc. v. City of Lackawanna, N.Y., 436 F.2d 108 (1970).

18. 42 F.R.D. 622.

19. Norwalk CORE, 395 F.2d 930,931.

20. Ibid.

21. Kennedy Park Homes Assn., Inc. v. City of Lackawanna, 318 F. Supp. 696, 697.

22. Kennedy Park, 436 F.2d 114.

23. Ibid., p. 109.

24. John Hart Ely, "Legislative and Administrative Motivation in Constitutional Law," Yale Law Journal, 79, p. 1205.

25. U.S. v. O'Brien, 391 U.S. 367 (1968).

26. Joseph Tussman and Jacobus ten Broek, "The Equal Protection of the Laws," California Law Review, 37, p. 341.

27. Ely, "Legislative and Administrative Motivation in Constitutional Law," pp. 1212-1214.

28. Ibid., p. 1216.

29. While the definition of discrimination used here is my own, it corresponds to conventional usage. In Webster's New World Dictionary, 2nd ed., discrimination is defined as "the ability to make or perceive distinctions . . . a showing of prejudice in treatment."

30. The dimensions of the anti-discrimination principle are outlined by Paul Brest, "The Supreme Court, 1975 Term--Forward: In Defense of the Anti-Discrimination Principle," Harvard Law Review, 90, 1, p. 1.

31. Coleman v. Aycock, 304 F. Supp. 132 (1969).

32. Hadnot v. Prattville, Ala., 309 F. Supp. 967 (1970).

33. Coleman, pp. 143, 144.

34. Ely, "Legislative and Administrative Motivation in Constitutional Law," p. 1285.

35. Hawkins v. Town of Shaw, 303 F. Supp. 1168 (1969).

36. A statistical explanation of the extent of racial segregation in American cities is provided by Karl E. Taeuber and Alma F. Taeuber, Negroes in Cities (Chicago: Aldine, 1965).

37. Shaw, 437 F.2d 1287.

38. Ibid., p. 1292.

39. Hawkins v. Town of Shaw, en banc, 461 F.2d 1183 (1972).

40. Tussman and ten Broek, "The Equal Protection of the Laws," p. 344:

> "The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated."

41. Judge Tuttle quotes as follows from Brooks v. Beto, 366 F.2d 1,9 (1966):

> "(F)igures speak, and when they do, courts listen."

42. Shaw, 437 F.2d 1293.

43. Fessler and Haar, "Beyond the Wrong Side of the Tracks," passim.

44. Ibid., p. 446.

45. Beal v. Lindsay, 468 F.2d 286 (1972).

46. Shaw, 437 F.2d 1289.

47. Beal, 468 F.2d 287.

48. Ibid., p. 290.

49. A discussion of input vs. output equality may be found in Robert L. Lineberry, "Mandating Urban Equality: The Distribution of Municipal Public Services, Texas Law Review, 53, p. 26.

50. Ibid., p. 51.

51. Ibid., p. 52.

52. Quoted at Ibid., p. 52.

53. On the question of outputs and policy impact see: Herbert Jacob and Michael Lipsky, "Outputs, Structure, and Power: An Assessment of Changes in the Study of Local Politics, Journal of Politics, 30, p. 510.

54. Judge Friendly indicates this argument as a possibility in note 3 of his Beal decision, p. 290:

> "The plaintiffs have not argued that the vandalism afflicting the park can be attributed to police protection that was unequal or unreasonably low in other demands on the police."

55. An illustration of the extent to which the Federal Judiciary is involved in local educational policy may be found in Milliken v. Bradley, 433 U.S. 267 (1977).

56. Burner v. Washington, 399 F. Supp. 44 (1975).

57. "Note," Search: A Report of the Urban Institute, 5, 7, p. 1.

58. See especially: Charles H. Backstrom and Gerald D. Hursh, Survey Research (Evanston, Ill.: Northwestern University Press, 1963), Ch. II, passim.

59. Peter Bloch, "Equality of Distribution of Police Services--A Case Study of Washington, D.C.," Urban Institute Paper, 712-12-1, p. xi.

60. Ibid.

61. Brown, p. 492:

"We must look. . . to the effects of segregation itself on public education."

62. Ibid., p. 493.

63. Ibid., note 11, p. 494.

64. Washington v. Davis, 96 S.Ct. 2040 (1976).

65. Ibid., p. 2046.

66. Washington v. Davis, 348 F. Supp. 16-18 (1972).

67. Davis v. Washington, 512 F.2d 960 (1975).

68. Washington v. Davis, 96 S.Ct. 2053 (1976).

69. Ibid., p. 2050.

70. Ibid., Footnote 12, in part:

"In other contexts there are Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (CA2 1968) (urban renewal); Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108, 114 (CA2 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1265, 28 L.Ed.2d 546 (1971) (zoning); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (CA9 1970) (dictum) (zoning); Metropolitan H.D. Corp. v. Village of Arlington Heights, 517 F.2d 409 (CA7), cert. granted, December 15, 1975, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975) (zoning); Gautreaux v. Romney, 448 F.2d 731, 738 (CA7 1971) (dictum) (public housing); Crow v. Brown, 332 F. Supp. 382, 391 (N.D.Ga. 1971), aff'd, 457 F.2d 788 (CA5 1972) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (CA5 1971), aff'd on rehearing en banc, 461 F.2d 1171 (1972) (municipal services)."

CHAPTER V

SUMMARY AND CONCLUSIONS: EMPIRICAL AND ANALYTICAL CONSEQUENCES OF THE DECLINE OF CONSTITUTIONAL LITIGATION FOR RACIAL EQUALITY IN THE PROVISION OF URBAN SERVICES

Summary and Review of the Preceding Argument

One of the contentions of this thesis has been that the political analysis of changes in constitutional law requires a theoretical framework. Since the U.S. Constitution itself is grounded in a theory of the state and of political relations, one might consider whether a similar theory is the basis for the elaboration or modification of the Constitution. The line of cases explored in Chapter IV was an attempt by black plaintiffs to elaborate the Equal Protection Clause so that it would apply to the provision of municipal services. This attempt has been largely unsuccessful. What the failure of this elaboration will mean for the Constitution and the status of the Equal Protection Clause depends on what one takes the Constitution to mean in the first place.

The first chapter of this dissertation presented a theory of the design of the Constitution as it applies to the litigation under discussion. Chapter I sets out the compound republic theory as a structural explanation of the safeguards inherent in the Constitution. These safeguards were designed to thwart both the tyranny of the state and the violence of majority and minority faction among citizens. It is within the context of this theory that the current political position of blacks in urban areas may be understood. It is this theory also which can begin to explain the consequences for the black community and for the Constitution of the decline of constitutional litigation for service equalization.

In order to arrive at a point where empirical and analytical consequences may be discussed, this dissertaion has taken the following analytic steps in the first four chapters:

- an explanation of the theory behind the U.S. Constitution;
- a description of the political position of blacks in urban areas in terms of the guarantees of individual decision making power within the Constitution;
- an empirical illustration of some aspects of categorical inequality in the provision of public services to the black community;
- a description of a strategy of constitutional litigation pursued by several urban black communities in attempting to apply a pivotal safeguard, the Equal Protection Clause, to State action which categorizes blacks in the provision of inferior public services.

The first part of this summary will review the two analytical assumptions which underlie the discussion of constitutional safeguards and which provide a framework for analysis of the situation of the black community described in Chapters II and III.

Major Analytical Assumptions

First assumption

Among other safeguards of individual political power in the compound republic scheme is a series of civil rights designed to prevent (and redress) categorical political inequalities.

There is a variety of ways to consider the problem of establishing a political constitution. One of the more common perspectives on this problem focuses on the relative political autonomy of the individual. Such a perspective raises several questions. Should the authority to allocate resources be centralized at all? If so, how much, if any decision making power can and should be left to the individual? What is the "proper" balance between the political power of the state and the political power of the individual? How can any balance between the state and the individual be maintained?

The U.S. Constitution establishes a central government with limited allocative authority, and it states quite plainly that "/t/he powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people." However, as Madison pointed out, the people will inevitably form self-interested factions which may, upon occasion, mitigate the autonomy of others who may have differing interests. To deal with this problem, the Constitution provides recourse from local factional interests by establishing a Federal Judiciary with the authority to issue rulings which "shall be the supreme law of the land. . . anything in the Constitution or laws of any state to the contrary notwithstanding."

