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EQUAL PROTECTION AND MORAL CIRCUMSTANCE: ACCOUNTING FOR CONSTITUTIONAL BASICS

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INTRODUCTION

SINCE its ratification in 1868, the equal protection guarantee[1] has been notable for its underachievement. The fourteenth amendment was adopted shortly after the Civil War to secure the citizenship and basic rights of those individuals whose humanity the Constitution's original framers bartered away.[2] The amendment also empowered Congress to enforce its provisions through appropriate legislation.[3]

In its first test after ratification,[4] however, the fourteenth amendment's potential for challenging official discrimination was significantly curtailed. The Supreme Court effectively trimmed the privileges and immunities clause to the point that it has never operated as a meaningful check upon exercises of state power.[5] Although initially determining that the

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The general themes and concepts related in this article are amplified and explored in further context and detail in a forthcoming book: D. Lively, The Constitution and Race (1992).

1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

2. As the price for Southern support for the Constitution, the framers accommodated the institution of slavery. *See* W. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760-1848 62-65 (1977). The Supreme Court subsequently noted that because they were "so far inferior [and] had no rights which the white man was bound to respect . . . negro[es] might justly and lawfully be reduced to slavery." Scott v. Sandford, 60 U.S. 393, 407 (1857). The Court found that "the right of property in a slave is distinctly and expressly affirmed in the Constitution." *Id.* at 451. Constitutional provisions overtly accommodating slavery include congressional representation and federal taxation provisions equating a slave's status to three-fifths of a person. *See* U.S. Const. art. I, § 2, cl. 3; *id.* § 9, cl. 4. For a discussion of how several other provisions served the institution of slavery, see W. Wiecek, *supra*, at 62-63.

3. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

4. The Slaughter-House Cases, 83 U.S. 36 (1873). This group of cases concerned a challenge to a state law prohibiting, with one exception, livestock yards and slaughterhouses within a city and surrounding areas. *See id.* at 59-60.

5. The Court determined that the privileges and immunities clause afforded no new protection for a citizen of a state against the legislative power of the state. *See id.* at 77-79. As the dissent noted, the majority's construction of the clause reduced it to a redundant nullity. *See id.* at 96 (Field, J., dissenting). The architect of the fourteenth amendment, Representative John A. Bingham, intended that "privileges and immunities" incorporate the first eight amendments to the Constitution. J. James, The Framing of the Fourteenth Amendment 106 (1956).

due process clause had no substantive significance,[6] by the turn of the century, the Court transformed it into a source of Social Darwinist values that supported rather than challenged racist notions.[7] By a process of elimination, therefore, the equal protection clause became the primary constitutional vehicle for combatting racial injustice.

The fourteenth amendment restructured basic law by recognizing and accounting for a class of citizens that had been slighted in the original drafting process and demeaned by subsequent jurisprudence.[8] Prior to *United States v. Carolene Products Company*,[9] however, Justice Holmes described the equal protection guarantee as "the last resort of constitutional arguments."[10] Several generations would elapse following the ratification of the fourteenth amendment before the Court forcefully employed the equal protection clause to account for minority interests.[11] In eventually disclaiming the fourteenth amendment as a basis of economic liberty,[12] the Court suggested the possibility of enhanced judicial attention to "prejudice against discrete and insular minorities."[13]

Invariably, construction of an abstract principle will reflect the subjective views and experience of its interpreter. The phenomenon is particularly evident with respect to an amorphous constitutional term like "equal protection" that is neither self-defining nor self-executing.[14] Ab-

6. The Court construed the provision to require that laws be enacted pursuant to procedural due process. *See* The Slaughter-House Cases, 83 U.S. at 80-81.

7. The *Lochner* Court interpreted the fourteenth amendment due process clause to afford substantive protections of economic and other liberties. *See* Lochner v. New York, 198 U.S. 45, 53 (1905); *see also* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (describing *Lochner* doctrine); Sunstein, Lochner's *Legacy*, 87 Colum. L. Rev. 873, 877-79 (1987) (same). Justice Holmes criticized the *Lochner* majority for constitutionally enshrining "Mr. Herbert Spencer's Social Statics." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

8. The fourteenth amendment was ratified in 1868. *See* U.S. Const. amend. XIV, proposal and ratification (U.S.C. 1988).

9. 304 U.S. 144 (1938).

