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Abstract

This Essay is about the competition between de jure and de facto ways to identify constitutionally prohibited acts and the brief victories in scattered Warren Court rulings of de facto modes of constitutional review. My thesis is that the de jure/de facto opposition in equal protection doctrine was a particularly visible site of ideological conflict over the meaning of social power and its official identification. I consider those rulings applying a de facto standard a "strand" because the de facto standard formally applied only in narrow doctrinal settings and for brief periods of time. I consider these rulings "subversive" because the application of the de facto standard even in these limited settings gave formal and authoritative recognition to a discourse critical of traditional and dominant American constitutional interpretation. One part of the legacy of the Warren Court is that these cases continue to demonstrate the possibility of interpreting the Constitution in a more Left-leaning direction.

I intend this Essay to be evocative rather than exhaustive. I do not discuss every context in which these issues are relevant, nor every case or doctrinal category presenting the tension between these modes of review. Instead, I consider these issues at a relatively high level of generality, assuming as a starting point that these cases and the doctrinal issues they present are familiar to readers.