The great majority of the black population of the United States was an exception to the safeguards of the individual in the Constitution of 1789. Most blacks were individuals without political power. They constituted a

separate category without citizenship. It is the Fourteenth Amendment that attempts to rectify the anomalous situation of a category of people who are not political individuals or, indeed, citizens. And, it has been this Amendment which has been used to assert the political individuality of blacks in light of any inferior categorical treatment by the States.

To put it another way, American political society is based on a written constitution which guarantees the political individuality of the citizen. Under the U.S. Constitution, the position of the State is ideally the same with respect to all citizens so that there is no "corruption of blood" or political disability due to "previous condition of servitude." No system, however, works in perfect accord with its ideals. Special dispensation is often given in the name of friendship or even mercy. Prejudice is also evident in a variety of forms in the treatment of individuals. However, as the foregoing argument contends, the denial of equal treatment by the State to a category of individuals does more than bruise an ideal, it challenges the ability of constitutional decision makers to respond to a fundamental malfunction in the system. Whether categorical inequalities exist is of course a pertinent question, but it is separate from the analytical point being made here. That is, that the design of the U.S. Constitution does not allow for categorically inferior treatment of individuals before the law; and that the identification of such treatment stands as a challenge to the integrity of the Constitution. As argued in Chapter I, however, asserting that a group may be wronged by the State does not provide a very useful explanation of the position of blacks or of the possible need for constitutional litigation. Such an explanation entails raising questions of constitutional structure and design. What is the constitutional structure of the relationship between the State and the individual? Does that

relationship vary in any aspect by race? In addressing these questions it is useful to make reference to the design of constitutional structure which is the basis of this relationship.

One of the most thorough statements of the design of the American constitutional system as it explains the position of the individual is provided by Vincent Ostrom in The Political Theory of a Compound Republic. With reference to the necessity of reciprocal authority between the rulers and the ruled, Ostrom has this to say:

> The logic of political relationships, thus, necessarily implies inequality in reaching decisions for establishing the terms and conditions of organized social relationships in a community. However, the condition of political inequality, which necessarily implies that a few must rule the many, does not preclude the many from exercising an equal prerogative in commanding the services of the few.[1]

Once again, it may be noted that the empirical question of whether the claims of the many or any one among them are sustained or denied is a separate issue. But why not simply begin with the empirical question of service distribution and examine it in detail? The answer to this question explains the value of Vincent Ostrom's work to this dissertation. The compound republic theory set out in Chapter I explains the structural safeguards available to the individual, such as the Equal Protection Clause. This focus on safeguards and the political position of the individual identifies allegations by blacks of unequal treatment by government as being theoretically significant. This is because such allegations raise the question of potential recourse for blacks from local inequality. Is there another level of government which will hear their complaint? According to the theory used here, there is. The concurrency of regimes in a compound republic provides for appeal to the Federal Judiciary in instances of unequal protection of the laws by the States.

The first chapter also considered whether one of the dominant interpretations of American politics, pluralist theory, might be used to examine constitutional litigation for racial equality in the provision of urban services. Pluralist theory and the compound republic theory are congruent at many points. Among other similarities, they both focus on the fundamental role of groups and how groups affect the distribution of goods and services in society. However, a distinction in emphasis between the two becomes apparent on the question of recourse from local inequality. The emphasis in pluralist theory is on the social factors that define legitimacy and political participation. These factors are, of course, significant, and they are discussed in some detail in Chapter II. The question of recourse calls for an additional consideration that is not emphasized in the main works of the pluralist tradition: a consideration of the rules and standards that either limit or expand the recourse available to those alleging inferior treatment by local government. The compound republic theory focuses directly upon these rules and standards as elements of constitutional structure. Therefore, the compound republic theory may be considered an extension of pluralist theory for the purpose of considering constitutional structure. But a necessary extension, for without it, it may be possible to overlook the significance of the Federal Judiciary, among other structures, as an institutionalized recourse from inferior treatment by local government. It is an assumption about the institutional position of the Judiciary that we turn to next.

Second assumption

The Federal Judiciary, under the Equal Protection Clause of the Fourteenth Amendment, has the institutional responsibility for redressing categorical inequality resulting from State action.

This assumption focuses the question of safeguards directly on the Equal Protection Clause. Preceding the clause itself are two parts of the Fourteenth Amendment which explain specifically what is meant by a "safeguard" in a compound republic. The first part, the opening of the Amendment, compounds the national and local regimes by establishing the overlapping category of national citizenship. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." The way in which this clause provides a safeguard is by giving the citizens of each State dual citizenship, of a State regime and of the National regime. This duality cannot eliminate the possibility of political oppression, but it provides an additional level of government as a recourse for citizens whose claims for public goods and services have not been sustained locally.

The opening section of the Amendment goes further, as if to leave no doubt that it is establishing a recourse from local injustice. In doing so it brings the entire range of State and municipal statutes, regulations and official acts under the potential scrutiny of the Federal Courts. This is done forcefully and simply with the words "No State shall" followed by injunctions against the denial of first, the privileges and immunities of citizenship, second, the due process of law and, third, the equal protection of the laws.

Any question about the unitary nature of the judiciary from the local through the Federal Courts respecting civil rights should be answered by the Fourteenth Amendment. By enumerating three critical civil rights and by prohibiting any State action contravening those rights, the Fourteenth Amendment places the Federal Judiciary in a direct line of appeal from any State court decision dealing with citizen privileges, due process or equal protection.

The argument about the unitary nature of the judiciary has been made because of a tendency among some observers to consider the provision of urban public services to be, a priori, a local function in the context of which Federal intervention is unwarranted. However, once the analyst accepts the compound nature of the republic and the unitary nature of the judiciary, as has been done in this thesis, questions of local origin can become national if the protection of the law afforded by the State is unequal.

Major Empirical Findings

First finding

It may be shown in some cases that certain aspects of municipal public services are provided unequally to categories of citizens by race.

The central question in the service equalization litigation is appropriately the most difficult one as well. What responsibility does the State bear for racial inequality in the provision of public services? The first corollary question, and the one directly addressed by this first finding, concerns the demonstrability of racial inequality. What is the extent of such inequality and how may it be measured? The central question about responsibility entails a discussion of the role of municipal government in the face of racial distinctions in society. Once this role has been determined, the question of demonstrability and measurement may be addressed.

Municipal governments exist in part to provide a broad range of public goods and services from sewer lines to the disposition of criminal cases. Therefore, municipal politics is concerned with the degree and manner of the provision of public goods and services. The great majority of cities, however, do not present uniform environments for service producers. Some roads are more heavily used than others and the allocation of maintenance

resources may favor them; some neighborhoods have more children than others and the allocation of education and recreation resources may favor them; and some areas are regarded as less safe than others and the allocation of police resources may favor them. The politics of urban areas, therefore, will usually involve controversy about governmental choice among the variety of demands made for public goods and services.

Another non-uniform aspect of the service environment is that in all but a few American communities some neighborhoods will have a great many more black residents than others. Further complicating service provision is the fact that the racial distinction in cities has been adhered to socially, economically, and electorally. Socially, racial distinctions are usually a factor in the individual's choice of residence and in his or her choice of private goods and services (for some private services like domestic maintenance, the black community has been a conventional source). Economically, the racial distinction is often used in decisions about mortgage investment, commercial location and the relative price of private goods and services. Electorally, race is often the basis for composing party tickets and selecting delegates to party conferences.

Each of these distinctions is of long standing in many urban areas. Government's role may be to blunt the impact of these distinctions on the black individual with compensatory payments to black individuals or by regulating private interests doing business in black communities. However, it should be clear that municipal government is not constitutionally responsible for redressing discriminatory patterns of private association when no public good or service is involved. The most likely response to this last statement--especially in light of the school desegregation controversy --is that it is virtually impossible to find <u>any</u> private association that

does not involve a public good or service to some degree. This is not easily disputed. As Justice Black put it, the civil rights laws might well allow "the Federal Government complete control in every nook and cranny of every precinct and county in every one of the fifty states."[2]

Race is a basic social distinction in patterns of private association and action. However, according to the Fourteenth Amendment, government may not act, in providing services, so as to correspond to the racial distinction which is so often automatic in urban society. The political nature of race, then, involves the controversy over the decision confronting municipal government in providing service to the black community. The extremes of this decision are to perhaps reinforce the distinction made socially by providing services commensurate with the social position of many blacks, or to attempt to override the racial distinction by monitoring the level of service provided racially, and by taking steps to equalize the level, racially. This sounds deceptively simple. It is not simple.