10. Buck v. Bell, 274 U.S. 200, 208 (1927). Holmes' refusal to take the equal protection guarantee seriously was congruent with a sense that it would be "pointless" for courts to provide relief to minorities, given the white majority's lack of sympathy toward minority interests. *See, e.g.*, Giles v. Harris, 189 U.S. 475, 488 (1903) (holding that federal courts did not have jurisdiction over black citizens' fifteenth amendment claim of race-based denial of right to vote).

11. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

12. *See, e.g.*, United States v. Darby, 312 U.S. 100, 125 (1941) (fourteenth amendment does not preclude state minimum wage regulations); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937) (substantive due process doctrine "a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed").

13. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

14. The fourteenth amendment is not the only ambiguous constitutional provision. While some provisions, such as those setting age qualifications for elected offices, *see* U.S. Const. art. I, § 2, cl. 2; *id.* art. II, § 1, cl. 5, are relatively precise, the provisions concerning individual rights and liberties are universally abstract. *See id.* amends I-X. Therefore, such provisions only can be interpreted through reference to extra-constitutional materials.

sent an explicit command to actuate the equal protection guarantee in comprehensive and substantive fashion, it is not surprising that the provision has demonstrated limited utility in vindicating minority interests. Born of limited aims and aspirations and crafted by a culturally homogeneous group, much like the Constitution's original provisions, the fourteenth amendment reflected the influence of white superiority.[15] The result was a fundamental but qualified demand for racial equality limited to contract and property rights, individual security and legal status.[16]

The limited agenda and vision of the fourteenth amendment's architects neither precluded nor restrained dramatic judicial expansion of the provision's scope beyond considerations of race.[17] The Court has recognized various unenumerated fundamental rights that reflect and vindicate the values and priorities of the dominant culture.[18] An examination of the Court's racial jurisprudence reinforces the impression that the fourteenth amendment's meaning for minorities is primarily a function of evolving majority tolerance.

During the late nineteenth century, when official racial segregation was challenged,[19] the Court repudiated the notion of a color-blind constitution and created the separate but equal doctrine.[20] A century later, when affirmative action was contested as a means of remedying racial disparities, color-blindness was subscribed to in undifferentiating fashion.[21] In the interim, an anti-discrimination principle emerged, only to be swiftly eviscerated by tests that frustrated proof of constitutional violations.[22] The Court has also thwarted alternative strategies for exposing

15. Official segregation existed in both the North and South. *See* R. Berger, Government By Judiciary: The Transformation of the Fourteenth Amendment 14 (1977). Moreover, at least two northern states—Indiana and Oregon—excluded blacks altogether. *See id.* The fourteenth amendment's framers did not intend to outlaw or condemn racial segregation. Rather, they limited their purposes to securing for blacks "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and inherit and dispose of property." Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (statement of Rep. Trumbull); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1026-28 (1979).

16. *See infra* notes 90-101 and accompanying text.

17. *See infra* note 32 and accompanying text.

18. In identifying unenumerated fundamental rights, the Court plumbs society's values to determine whether an interest is rooted in its "traditions and conscience." *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("right to engage in homosexual sodomy" not so rooted); Roe v. Wade, 410 U.S. 113, 153 (1973) (liberty to elect abortion so rooted). The Court's inquiry is designed to discern pervasive if not virtually consensual popular support for a premise. *See Bowers*, 478 U.S. at 194 (inquiry reflects judiciary's sense that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution").

19. *See* A. Lewis, Portrait of a Decade 18 (1964).

20. *See* Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

21. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989) (plurality opinion) (standard of classification not affected by race of those harmed or helped by classification); *id.* at 520 (Scalia, J., concurring) ("strict scrutiny must be applied to all governmental classification by race").

22. In order to establish a fourteenth amendment violation, plaintiffs must demon-

and defeating persisting racial discrimination.[23] Modern case law, unlike its juridical antecedents, may condemn the nation's history of discrimination[24] and speak in forceful rhetoric.[25] In reality, however, the history of fourteenth amendment review reveals a pattern of judicial subservience to dominant social interests.

