



[T]he Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense."

Id. at 1-2.

It seems likely that the dissenting Justices had particularly tried to win over Justice Powell, but were unable to do so. The dissent notes with specific approval the warning Justice Powell had given in an earlier case, where he had written that raising the level of judicial scrutiny in Equal Protection cases according to the Court's view of the societal importance of the interest affected, tends to cause the Court to assume a "legislative role."

As you will recall, the Solicitor General's office had decided not to take a position before the Supreme Court on the Equal Protection issue in this case. The briefs for the State of Texas were quite poor. It is our belief that a brief filed by the Solicitor General's Office supporting the State of Texas -- and the values of judicial restraint -- could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case.

In sum, this is a case in which our supposed litigation program to encourage judicial restraint did not get off the ground, and should have.