The position between benign neglect and positive responsibility that a municipal government may reasonably be expected to take depends on several complex factors. The primary factor which determines governmental responsibility and may bring constitutional safeguards into play is the assessment of relative service levels between the races; the determination of just how equally service is being distributed. It is this factor that the empirical section of this dissertation has examined.

As noted above, the otherwise useful literature on service equality often does not deal directly with this factor. This literature, represented by the works reviewed in Chapter II, either does not focus directly on race or it relies upon indicators of service <u>effort</u>. The argument of Chapter III is that a focus on service effort alone does not consider that aspect

of service provision which is arguably quite important to citizens--the costs and benefits to them of the results of government service provision. Chapter III presents an empirical case which demonstrates, in one instance, racial inequality in some results of municipal provision of a service.

The service examined in Chapter III is police protection. A comparison was made between two residential neighborhoods similar in many respects, but distinct racially. The key finding was that on several measures, citizen experience and evaluation of police protection in the black neighborhood were distinctly less favorable than citizen experience and evaluation in the comparable white neighborhood using the same measures. This finding cannot and does not argue that police service is everywhere unequal by race. In fact, evidence to the contrary is presented in Chapter III. It does argue, however, that some aspects of unequal protection of the law between the races may be determined empirically. This is an important argument because service inequality is often simply asserted or assumed by analysts of political relations between the races. The empirical case in Chapter III is a limited one; limited in its application to other services and to other situations. What it does show, however, is that race does have implications for citizen experience and evaluation of some public services in cities. And once there is some reason for believing that this may be the case, the political analyst may then ask what possibility there is of equalizing the aspects of identifiable inequality with respect to any particular public service.

To retrace the steps taken here, we may briefly outline the foregoing argument. The analysis of the compound republic theory in the first chapter focused on the role of the Federal Judiciary as a recourse available to

individuals who have been denied the equal protection of the laws by local government. The empirical question which logically follows the finding of some aspects of unequal protection, above, is: what has been the response of the Federal Judiciary to pleas for redress of service inequality brought by residents of black communities? The next section examines the answer to this question which was discussed in Chapter IV.

Second finding

The Federal Judiciary has narrowed the legal basis for finding categorical inequality in service provision to be unconstitutional.

The analysis of municipal service litigation in Chapter IV concludes with Washington v. Davis.[3] Davis is the Supreme Court decision which makes a showing of discriminatory motivation on the part of the State necessary to a finding of unequal protection. The most successful of the cases in this line, Hawkins v. Town of Shaw,[4] which required no explicit showing of State intent, was mentioned disapprovingly in a footnote in the Davis decision.[5] Since it is extremely difficult for plaintiffs to discover a direct link between service inequality and overtly discriminatory public policy (assuming the latter is discoverable), Davis may be said to limit the availability of Federal Judicial remedies to blacks alleging unequal service.

In considering Shaw and similar cases in light of the Davis ruling, Robert Lineberry finds that "it is frankly difficult to believe that there is no constitutional recourse for the citizens of Shaw, Mississippi. . ."[6] Indeed, it does seem incredible until the controversy over State motivation is put in perspective. The discussion in Chapter IV of the municipal service litigation and its antecedents shows that while several cases proclaimed to have found discrimination without a showing of motivation, e.g. Gomillion,

Norwalk Core, Kennedy Park, and Shaw, each, in fact, does rest on a showing or strong implication of motivation.[7] The supposed dichotomy between a finding of discrimination based on a discoverable motive and a finding of discrimination based solely on disproportionate impact between the races cannot be found in this line of cases. However, it was a belief in this dichotomy that led the Supreme Court to narrow the legal basis of service equalization litigation.

The argument in Chapter IV against the motive/impact dichotomy is similar to the argument in Chapter II respecting Edward Banfield's distinction between the historical and presently operating causes of discrimination. Governments, it may be argued, are institutional arrangements. Institutions are patterns of social expectation, interpretation and behavior that persist. As such, governments may well have present consequences which have little empirical reference to the motives of any present, individual officer. Judge Tuttle recognized this in his Shaw decision when he held the current town government to be part of "the long history of discrimination" in Shaw.[8]

By insisting on a showing of current motivation to discriminate, the Davis Court and others before it are substituting individual actors for institutional patterns. This greatly changes the meaning and utility of the phrase "No State shall" in the Fourteenth Amendment. From the perspective of the Davis Court, the "State" becomes a contemporaneously created structure with little responsibility for discriminatory patterns of allocation unless the source of such a pattern is also contemporary.

The analysis behind the Davis decision and the motive/impact dichotomy are counter to a basic element of the compound republic theory; that the

several regimes in the American system are patterns of safeguards of the individual against the violence of faction and the tyranny of the majority. As Madison puts it, it is the "proper structure of the Union," that safeguards the individual from state oppression, not the good will of the governors.[9] Thus, when no present cause of unequal treatment by government is obvious, the analyst may (as Madison and Hamilton do in The Federalist) attempt to connect the consequences of "state action" not just to current state officers, but to the institutional arrangements from which those consequences flow. Therefore, the discovery of a "state motive"--that which induces state action--may in some cases involve factors which have historically affected the governmental pattern as well as those factors which operate to maintain it.

The historical development of governmental institutions then may be considered a motive force in the contemporary action of states. The danger inherent in considering historical development to be a motive force is that the analyst will reify governmental institutions. What is argued here is not that institutions act as individuals. Rather, it is argued that quite apart from the behavior of individual officials, it may be possible to discern some of the effects of institutional patterns and of the way in which those patterns have developed.

It may be the case that denying blacks the opportunity to present a structural and historical explanation of their political position--which is one effect of Davis--is to limit judicial recourse for them from service inequality in the local regime. The political position of blacks respecting the local regime may be considered a question of constitutional structure. In addition, what blacks are able to demand as a faction and as individuals --and how such demands affect the relationship between local and national regimes--may also be considered questions of constitutional structure. There is a complex of political relationships in these considerations that may be

interpreted in a number of ways. It is the compound republic theory, however, which emphasizes such relationships as questions of constitutional structure.

Because of this theory's emphasis on constitutional design, the examination of a claim of political inequality may include reference to the historical development of the political relationships in question. The principle of judicial judgment suggested by this theory is a comparison between current relationships and a basic element of the Federal Constitution, the ability of anyone to enforce the law as it applies to the State.

By way of contrast, the principle in public service equality litigation currently in force in the Federal Judiciary is that it is necessary to show a presently operating, discriminatory State motive before racially unequal service can be considered a violation of the Equal Protection Clause. Because of the Supreme Court's Davis decision, it is this latter principle which has become part of the Federal Constitution. As such, it becomes, like other parts of the constitution, a rule "within which subsequent action will be conducted." The next section of this chapter will consider what this action may be, empirically, and what effect it may have, analytically.

Projected Empirical Consequences: The Politics of the Urban Black Community

In a section in The Political Theory of a Compound Republic on the "empirical relevance" of the theory, Vincent Ostrom makes reference to the political position of blacks:

> I infer that in proportion as Black Americans (and other politically disabled groups) are excluded from exercising the authority of persons to command the services of governmental officials in order to sustain equal provision of public services and equal application of law, they are subject to a condition of tyrannical rule. The maintenance of the integrity of "any-one" rules appears to be a necessary condition for sustaining government in any political association on the basis of reason and justice.[10]

Drawing on the empirical and legal analysis above, it is possible to make Ostrom's conditional statement somewhat more definite: in cases where inequality can be shown, blacks, because of recent decisions in constitutional law, will find it difficult to exercise the authority of persons . . . to sustain equal provision of public services. What follows is a discussion of some of the immediate and projected ramifications of this difficulty.