An examination of the full record of fourteenth amendment jurisprudence reveals few instances of the equal protection guarantee successfully vindicating minority interests. Racial duality in housing,[26] criminal justice[27] and employment[28] persistently have survived constitutional challenge. The judicial mandate to desegregate public education[29] indicated a radical restructuring of fourteenth amendment jurisprudence.[30] Subsequent glosses upon the desegregation formula, however, limited its actual impact as a force for societal change.[31] The fourteenth amendment has

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strate that a discriminatory purpose motivated the challenged state action. *See* Washington v. Davis, 426 U.S. 229, 239-41 (1976). Because proof of wrongful intent is elusive, the discriminatory purpose requirement effectively precludes relief from many forms of government discrimination. *See, e.g.*, Crawford v. Board of Educ., 458 U.S. 527, 544-45 (1982) (no discriminatory intent found in amendment to state constitution that limited court-ordered busing); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 280-81 (1979); (no discriminatory intent found in statute granting preferential hiring to veterans); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (no discriminatory intent found in zoning plan).

23. In City of Memphis v. Greene, 451 U.S. 100 (1981), a traffic barrier erected between black and white neighborhoods was challenged unsuccessfully under the thirteenth amendment as a "badge of slavery." *See id.* at 124, 128-29.

24. *See, e.g., J.A. Croson Co.*, 488 U.S. at 499 ("there is no doubt [that this nation has a] sorry history of both private and public discrimination"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 278 n.5 (1986) ("[n]o one disputes that there has been race discrimination in this country").

25. Thus, while the Court construed 42 U.S.C. § 1981 (1988) to provide no relief for on-the-job racial harassment, it observed that "[n]either our words nor our decisions should be interpreted as signaling one inch of retreat from . . . forbid[ding] discrimination in the private, as well as the public, sphere." Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989).

26. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (rejecting equal protection challenge to zoning restrictions which precluded low income housing and adversely affected minorities).

27. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 289-91, 298 n.20 (1987) (rejecting equal protection challenge to death penalty premised upon both statistical demonstration that penalty was disproportionately imposed upon blacks and argument that disparate impact was legacy of prior racially dual criminal justice system).

28. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 247-48 (1976) (rejecting equal protection challenge to employment testing procedures that blacks failed at higher rates than whites).

29. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

30. The Court heard arguments in the *Brown* case during the term before the desegregation decree was announced. *See id.* at 488. It then delayed issuance of its remedial decree for another term, *see* Brown v. Board of Educ., 349 U.S. 294, 299 (1955), in order to obtain cooperation from and defuse resistance by state and local officials.

31. As Justice Marshall observed, limiting the purview of the equal protection clause to instances of de jure segregation ensures that "[n]egro children . . . will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past." Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).

proven more useful in addressing interests unrelated to race than in effectuating its central purpose.[32] Even as a predicate for legislative action,[33] judicial interpretations that allowed Congress to reach only state action circumscribed the scope of the amendment.[34]

The concept of equal protection has probably raised and dashed more expectations of social progress than any other constitutional provision. For instance, the Court's school desegregation jurisprudence not only promised unitary school systems[35] but also equal educational opportunity.[36] Such aspirations have not been realized, however, and have actually been undercut by limiting constructions of the amendment that have left educational equality interests substantially unimproved or worse off.[37] Recent decisions, despite their rhetoric, exhibit a reluctance to con-

32. Following the Court's much criticized employment of the fourteenth amendment to protect economic liberty earlier this century, the amendment became the foundation for a right to privacy in matters concerning abortion, family, marriage and contraception. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (fundamental right to marry under fourteenth amendment); Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion) (fundamental right to family association); Roe v. Wade, 410 U.S. 113, 153 (1973) (fundamental liberty to elect abortion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (fundamental right to privacy protects married couples' access to contraceptives). The right to privacy, however, was not construed to encompass a right to government funding of abortions for poor women. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (denial of public funding for medically necessary abortions does not violate fourteenth amendment); Maher v. Roe, 432 U.S. 464, 469-70 (1977) (denial of public funding for nontherapeutic abortions does not violate fourteenth amendment). This cabining of the privacy right was particularly injurious to non-white mothers. *See Harris*, 448 U.S. at 343 (Marshall, J., dissenting).

33. *See* U.S. Const. amend XIV, § 5.

34. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883) (Congress' power under section five of fourteenth amendment may not extend beyond coverage of section one); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875) (fourteenth amendment does not impose affirmative power upon federal government to compel states to treat all citizens equally). The limitation may have been insignificant well into the twentieth century, however, because Congress largely countenanced segregation, as evidenced by the segregation of schools in the District of Columbia. *See* Bolling v. Sharpe, 347 U.S. 497, 498 (1954). The Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1988), which prohibited discrimination in public accommodations, *see id.* at § 2000a(a)-(c), was enacted nearly a decade after the Court held that racial segregation was unconstitutional. In response to judicial limitations upon the power of the fourteenth amendment, the 1964 Act was enacted pursuant to the commerce clause. *See id.* at § 2000a(b)-(c). The Court has held that Congress may reach private activity under the commerce clause if there is a rational basis for concluding that the private activity affects interstate commerce and the means Congress chooses to regulate the activity are reasonable and appropriate. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-59 (1964). The Court eventually recognized congressional power to reach private action under the fourteenth amendment. *See* Katzenbach v. Morgan, 384 U.S. 641, 648-50 (1966) (Congress has same broad powers under fourteenth amendment as afforded by necessary and proper clause). By itself, the commerce power would seem broad enough to support civil rights laws concerning education, employment, public accommodations and other interests. *See, e.g., Heart of Atlanta Motel*, 379 U.S. at 258-59 (expansive construction of Congress' power to remedy racial discrimination pursuant to commerce clause power).

35. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

36. *See id.* at 493.

37. *See infra* notes 146-150 and accompanying text.

front the persistent reality of racial discrimination[38] and suggest that the usefulness of the equal protection guarantee as a means of accounting for minority interests has been substantially undercut.

In *City of Richmond v. J.A. Croson Company*,[39] the Court expressed hostility toward affirmative action by branding remedial classifications as suspect.[40] Thus, color-blindness has emerged as a cardinal fourteenth amendment principle[41] that effectively checks race-conscious remedies.[42] Barring two circumstances—rare instances of provably intentional racial discrimination[43] and federal initiatives calculated to achieve equal protection objectives[44]—race-conscious remediation has been constitutionally foreclosed.

More than a decade ago, the Court imposed upon equal protection litigants the burden of proving that challenged state action is prompted by discriminatory intent.[45] Because wrongful motive is elusive and easy to disguise,[46] the discriminatory purpose standard has effectively limited the equal protection guarantee's reach to instances of overt discrimination. Thus, the Court has engineered an equal protection standard that, while useful in 1954 to combat de jure segregation, remains unresponsive to the subtle, disguised, and even unconscious manifestations of racism that pervade contemporary society. Affirmative action is the primary victim of the Court's standards because of its explicit race-consciousness.[47]

Modern equal protection doctrine perpetuates an historical pattern of accommodating imperatives of the dominant culture. Nearly a century ago, the Court rationalized the separate but equal doctrine on the ground that its critics mistakenly perceived enforced racial separation as imply-

38. *See infra* notes 158-206 and accompanying text.

39. 488 U.S. 469 (1989).

40. *See id.* at 493-95.

41. *See id.*

42. *See id.* at 505-09.

43. *See id.* at 509.

44. A decade ago, a plurality of the Court deferred to Congress' authority under section five of the fourteenth amendment and upheld a minority set-aside provision for federal public works contracting. *See* Fullilove v. Klutznick, 448 U.S. 448, 476 (1980) (plurality opinion). More recently, a majority supported a Federal Communications Commission policy that afforded preferences to minorities in the broadcast licensing process. *See* Metro Broadcasting v. FCC, 110 S. Ct. 2997, 3008-09 (1990). The Court upheld Congress' power to engage in race-conscious remediation pursuant to its power under section five of the fourteenth amendment, while noting that an important governmental interest in promoting broadcast diversity was at stake. *See id.* at 3009.

45. *See supra* note 22 and accompanying text.