The Decline of a Safeguard

Perhaps the most immediate effect of the current service equality standard is a shift away from the Federal Judiciary by blacks seeking redress of service inequality. As Lineberry puts it, the Davis decision "bodes ill for those who would haul offending municipalities into court."[11] One projection that can be made is that under the Davis rule, successful claims for service equalization in the Federal Courts will be very few. Further, except in rare cases where there is clear evidence of discriminatory motive in an ordinance or official statement, few allegations of service inequality are likely to be brought to the Federal Courts at all. As Barry Miller notes, "/t/he result in Davis indicates that the Court prefers that the other branches of the federal government be the primary articulator of this (racial) equality."[12]

The analytical consequences of judicial withdrawal from this area of equal protection litigation is the topic of the final section of this chapter. The empirical issue which remains concerns the relative effectiveness of strategies other than constitutional litigation which are still open to black communities receiving inferior levels of public service. Among the strategies which remain, the following have been selected as indicative of the approaches other than service litigation used up to now by the black community: the politics of protest, strategies of neighborhood political

control, interest group politics, and municipal electoral politics.

The politics of protest

This alternative has been analyzed by Michael Lipsky with reference to a case study showing the more dramatic aspects of the black power movement.[13] Lipsky, together with David J. Olson, has recently reviewed the efficacy of protest in the black community. Lipsky and Olson find that the threat to systemic stability represented by the demonstrations and riots of the 1960's has been successfully "processed" and defused by municipal elites. According to Lipsky and Olson, the symbolic goods provided by commission recommendations and the conciliatory rhetoric of politicians under seige have been in many cases substituted for any actual redress of grievances. As they put it:

> The process of crisis reduction diminishes the system's capacity for change, and the sense that there is a need for change. The study of riots and their political impacts thus ultimately illuminates both the response to riots and the extent to which those events are viewed as requiring responses. Riot commission politics is part of the process by which the United States purchases system stability at the expense of blacks and through explicit and implicit mechanisms which substantially insulate the system from their political influence.[14]

Lipsky and Olson conclude that black protest will most likely continue to be processed rather than responded to. They phrase this conclusion in terms familiar to critics of pluralism. However, there is an additional pertinent explanation for the relative ineffectiveness of protest as an alternative to court ordered service equalization. That is, the unspecified, discontinuous nature of much black protest. A riot or demonstration, even if it has an obvious target, may be interpreted in a variety of ways. The fact that a group has had to protest at all may indicate a lack of sufficient resources either to directly influence policy-making in its favor or to

threaten policy-makers with the withdrawal of crucial support. This being the case, policy-makers concerned with allocating public service resources need not accept the precise claims of service inequality espoused by black protestors. Instead, a version may be adopted which involves a minimal change in current procedures. In fact, it is just such official response to black protest about service levels which prompted the litigation in Shaw, Norwalk Core, Kennedy Park, and Burner.[15] It is difficult, therefore, to find protest to be a potentially more effective redress strategy than court ordered equalization.

Neighborhood political control

In Chapter I it is argued that political control of urban neighborhoods is not likely to be freely granted to the black community by urban policy makers. This would be a constitutional change of some magnitude, and as Bish and Ostrom argue, it is a change whose potential is indicated by the compound republic theory. Through such a change, neighborhood control would be the basis of a federal, political system for metropolitan areas. A greater diversity of governmental forms than now exists in urban areas would be created. We might predict that a more diverse system would be better able to respond to the diversity of citizen demands originating at all levels, from the block up to the metro-region.

Bish and Ostrom find neighborhood government necessary to the provision of public services which citizens will find satisfactory. Instituting a system of neighborhood governments, together with broader scale service

producers where appropriate, might be the first step taken to redress whatever imbalance of service there is between Baden and Penrose in St. Louis, for instance. According to this argument, any solution to service inequality based on a determination of local need is best formulated and carried out by local residents.

> Only if citizens have legislative or constitutional authority to develop smaller units of government within center city neighborhoods, can we expect them to acquire the capability for solving small-scale neighborhood problems.[16]

Therefore, in keeping with the compound republic theory, neighborhood government can be considered among the best strategies available to blacks receiving inferior levels of public service. However, like many "best strategies," neighborhood government is not easily pursued. Getting the "legislative or constitutional authority" referred to by Bish and Ostrom is a long term process for which their are no standard transformation rules. In some areas it may be possible for citizens to build coalitions of voluntary neighborhood associations to press their claim for formal allocative authority in the State legislature. In other areas, it may become clear to State and local policy makers that both efficiency and responsiveness in local government rest upon a more complex, diversified political structure. They may become persuaded of this because of training in the theoretical tradition represented by Bish and Ostrom or because of exposure to the growing body of empirical research on the value of a federated metropolis.

The most fertile situation for neighborhood government (or any constitutional change) is a conjunction of citizen demand and elite inclination. As of the late 1970's this is a development to be planned for and worked toward. However, it is not imminent. The tradition represented by Bish and Ostrom is not widely enough understood, nor has neighborhood political power yet reached the point in many cities where neighborhoods are able to

make successful claims against the State for governing authority. In the short run, therefore, a strategy of neighborhood control may not be as effective as a Federal Judicial remedy in achieving the equalization of local services between the races.

Interest group politics

Blacks as an interest group, lobbying and competing for service improvements, is an image derived from the experience of other interest groups in urban politics. There are arguments in Chapters I and II which question the current accuracy of this image as a reflection of the experience of blacks in some cases. The chief argument is that urban black communities often lack sufficient quantitites of the four resources which are not only useful in pressing demands against urban government, but which have been the defining characteristics of interest groups in urban politics. These resources are: professional expertise applicable to specific policy areas, the ability to deprive policy makers of critical support, the promised benefit and/or the legal authority needed to shape a disciplined constituency, and unencumbered, informal access to policy makers. There resources often make the difference between a group being a competitor in interest group politics--an integral part of the policy making process--and a group needing to rely on the politics of protest--the episodic recourse available to the outsider.

The way in which a group will present its demands in the urban political system will depend, to some extent, on the political resources it has available to present those demands. It is argued in Chapter II that recent research on the political position of urban blacks indicates in some cases that urban blacks do not have sufficient resources to present their demands as effectively as other petitioners at city hall, such as labor unions, retail merchants and citizen groups from more affluent neighborhoods. Where this is true (several well documented examples

are discussed in Chapter II) urban blacks may develop the characteristics of a stable minority. This, of course, is not the case in all cities. There are, in fact, several major cities in which blacks constitute popular and electoral majorities and may have little trouble in influencing public service policy. However, there is some evidence to suggest that there are other cities in which the black community has relatively more trouble influencing public service policy. In these cities, black demands for service equalization will probably involve the politics of protest to a greater degree than interest group politics.

Municipal electoral politics

The urban political machine presents a rough analogy for the redress strategy which focuses on municipal electoral politics. The machine in its ideal-type allowed for the kind of political linkage between citizen demand and service provision that has been missing in some cities since the machine's demise, and in some cases may never have existed. In return for electoral support from a community-based councilmanic ward, in this ideal-type, the ward representative (or more popularly, the ward heeler) was held directly responsible for the level of public services provided to that ward. This responsibility was institutionalized in a variety of ways. Often the ward-heeler was able to appoint (or veto the appointment of) the police captain in charge of the local precinct. The heeler would also have a say in the award of public service contracts and franchise. This would help insure that private interests serving the city would attend the wishes of the heeler and, quite possibly, the wishes of his constituents as well.