46. *See id.*

47. A century ago, in its first review of a constitutional challenge to state segregation, the Court rejected Justice Harlan's vision of a "Constitution [that] is color-blind." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Principles of racial neutrality manifestly have different implications when affirmative action is the dominant issue. The Court has recalibrated its equal protection standards in a way that serves the current interests of the dominant culture by adopting a color-blindness principle. *See supra* notes 40-44 and accompanying text; *infra* notes 167-198 and accompanying text.

ing black inferiority.[48] The contemporary Court has disapproved of affirmative action partially in reliance on the notion that remedial programs actually harm minorities.[49] The rationalizations of past and present are, therefore, linked by a common disingenuousness that is presumptuous and paternalistic.

Any attempt to realize the potential goals of the equal protection guarantee must respond to the objection that judicial intervention on behalf of minorities is anti-democratic. It must also reckon with the limitations originally set for the equal protection agenda and since molded by the realities of society's moral development. Frustration of the Court's desegregation mandate demonstrates that judicial efforts to expand equal protection jurisprudence beyond the dominant society's capacity for change are destined to fail.[50] The Court's treatment of race-conscious remedies,[51] however, is also susceptible to criticism for imposing a legal standard of color-blindness that exceeds the progress of morality and is thus ahead of its time.

As framed and ratified, the fourteenth amendment was the product of limited aims.[52] Its marginal accounting for minority interests for over more than a century, however, has elicited arguments for a more expansive and aggressive fourteenth amendment agenda. Resultant and often competing notions have generally failed to comport with contemporary realities,[53] prompted allegations of the anti-democratic exercise of judicial power,[54] or required profound changes in the structure of society that are unacceptable to the dominant culture.[55] Creative fourteenth amendment theories have largely been unsuccessful as a source of jurisprudential inspiration and practical result. Such concepts also have diverted attention from the potential value of the original understanding of the equal protection clause as a means of accounting for racial injustice. When principle fails to synchronize with morality, significant risks of doctrinal resistance and negation arise. Both the interests of doctrinal and normative progress would be furthered by an enhanced appreciation for the relevance of the amendment's original understanding to a society

48. *See Plessy*, 163 U.S. at 551.

49. *See infra* notes 185-190 and accompanying text.

50. *See infra* notes 116-206 and accompanying text.

51. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (plurality opinion).

52. *See infra* notes 83-103 and accompanying text.

53. For an explanation of why judicial attention to discrete and insular minorities is increasingly anachronistic, see *infra* notes 255-258 and accompanying text.

54. *See, e.g.*, R. Bork, The Tempting of America: The Political Seduction of the Law 81-82 (1990) (expansive construction of equal protection clause cannot be justified on grounds it is "good for us" nor pursuant to theory that requires judiciary to perform legislative function).

55. *See* Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting). Justice Marshall contended that the *Milliken* Court rejected expansion of the desegregation remedy beyond municipal boundaries because it felt that desegregation "ha[d] gone far enough." *Id.*

that remains functionally, if no longer officially, divided by race consciousness.

Part I of this Article examines how contemplations of the framers of the fourteenth amendment and early decisions foreshadowed the equal protection guarantee's underachievement. Part II demonstrates that equal protection jurisprudence has consistently accommodated the interests of the dominant culture. Part III argues that redirection of judicial attention to the limited but yet unfulfilled original agenda of the fourteenth amendment would enhance the guarantee's efficacy in accounting for minority interests.

I. PRELUDE TO THE PRESENT

The history of equal protection doctrine demonstrates the maxim that the past is merely a prologue to the future. Despite a changed social context, modern jurisprudence remains largely consistent with the past, at least with respect to the manner in which relevant priorities are ordered. Society has consistently subordinated minority interests to the interests of the dominant culture since the founding of the republic, when the freedom and citizenship of most blacks persons were sacrificed to facilitate ratification of the Constitution.[56]

A prerequisite for fully appreciating *Scott v. Sandford*,[57] the most condemned decision in the history of American jurisprudence, is recognition that judicial accommodation of dominant priorities at the expense of minority interests has been an historical constant. *Scott*, which upheld the constitutionality of slavery,[58] has been described as a " 'derelict[] of constitutional law.' "[59] So profound is its infamy that, even if it cannot be purged from the nation's legal heritage, the ruling has become "the most frequently overturned decision in history."[60]

Scott, however, is neither a jurisprudential relic nor entirely aberrational. It was inspired by priorities and analytical processes that continue to influence law making. Chief Justice Taney, referring to original perceptions of blacks as inferior, held that the Constitution did not afford them citizenship and basic rights.[61] Despite the repudiation of the *Scott*

56. *See* W. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812 322-25 (1968).

57. 60 U.S. 393 (1857).

58. The Court determined that original intent contemplated and accommodated slavery, *see id.* at 409, and that the fifth amendment created rights to own property, including slaves that Congress could not vitiate. *See id.* at 451-52.

59. Meese III, *The Law of the Constitution*, 61 Tulane L. Rev. 979, 989 (1987) (quoting P. Kurland, Politics, the Constitution and the Warren Court 186 (1970)).

60. D. Bell, Race, Racism and American Law 21 n.4 (1973). The attempt to erase *Scott* from the jurisprudential landscape has been largely successful, as indicated by elision of the case from most constitutional law courses. Only one major casebook includes an edited version of the decision and a discussion of its central meaning. *See* G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 440-43 (1986).

61. *See* Scott v. Sandford, 60 U.S. 393, 453-54 (1857).

decision by the thirteenth and fourteenth amendments, its racist spirit and ideology were evident in the Court's endorsement of official segregation and investment in the separate but equal doctrine.[62] Not until 1954, in declaring "[s]eparate . . . inherently unequal,"[63] did the Court meaningfully confront the ideology of *Scott*. Since then, evisceration of the desegregation mandate[64] and invalidation of affirmative action initiatives[65] suggest a jurisprudential ordering of priorities that, even if responsive to different realities, is not entirely dissociated from a discredited past.

The intense effort to repudiate and disparage *Scott* is revealing, despite the decision's fidelity to the original racial ideology of the Constitution's framers and abiding attitudes.[66] Overruling a case requires only a single decision. The reiterated condemnations of *Scott* obscure a significant continuity in the Court's racial jurisprudence before and after adoption of the fourteenth amendment, and wrongly suggest that *Scott* was the product of exceptional criteria or factors.

Scott's context further indicates its crucial position in an enduring jurisprudential pattern. At the time of the decision, racism was rampant in the antebellum North. Concern that former slaves would migrate to the free states and compete in the exclusively white employment marketplace accentuated racist sentiments.[67] The abolitionist movement promoted emancipation but, except for its radical exponents, did not contemplate comprehensive racial equality in a legal or normative sense.[68] Even Lincoln, the President responsible for emancipation, never embraced general racial parity. He observed that

> [t]here is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us . . . . [E]ven when you cease to be slaves, . . . you are yet far removed from being placed on an equality with the white race. . . . I cannot alter it if I would. It is a fact.[69]

Given such a moral and ideological backdrop, it is unsurprising that public school segregation had become rooted in the North even before

62. *See infra* notes 106-111, 128-134 and accompanying text.

63. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

64. *See infra* notes 146-151 and accompanying text.

65. *See infra* notes 169-206 and accompanying text.

66. As Susan B. Anthony observed, " 'Taney's decision, infamous as it is, is but the reflection of the spirit and practice of the American people, North as well as South.' " D. Fehrenbacher, The Dred Scott Case 430 (1978) (quoting draft of a speech by Susan B. Anthony (1861)). Nonetheless, it did deviate from original contemplations of a federal government that would be neutral on slavery. *See, e.g.*, W. Wiecek, *supra* note 2, at 15-16 (discussing post-Revolutionary consensus view that states retained sole power to regulate or abolish slavery within their territories).

67. *See* R. Berger, *supra* note 15, at 12.

68. *See* D. Fehrenbacher, *supra* note 66, at 190-92; W. Wiecek, *supra* note 2, at 167-69, 217-18.

69. C. Woodward, The Burden of Southern History 81 (1960) (quoting speech of President Lincoln).

the Court upheld the constitutionality of slavery.[70] In *Roberts v. City of Boston*,[71] the Massachusetts Supreme Court held that a black student had no right to attend a nearby white public school when a distant black facility afforded an "equal" albeit segregated education.[72] Assignment of students to distant schools as a means of overcoming segregation would become a politically explosive issue a century later.[73] While inconvenience and burden provided grounds for resistance to busing in modern times, they did not impede accommodation of racial separation in 1850, even when transportation was inefficient or impracticable.