With the machine as historical background, together with a more general belief that electoral power leads to political power, there has been an increased focus on mayoral and city council elections in many urban black

communities. The difficulty with this focus is that in many cities the ward system has been replaced with larger districts or with at-large elections. Where it has occurred, this replacement makes it very difficult for blacks to elect blacks unless they consitute a majority city-wide. Nonetheless, by arguing that the at-large system had effectively disenfranchised them, blacks in Dallas, Texas, were able to have the representative system in that city declared unconstitutional. In Lipscomb v. Wise, the U.S. Court of Appeals, Fifth Circuit, ordered the District Court to "require the city to reapportion itself into an appropriate number of single-member districts for the purpose of holding City Council elections."[17] However, sitting as Fifth Circuit Justice, Supreme Court Justice Powell recalled the Circuit's mandate and stayed its judgement in the Lipscomb case, pending the action of the entire Supreme Court in Dallas' petition for a Writ of Certiorari.[18]

Assuming for the moment that the Supreme Court will open the way for blacks to gain electoral power in their communities, how might such a change help blacks redress what municipal service inequality there is?--It certainly would not hurt, and, in some cases, it may provide the catalyst for neighborhood government. However, the linkage between the vote and the level of service to the ward has been somewhat modified since the days of the political machine. Reinstating single-member districts would be an important gain for the black community. However, there is a variety of reforms parallel to at-large elections that the control of single-member districts is unlikely to affect. First, there is the municipal civil service system, often buttressed by public employee unions, which together can make any major change in service to a particular ward very difficult because of their limited accountability to any one geographic area in the city. Second, there is the deference accorded public service professionals.

This deference is often found in large cities where resources available for innovation and expansion in service delivery are bounded by the fixed costs of social programs and physical maintenance and by the current interests of the Civil Service and its unions. (This is well illustrated by the educational innovation attempted in Oceanhill-Brownsville in 1968 and the ensuing city-wide teachers' strike in New York City.) Because resources for innovation are limited, it is often difficult for neighborhood groups or even elected representatives to garner the resources necessary for service expansion. In many cities, what slack resources there are have been entrusted to professional planners and other career civil servants. These professionals will, of course, be influenced by neighborhood groups and members of the city council. However, as argued in Chapter II, it is these professionals that blacks have, in many cases, had trouble influencing.

The effects of each element of the Progressive reform movement such as the merit system and at large elections have been well documented elsewhere.[19] It suffices to say, here, that several of the reforms which have helped isolate service provision from citizen demand in some cities will not be directly affected by the reinstitution of single-member districts. Thus what may appear to be the best hope of those advocating a louder electoral voice for blacks may not help blacks achieve public service equality.

To conclude this section, if one were to add the somewhat negative assessment of the above alternatives to the decline of constitutional litigation discussed in Chapter IV, the prospects for service equalization would not appear to be very good. The next section of this chapter fits this assessment of service equalization into the larger picture of contemporary black politics.

The Return to "Darktown"

Life is by no means unsupportable for the great majority of blacks in American cities. It cannot be said that there has been no progress toward political and economic racial equality in the post-World War II era. However, as argued in Chapter II, the trend toward equality does not seem to be continuous. The past decade has shown an increase rather than a decrease in several measures of relative economic deprivation. This dissertation has examined one aspect of the relative position of blacks; those cases in which it may be argued that blacks are receiving a level of public service inferior to that received by whites. It is impossible to assert, empirically, how widespread or confined racial inequality in service provision is. Instead, what has been done in Chapter III is to present evidence so as to reject the hypothesis that there are no empirically verifiable aspects of racial inequality in the distribution of municipal public services. The extent of this inequality may be small indeed. However the scope and extent of inequality is not the question raised by this dissertation. The question is, rather, in cases where aspects of racial inequality in urban public services may be found is there an effective institutional redress available to blacks? The answer offered here is a qualified no.

While there are several positive developments noted above in the areas of electoral politics and neighborhood government, they constitute relatively long-term strategies. The strategy given the most careful consideration here has been constitutional litigation. It is argued above that both in terms of a theory of the American political system and in terms of providing effective redress of service inequality, constitutional litigation may be considered an appropriate and expedient strategy. What of other redress strategies which may be considered alternatives to constitutional litigation?

They have also been evaluated, and a qualification is in order for this assessment as well.

It is not the case that blacks are everywhere in the same political position. It is the case that they are very nearly in the same geographical situation everywhere. That is, that they are separate, residentially. This segregation is extraordinary in American society, and it has political side-effects. It demarcates blacks and to some extent limits their political options as individuals. Even this does not occur to the same degree everywhere. Nonetheless, as explained above, there is little empirical evidence to suggest that any of the alternative strategies examined can presently provide redress of instances of racial inequality in public service. Where, then, does this leave the urban black community and the black individual?

There are several consequences for the black community which might be predicted from the foregoing analysis of redress strategies. Because of the large scale disorders in urban black communities in the 1960's, civil violence is one consequence that might be predicted. However, while service inequality might be a factor contributing to violent frustration, it is unlikely to spark large scale disturbances. In addition, an earlier argument applies. Violent protest in most cases cannot be considered a demand for redress of a specific grievance. So that even if it occurred, it might not result in redress.

Another possible consequence, and one for which many black political leaders have considerable hope, is increased aid to the black community from various agencies. The current focus of the Congress of Racial Equality, especially, has been the Carter Administration's comprehensive proposal to the Congress known as the "urban strategy." However, even if the strategy were to be adopted by the Congress in its present form, it will provide only limited assistance to black neighborhoods seeking to supplement or change

levels of public service.

The element of the Carter Administration proposal which applies most directly to the problems of service inequality discussed here is the "Self-Help Development Program." This program is designed to strengthen the role played by neighborhood associations in determining the quality of public goods and services enjoyed by neighborhood residents. President Carter outlined this part of the proposal in a message to the Congress in March, 1978:

> I will request $15 million in FY 1979 for a self-help development program to be administered by the Office for Neighborhoods in HUD.
>
> This new program will provide funds for specific housing and revitalization projects in poor and low-income areas. Each project would involve the participation of local residents, the private sector and local government and would require the concurrence of the mayor.[20]

However, even if a good many less than all the urban poor areas wanted the self-help funds and received mayoral concurrence, there would not be much more than a few thousand dollars available for most neighborhoods. Such an effort pales beside the multi-billion dollar War on Poverty and the millions of dollars received by some communities through the Model Cities and Community Action Programs.

However, this is to be a "self-help" program, not a massive Federal intervention. It may be argued that the smaller, more carefully directed amounts of the Carter Administration proposal are less likely to stir the greed of local politicians and that the use of large amounts for solely administrative purposes is more likely to be questioned. However, based on analyses of prior Federal urban programs, one cannot be confident that relatively small expenditures tied to mayoral consent will have much affect on the political position of blacks or on their ability to change the level of public service they receive.[21]

What seems more likely than either civil disorder or specific and effective Federal intervention is a return to the political situation characterizing service provision to the black community before the line of cases represented by Hawkins v. Shaw. Black demands for service equalization prior to Shaw were presented either through collective protest, through individual plea, or in a general way at the ballot box. At best such demands have met with a genuine reallocation of resources. At worst, these demands have been considered non-issues and have never become part of the public agenda. As argued in Chapter II, the environmental factors which determine whether a demand will receive a favorable response are often beyond the control of the black community. And, as indicated by plaintiff's arguments in Shaw, it was largely because of the non-response from policy makers to their demands for equal service that certain black communities brought cases against municipalities in Federal Court.

It is the picture of the political position of blacks before Shaw--a picture that may become accurate once again--that prompted the title of this section and of the thesis: the return to "darktown." Darktown is one of the many pejorative labels for urban black communities. It dates from Reconstruction and the first migrations of blacks to Northern cities. Darktown, in the parlance of the time, was a place where life was lived differently and separately from white society.

The political position of the residents of Darktown is explained in works by Cayton and Drake, Osofsky, and Clark which are referred to in Chapters I and II. We learn especially from Clark's Dark Ghetto, that while the residents of Darktown were expected to complain about the public service they received, any demand for racial equality in service provision would seem out of place. At least up to the time of Shaw, it appeared to some

policy makers and observers that the distinct nature of the black community required a level of service distinct from that required in white communities. This position is very like that taken by Judge Clark in his dissent to the Shaw ruling. Clark argued that judicial intervention into the provision of services in Shaw was unwarranted because first, "the people of the Town of Shaw had living standards that varied according to their individual financial condition and social values" and second, "some of them occupied properties which required and permitted a lower level of municipal service than other properties."[22]

The return to Darktown is meant to connote one consequence of the empirical findings in this dissertation. That is that in some cases there is not available to urban blacks any routine, institutionalized procedure for obtaining redress of municipal service inequality. This will not undo the progress toward racial equality of the post-World War II era. However, the decline of constitutional litigation as a recourse from local inequality may be considered a set-back--toward Darktown--for those black communities receiving inferior service and unable to find recourse elsewhere.