Although *Scott* is often described as an idiosyncratic reflection of the values of southern plantation society,[74] its racist premises reflected cultural attitudes unbounded by geography. Writing for the Court, Chief Justice Taney recounted that blacks

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[75]

Taney discerned perhaps erroneously from founding documents, but accurately from dominant attitudes and legally imposed disabilities, that a "barrier was intended to be erected between the white race and the one which they had reduced to slavery."[76] He further observed that a "stigma, of the deepest degradation, was fixed upon the whole race"[77] and that the "distinguished men who framed the Declaration . . . perfectly understood the meaning of the language they used . . . and . . . that it would not in any part of the civilized world be supposed to embrace the negro race."[78]

Given a charter document that consciously accommodated slavery,[79] and a society that pervasively and overtly expressed its racism,[80] Taney's conclusion that the "state of public opinion had undergone no change when the Constitution was adopted"[81] or been significantly transformed

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70. *See* Commission on School Integration, Public School Segregation and Integration in the North 3-4 (1963); M. Weinberg, Race and Place: A Legal History of the Neighborhood School 2-5 (1967); *see also* Brown v. Board of Educ., 347 U.S. 483, 491 n.6 (1954) (school segregation has long been of national concern).

71. 59 Mass. 198 (1849).

72. *See id.* at 207-10.

73. For a discussion of the emergence and operation of separate but equal education, see R. Kluger, Simple Justice, 102-09 (1975); L. Litwack, North of Slavery 113-14 (1961).

74. Critics of *Scott* labeled the Court " 'the citadel of slaveocracy.' " A.T. Mason, The Supreme Court From Taft To Warren 16 (1968) (quoting historian Von Holst).

75. Scott v. Sandford, 60 U.S. 393, 407 (1857).

76. *Id.* at 409.

77. *Id.*

78. *Id.* at 410.

79. *See supra* note 2 and accompanying text.

80. *See supra* notes 66-78 and accompanying text.

81. Scott v. Sandford, 60 U.S. 393, 410 (1857).

in the intervening years is not surprising. *Scott* is not the derelict that retrospective glossings portray. Rather, the decision reflects dominant values that inspired the Constitution.

Ratification of the fourteenth amendment substantially redistributed governmental power. Prior to the amendment's adoption, the liberties and safeguards enumerated in the Bill of Rights constrained the federal government but not the states.[82] As one of the fourteenth amendment's champions explained, the provision was designed to respond to "that defect, and allows Congress to correct the unjust legislation of the States."[83] It thus afforded federal protection from impermissible state enactments.[84] As debates over the aims and meaning of the provision proceeded, it became evident that society's general disposition toward blacks remained racist and the amendment's reach would be correspondingly narrow.[85] Although the fourteenth amendment superseded *Scott* by recognizing black personhood and citizenship, it did not completely[86] break from the antebellum values of both the North and South.

As initially conceived, the fourteenth amendment neither deviated from nor challenged dominant morality. Political considerations influenced the conceptualization and drafting of the fourteenth amendment. Especially significant were concerns that the Civil Rights Act of 1866 would be jeopardized as southern states returned to the Union.[87] Ratification of the amendment placed basic elements of black citizenship beyond normal politics, and "fix[ed] [them] in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake . . . and no cloud can obscure it."[88]

Because the fourteenth amendment was intended to constitutionalize the 1866 Civil Rights Act,[89] analyzing the aims and focus of the statute

82. *See* Delaware v. Van Arsdall, 475 U.S. 673, 705-06 (1986) (Stevens, J., dissenting); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 156 (1973) (Douglas, J., concurring); Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 247 (1833).

83. Cong. Globe, *supra* note 15, at 2459 (statement of Rep. Stevens).

84. *See id.* at 3148 (statement of Rep. Stevens).

85. The congressional debates over the fourteenth amendment were replete with references to white superiority and prejudice. *See* R. Berger, *supra* note 15, at 13-15.