The Potential Loss of an Application for Policy Relevant Political Analysis

It has often been argued that it is the responsibility of the political analyst to disseminate his or her findings in a way that makes them useful to policy makers concerned with the same problems. Policy relevance, therefore, may provide a social justification for resources, often from the public fisc, used for political analysis. It may also turn political analysis toward the more pressing problems of society and stimulate the development of empirical theory.

One area in which a conscious effort has been made to analyze policy

relevant political questions is the provision of public services in metropolitan areas. The work done by Elinor Ostrom, et al., Lineberry, and Levy, et al.[23] provides empirical measures of service levels. These measures may be adopted by policy makers to evaluate their deployment of resources in providing particular services and to evaluate potential costs and benefits related to structural reforms such as jurisdictional consolidation of services.

In addition, the compound republic theory holds any citizen capable of raising a constitutional guarantee against a harmful action of government. Thus, political analysis of urban service provision should be available and useful to individuals and neighborhoods as well as policy makers. Thus, in spite of the decline in litigation for service equality, neighborhoods should continue to have some use for the kind of analysis done in Chapter III. Such analysis should provide arguments relevant to the neighborhood government movement and to the litigation for single-member districts. However, its potentially most potent application--to the identification and redress of current service inequalities--is far less likely, for two reasons. First, the litigation to which such analysis is most appropriate has been substantially undercut by Washington v. Davis. Second, as shown in Beal v. Lindsay[24] and Burner v. Washington (discussed in Chapter IV), the Federal Courts have shown little inclination to include political analysis as evidence. In those few cases on municipal service where the Courts have used political analysis they have either relied on inappropriate research, or they have misinterpreted the data presented. Both of these faults may be found in Burner v. Washington. (However, the Court cannot be blamed entirely for accepting the research presented by the Urban Institute in Burner.) The possible consequence indicated by this situation is that the decline of constitutional

litigation for service equalization will limit one important use of policy relevant political analysis; its use as evidence by individuals and neighborhoods bringing constitutional claims of unequal service against municipalities.

The next section will present an analytical explanation of the decline of the line of service equalization cases and the relation of the decline to the use of political theory in constitutional law.

Projected Analytical Consequences

The motivation requirement in Washington v. Davis and the prior debate in the Federal Judiciary on the question of motivation show that, in the case of municipal service litigation, the Courts have been guided by no general analytical concept or theory. As argued above, there were several opportunities (Hadnot v. Prattville, Beal v. Lindsay and Hawkins v. Shaw among them) for the Federal Courts to develop a uniform definition of motivation.

The interpretation of the compound republic theory in Chapter IV argues that the anyone-rules principle implies that motivation should be defined so as to broaden potential access to the Federal Judiciary for those alleging public service inequality. In effect, the Federal Court rulings on State motivation through Davis have accomplished the opposite by narrowing the definition of motivation and rejecting the disproportionate impact standard. There are guiding principles other than "anyone-rules," and interpretations of constitutional structure other than the concurrency of regimes. However, no alternative principle seems to have been adopted in this litigation.

The lack or confusion of guiding principles is not unique to this area of constitutional law. This was noted in Chapter I in a brief discussion

of commerce clause litigation. However, the common nature of a problem should not exclude it--or a part of it--from analysis. (In fact, the basis of standards in constitutional law may be of interest to analysts of American politics whether or not they use the compound republic theory as a framework.) It was such an interest in determining the standard used by the majority in Davis that prompted Justice Stevens to observe the following in his concurrence:

> It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. . . My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume.[25]

Elsewhere in his concurrence, Justice Stevens informally suggests a judicial standard for Equal Protection litigation that may be considered an alternative to the majority's analysis:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation.[26]

The Stevens standard suggests a definition of state action in relation to the individual which is more in keeping with the compound republic theory's emphasis on broadly construed safeguards for the individual, than is the Court's opinion. However, there is a gap left by Steven's reference to "natural consequences." Can the Courts presume motivation on the basis of allegedly unconstitutional consequences which are unnatural in the sense that they are completely unanticipated or unprecedented? In order to answer

this question, one may refer to the final governmental defense possible in the face of demonstrated unequal protection. That defense is that there is some overriding governmental concern which has produced a regrettably negative consequence. In such cases the doctrine of "compelling state interest" makes the unanticipated negative consequence acceptable constitutionally. The final section of this chapter will consider the doctrine of compelling state interest in light of the service equalization litigation.

"Compelling State Interest" and Its Theoretical Position as Constitutional Law

This section returns to the question set out in Chapter I in the opening discussion of the Hobbesian dilemma. It is a question addressed by Madison and Hamilton and one that will probably recur in American political analysis--How can a balance be maintained between the efficient attainment of the public good and adequate protection of individual rights? Clearly, the balance that is struck will depend upon the definitions of "efficient attainment" and "adequate protection" that are used. The need for efficiency is discussed in detail in Chapter I in terms of the regime criteria of stability and safety. The dimensions of individual safeguards are discussed in terms of the compound republic theory in Chapter I and also in the first section of this chapter. One of the most prominent constitutional mechanisms used to maintain this balance in the United States has been the doctrine of compelling state interest.

The balance has at times favored the individual, constitutionally, since the enactment of the Fourteenth Amendment.[27] Until Washington v. Davis, the Federal Courts have imposed on the States the burden of proof of clear harm to the public interest in order to excuse unequal protection. As Judge Tuttle ruled in Shaw, "no compelling state interests can justify

the disparities that exist in the black and white portions of town. . ."[28] The implication of successful litigation for service equality--Kennedy Park, Norwalk CORE and Shaw--is that a sacrifice of efficient attainment may in some cases be acceptable in favor of more adequate protection of individual rights. Much the same point is made by Fessler and Haar when they abstract what they call the prima facie case of forbidden discrimination from the Equal Protection litigation preceding Shaw.[29]

A significant analytical consequence of the decline of service equalization litigation is what appears to be a departure from the pre-Davis interpretation of compelling state interest. The burden of proof in Equal Protection cases may be shifting from the State to the individual as a result of Davis. The requirement that plaintiffs show, as Justice Stevens put it, "evidence describing the subjective state of mind of the actor," has changed the constitutional balance somewhat to favor the State. It may be argued that the shift in the burden of proof to plaintiffs moots the earlier compelling state interest requirement. It may be possible under Davis for a State to classify citizens unequally, and then, unless the act of classification, not only the inequality, is shown to be discriminatory, the State need not justify its actions. Further, the resultant inequality in this situation would be constitutional.

Should such an interpretation of constitutionality in equal protection cases come about, the National regime may be weakened as a potential recourse from unequal treatment by local government. This is noteworthy in terms of the theory used here, since it is the availability of this recourse that is one of the defining characteristics of regime concurrency and of the constitutional structure of a compound republic.

Conclusion

The burden of this dissertation has been to examine a significant line of constitutional litigation and the position of those individuals primarily affected by it, in terms of the design theory of the American political system. This theory has been useful in demonstrating the importance of the Federal Judiciary as a recourse available to individuals who may be unequally classified by the States. The theory has also made it possible to assess the consequences of the complex shifts in the constitutional doctrine on State motivation which in part defines the equal protection of the laws.

The exigencies of constitutional law-making have not been discussed here. Among these exigencies are the shifts in personnel on the Courts, the sporadic way in which test cases are raised on appeal, and the difficulty in reaching agreement on any guiding principle or concept. All of these are important constraints. However, they should not allow us to neglect the problem indicated by the last section of this chapter; that of making constitutional law without constitutional theory. It may be argued, in conclusion, that the disjunction of law and theory might be of concern to policy-makers and political analysts alike--especially if we have an interest in government by "reflection and choice."

Notes

1. Vincent Ostrom, The Political Theory of a Compound Republic (Blacksburg, Va.: Public Choice Society, 1971), pp. 101-102.

2. Daniel v. Paul, 395 U.S. 315 (1969).

3. Washington v. Davis, 96 S.Ct. 2040 (1976).

4. Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (1971).

5. Davis, note 12.

6. Robert L. Lineberry, Equality and Urban Policy (Beverly Hills, Calif.: Sage Publications, 1977), p. 192.

7. Gomillion v. Lightfoot, 364 U.S. 339 (1960); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (1968); Kennedy Park Assn. v. City of Lackawanna, N.Y., 436 F.2d 108 (1970).

8. Shaw, p. 1293.

9. James Madison, "Federalist 10," in Alexander Hamilton, James Madison, and John Jay, The Federalist (Cambridge, Mass.: Harvard University Press, 1961), p. 62.

10. V. Ostrom, The Political Theory of a Compound Republic, pp. 120-121.

11. Lineberry, Equality and Urban Policy, p. 192.

12. Barry Miller, "Proof of Racially Discriminatory Purpose under the Equal Protection Clause," Harvard Civil Rights - Civil Liberties Review, 12, p. 739.

13. Michael Lipsky, Protest in City Politics (Chicago: Rand McNally Co., 1970), passim.

14. Michael Lipsky and David J. Olson, "The Processing of Racial Crisis in America," Politics and Society, 6, 1, p. 99.

15. Burner v. Washington, 399 F. Supp. 44 (1975).

16. Robert L. Bish and Vincent Ostrom, Understanding Urban Government (Washington, D.C.: American Enterprise Institute, 1973), p. 103.

17. Lipscomb v. Wise, 551 F.2d 1049 (1977).

18. Wise v. Lipscomb, 98 S.Ct. 19 (1977).

19. See especially: Eugene Lewis, The Urban Political System (Hinsdale, Ill.: Dryden Press, 1973); Grant McConnell, Private Power and American Democracy (New York: Knopf, 1966); and Theodore Lowi, The End of Liberalism (New York: Norton, 1969).

20. "Weekly Compilation of Presidential Documents," vol. 14, no. 13, March 27, 1978, p. 592.

21. A good analysis of the racial impact of Federal urban programs of the 1960's is by J. David Greenstone and Paul E. Peterson, Race and Authority in Urban Politics (New York: Russell Sage Foundation, 1973), passim.

22. Shaw, en banc, 461 F.2d.1183 (1972).

23. Elinor Ostrom and Gordon Whitaker, "Community Control and Governmental Responsiveness: The Case of Police in Black Neighborhoods," in Willis D. Hawley and David Rogers, eds., Improving the Quality of Urban Services (Beverly Hills, Calif.: Sage Publications, 1974), pp. 303-334; Lineberry, Equality and Urban Policy; and Frank Levy, Arnold Meltsner, and Aaron Wildavsky, Urban Outcomes (Berkeley, Calif.: University of California Press, 1974).

24. Beal v. Lindsay, 468 F.2d 286 (1972).

25. Davis, pp. 253-254.

26. Ibid.

27. See, for example: Yick Wo v. Hopkins, 118 U.S. 356 (1886); Buchanan v. Warley, 245 U.S. 60 (1917); and Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

28. Shaw, p. 1291.

29. Daniel Fessler and Charles Haar, "Beyond the Wrong Side of the Tracks: Municipal Services at the Interstices of Procedure," Harvard Civil Rights - Civil Liberties Law Review, 6, passim.

SELECTED BIBLIOGRAPHY

Books

Adams, John. A Defense of the Constitutions of the United States. London: J. Stockdale, 1794.

Altshuler, Alan. Community Control. Indianapolis, Ind.: Pegasus, 1970.

Aristoteles. The Politics. Translated by H. Rackham. Cambridge, Mass.: Harvard University Press, 1959.

Bachrach, Peter and Baratz, Morton. Power and Poverty. New York: Oxford University Press, 1970.

Backstrom, Charles H. and Hursh, Gerald D. Survey Research. Evanston, Ill.: Northwestern University Press, 1963.

Banfield, Edward C. The Unheavenly City Revisited. Boston: Little, Brown Co., 1974.

Baron, Salo W. A Social and Religious History of the Jews. New York: Columbia University Press, 1937.

Bish, Robert L. and Ostrom, Vincent. Understanding Urban Government. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1973.

Broom, Leonard and Selznick, Philip. Sociology. 5th ed. New York: Harper and Row, 1973.

Buchanan, James M. and Tullock, Gordon. The Calculus of Consent. Ann Arbor, Mich.: University of Michigan Press, 1965.

Carmichael, Stokely and Hamilton, Charles V. Black Power. New York: Vintage Press, 1967.

Clark, Kenneth. Dark Ghetto. New York: Harper and Row, 1965.

Dahl, Robert A. A Preface to Democratic Theory. Chicago: University of Chicago Press, 1956.

_____. Who Governs?. New Haven, Conn.: Yale University Press, 1961.

Downs, Anthony. Inside Bureaucracy. Boston: Little, Brown Co., 1967.

Drake, St. Clair and Cayton, Horace R. Black Metropolis. New York: Harper and Row, 1962.

Easton, David. A Framework for Political Analysis. Englewood Cliffs, N. J.: Prentice-Hall, 1965.

Eisenstadt, S. N. Social Differentiation and Stratification. Glenview, Ill.: Scott-Foresman, 1971.

Greenstone, J. David and Peterson, Paul E. Race and Authority in Urban Politics. New York: Russell Sage Foundation, 1973.

Greer, Scott. Urban Renewal and American Cities. Indianapolis, Ind.: Bobbs-Merrill Co., 1965.

Hamilton, Alexander; Jay, John; and Madison, James. The Federalist. o. p. 1787. Cambridge, Mass.: Harvard University Press, 1961.

Hirschman, Albert. Exit, Voice, and Loyalty. Cambridge, Mass.: Harvard University Press, 1970.

Hobbes, Thomas. Leviathan. o.p. 1651. Indianapolis, Ind.: Bobbs-Merrill Co., 1958.

Keller, Werner. Diaspora. New York: Harcourt, Brace and World, 1969.

Kotler, Milton. Neighborhood Government. Indianapolis, Ind.: Bobbs-Merrill Co., 1969.

Lasswell, Harold D. and Kaplan, Abraham. Power and Society. New Haven, Conn.: Yale University Press, 1950.

Lenski, Gerhard. Power and Privilege. New York: McGraw-Hill, 1966.

Levy, Frank; Meltsner, Arnold; and Wildavsky, Aaron. Urban Outcomes. Berkeley, Calif.: University of California Press, 1974.

Lewis, Eugene. American Politics in a Bureaucratic Age. Cambridge, Mass.: Winthrop, 1977.

_____. The Urban Political System. Hinsdale, Ill.: Dryden Press, 1973.

Lineberry, Robert L. Equality and Urban Policy. Beverly Hills, Calif.: Sage Publications, 1977.

Linton, Ralph. The Study of Man. New York: Appleton-Century, 1936.

Lipsky, Michael. Protest in City Politics. Chicago: Rand-McNally Co., 1970.

Lowi, Theodore. The End of Liberalism. New York: Norton, 1969.

Madison, James. Journal of the Federal Convention. Edited by E. H. Scott. Chicago: Albert, Scott Co., 1893.

McConnell, Grant. Private Power and American Democracy. New York: Knopf, 1966.

Neumann, John von and Morgenstern, Oskar. Theory of Games and Economic Behavior. Princeton, N. J.: Princeton University Press, 1944.

Olson, Mancur. The Logic of Collective Action. Cambridge, Mass.: Harvard University Press, 1971.

Osofsky, Gilbert. Harlem: The Making of a Ghetto. New York: Harper and Row, 1966.

Ostrom, Vincent. The Intellectual Crisis in American Public Administration. Rev. ed. University, Ala.: University of Alabama Press, 1974.

_____. The Political Theory of a Compound Republic. Blacksburg, Va.: Public Choice Society, 1971.

_____ and Hennessey, Timothy. Conjectures on Institutional Analysis and Design. Unpublished working paper. Bloomington, Ind.: Workshop in Political Theory and Policy Analysis, 1975.

Parenti, Michael. Democracy for the Few. New York: St. Martin's Press, 1974.

Parsons, Talcott. The Social System. Glencoe, N. Y.: Free Press, 1951.

Plato. The Republic. Translated by A. D. Lindsay. New York: Dutton, 1957.

Polsby, Nelson. Community Power and Political Theory. New Haven, Conn.: Yale University Press, 1963.

Prewitt, Kenneth, ed. Institutional Racism in America. Englewood Cliffs, N. J.: Prentice-Hall, 1970.

Przeworski, Adam and Teune, Henry. The Logic of Camparative Social Inquiry. New York: John Wiley, 1970.

Sellers, Charles and May, Henry. A Synopsis of American History. Chicago: Rand-McNally Co., 1963.

Shapiro, Martin and Hobbs, Douglas S. The Politics of Constitutional Law. Cambridge, Mass.: Winthrop, 1974.

Solzhenitsyn, Aleksandr. The First Circle. New York: Harper and Row, 1968.

Taeuber, Karl and Taeuber, Alma E. Negroes in Cities. New York: Atheneum, 1972.

Thompson, James D. Organizations in Action. New York: McGraw-Hill, 1967.

Thurow, Lester C. Poverty and Discrimination. Washington, D.C.: Brookings Institution, 1969.

Tocqueville, Alexisde. Democracy in America. O.P., c. 1835. Garden City, N.Y.: Doubleday Co., 1969.

Tullock, Gordon. The Politics of Bureaucracy. Washington, D.C.: Public Affairs Press, 1965.

Twain, Mark. [Samuel L. Clemens.] The Prince and the Pauper. Boston: J. R. Osgood, 1882.

Wolin, Sheldon. Politics and Vision. Boston: Little, Brown Co., 1950.

Articles and Reports

Bloch, Peter. "Equality of Distribution of Police Services - A Case Study of Washington, D.C." Urban Institute Paper, 712-12-1 (1974).

Brest, Paul. "The Supreme Court, 1975 Term-Forward: In Defense of the Anti-Discrimination Principle." Harvard Law Review, 90 (1976).

Duncan, Otis Dudley. "Inheritance of Poverty or Inheritance of Race?" On Understanding Poverty. Edited by Daniel P. Moynihan. New York: Basic Books, 1969.

Ely, John Hart. "Legislative and Administrative Motivation in Constitutional Law." Yale Law Journal, 79 (1971).

Fessler, Daniel and Haar, Charles. "Beyond the Wrong-Side of the Tracks: Municipal Services at the Interstices of Procedure." Harvard Civil Rights - Civil LIberties Law Review, 6 (1971).

Friesema, H. Paul. "Black Control of Central Cities: The Hollow Prize." Journal of the American Institute of Planners, (March, 1969).

Gray, Virginia. "Innovations in the States: A Diffusion Study." American Political Science Review, 67 (December, 1973).

Hume, David. "An Enquiry Concerning Human Understanding." Hume on Human Nature. New York: Collier Books, 1962.

Jacob, Herbert and Lipsky, Michael. "Outputs, Structure, and Power: An Assessment of Changes in the Study of Local Politics." Journal of Politics, 30 (May, 1968).

Levy, Marion. "Function." International Encyclopedia of the Social Sciences, 6 (New York: MacMillan and the Free Press, 1968).

Lineberry, Robert L. "Mandating Urban Equality: The Distribution of Municipal Public Services." Texas Law Review, 53 (1974).

Lipsky, Michael and Olson, David J. "The Processing of Racial Crisis in America." Politics and Society, 6 (1976).

Lowi, Theodore. "Machine Politics - Old and New." The Public Interest, (Fall, 1967).

Miller, Barry. "Proof of Racially Discriminatory Purpose under the Equal Protection Clause." Harvard Civil Rights - Civil Liberties Law Review, 12 (1977).

New York Times, March 1, 1970, p. 62.

_____, May 31, 1976. p. 1.

Olson, David J. "Politicians, Professionals, and the Poor." Paper presented at the 1970 Symposium of the New York Academy of Medicine.

Ostrom, Elinor. "Scale of Production and the Problems of Service Delivery in a Federal System." Unpublished working paper. Bloomington, Ind.: Workshop in Political Theory and Policy Analysis, (1974).

_____ and Ostrom, Vincent. "Public Choice: A Different Approach to the Study of Public Administration." Public Administration Review, 31 (March/April, 1971).

_____; Parks, Roger B.; and Smith, Dennis C. "A Multi-Strata, Similar Systems Design for Measuring Police Performance." Unpublished working paper. Bloomington, Ind.: Workshop in Political Theory and Policy Analysis, (1973).

_____ and Whitaker, Gordon. "Community Control and Governmental Responsiveness: The Case of Police in Black Neighborhoods." Improving the Quality of Urban Management. Edited by Willis D. Hawley and David Rogers. Beverly Hills: Calif.: Sage Publications, 1974.

Ostrom, Vincent. "Some Problems in Doing Political Theory." American Political Science Review, 71 (December, 1977).

Priven, Francis F. and Cloward, Richard A. "Black Control of Cities." The New Republic, September 30; October 7, 1967.

Search: A Report of the Urban Institute, 5, 7 (1975).

Tussman, Joseph and Broek, Jacobus ten. "The Equal Protection of the Laws." California Law Review, 37 (1949).

U.S. Department of Commerce. Bureau of the Census. "The Social and Economic Status of the Black Population in the United States." Special Studies, P-23, no. 54 (1974).

Verba, Sidney. "The Supreme Court, Segregation, and Social Research." Temple Law Quarterly, 31 (1957).

Walker, Jack L. "The Diffusion of Innovations Among the American States." American Political Science Review, 63 (September, 1969).

"Weekly Compilation of Presidential Documents." 14/13 (March 27, 1978).

Wilson, Woodrow. "The Study of Administration." Political Science Quarterly, 2 (June, 1887).

Wolfinger, Raymond. "Reputation and Reality in the Study of 'Community Power.'" American Sociological Review, 25 (October, 1964).

Yule, George,U. "On the Association of Attributes in Statistics." Statistical Papers of George Udny Yule. Edited by Alan Stuart and Maurice Kendall. New York: Hafner Publ. Co., 1971.

Judicial Decisions

Beal v. Lindsay, 468 F.2d 287 (1970).

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

Brooks v. Beto, 366 F.2d 1 (1966).

Brown v. Board of Education, Topeka, 347 U.S. 483 (1954).

Buchanan v. Warley, 245 U.S. 60 (1917).

Burner v. Washington, 399 F.Supp. 44 (1975).

Civil Rights Cases, 109 U.S. 25 (1883).

Coleman v. Aycock, 304 F.Supp. 132 (1969).

Daniel v. Paul, 395 U.S. 315 (1969).

Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Hadnot v. Prattville, Ala., 309 F.Supp. 967 (1970).

Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (1971).

_____, en banc, 461 F.2d 1183 (1972).

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

Kennedy Park Homes Assn., Inc. v. City of Lackawanna, N. Y., 436 F.2d 108 (1970).

Lipscomb v. Wise, 551 F.2d 1049 (1977).

Milliken v. Bradley, 433 U.S. 267 (1977).

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 108 (1968).

Spanish International Broadcasting Co. v. F.C.C., 385 F.2d 615 (1967).

U.S. v. O'Brien, 391 U.S. 367 (1968).

Washington v. Davis, 96 S.Ct. 2040 (1976).

Wise v. Lipscomb, 98 S.Ct. 19 (1977).

Yick Wo v. Hopkins, 118 U.S. 356 (1886).

VITA

Frank Michael Anechiarico

Born: August 20, 1949 - Mount Vernon, New York

Education:

B.A., Hamilton College, 1971
M.A., Indiana University, 1973
Ph.D., Indiana University, 1978

Professional Experience:

Associate Instructor, School of Public and Environmental Affairs, Indiana University, 1972.
Associate Instructor, Department of Political Science, Indiana University, 1973, 1976.
Research Assistant, Workshop in Political Theory and Policy Analysis, Indiana University, 1974-1975.
Instructor, Department of Government, Hamilton College, 1976-present.
Director, Hamilton College Semester in Washington Program, 1977, 1978.

Awards:

New York State Board of Regents Scholarship, 1967
Phi Beta Kappa, 1971
Thomas Watson Foundation Fellowship, 1971
Governor Herbert Lehman Fellowship, 1971
National Science Foundation Traineeship, 1971

Professional Membership:

American Political Science Association