86. *Scott* held that neither slaves nor their descendants qualified as citizens or enjoyed constitutional rights. *See* Scott v. Sandford, 60 U.S. 393, 416-17 (1857).

87. *See* Cong. Globe, *supra* note 15, at 2459 (statement of Rep. Stevens); *id.* at 2462-63 (statement of Rep. Garfield).

88. *Id.* at 2462 (statement of Rep. Garfield).

89. Even those who supported a more sweeping provision understood " 'that the amendment was designed to embody or incorporate the Civil Rights Act.' " R. Berger *supra* note 15, at 23 (quoting H.J. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory" and American Constitutionalism 291 n.73 (1968)). The modern incarnation of the Civil Rights Act of 1866 is 42 U.S.C. §§ 1981-82 (1988).

The original purpose of the fourteenth amendment has been a subject of extensive scholarly attention and debate. Some scholars argue that it enacted a broad principle of equality. *See, e.g.*, J. Baer, Equality Under the Constitution: Reclaiming the Fourteenth Amendment 105 (1983) (arguing that fourteenth amendment is lavish grant of liberty and

substantially reveals the original understanding of the amendment. The legislative history and congressional debates disclose an agreement that the Civil Rights Act would grant blacks civil but not political rights.[90] Enactment of the legislation and subsequent ratification of the fourteenth amendment did not "mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal . . . . Nor [was it meant] that all citizens shall sit on the juries, or that their children shall attend the same schools."[91] Civil rights were understood to be simply the absolute rights of individuals, such as " '[t]he right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' "[92]

The framers intended the fourteenth amendment to prohibit "discrimination in civil rights or immunities . . . on account of race."[93] Specifically, they meant to preclude racial discrimination with respect to contract and property rights, and guarantee equality in the criminal justice system.[94] Their vision and agenda did not contemplate elimination of all racial prejudice and discrimination, but sought to ensure that blacks were not denied basic opportunities for material development and equal legal standing.

Although the fourteenth amendment afforded blacks the constitutional status and protection that *Scott* denied,[95] it left the delineation of black political rights to the states. The chair of the Joint Committee on Reconstruction, Senator Fessenden, observed that the fourteenth amendment

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equality"); H.J. Graham, *supra*, at 157-241 (arguing that fourteenth amendment reaches private actors); Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 Sup. Ct. Rev. 33, 85 (1965) (arguing that Congress intended fourteenth amendment to protect political rights). Raoul Berger offers a restrictive understanding and definition. He argues that the amendment was the product of a narrow vision that did not contemplate granting comprehensive equality to blacks. *See* R. Berger, *supra* note 15, at 18-19. Berger's review of the drafting history, which includes several references cited in this Article, offers an especially detailed and comprehensive account of the historical record. From a practical standpoint, his minimalism offers more potential than expansive concepts as a predicate for actuating the fourteenth amendment. Grander theories invariably engender resistance and dispute, which render them academic. Some may interpret the fourteenth amendment in broader fashion, but all would agree that it at least covers what is described by the minimalist position. Such common ground affords a more promising basis of accounting for what are at least the amendment's core concerns.

90. *See* Cong. Globe, *supra* note 15, at 1117 (statement of Rep. Wilson). Representative Wilson construed the concept of civil rights to include rights to " 'life, liberty and property,' " *id.* at 1295, and to exclude those rights having " 'no relation to the establishment, support or management of government.' " *Id.* at 1117 (citation omitted). What is clear from the text and tone of the debates is that the fourteenth amendment was not meant to constitutionalize a standard of general racial equality.

91. *Id.* at 1117.

92. *Id.* at 1118 (quoting 1 J. Kent, Commentaries on American Law 599 (1854)).

93. Civil Rights Act of 1866, § 1, 14 Stat. 27 (1866); *see* Cong. Globe, *supra* note 15, at 474 (statement of Rep. Trumbull).

94. *See id.* at 474 (statement of Rep. Trumbull).

95. *See supra* notes 89-94 and accompanying text.

had nothing to do with the right to vote or any other political rights.[96] Fessenden perceived, moreover, not "the slightest probability that [black suffrage] would be adopted by the states," which generally denied blacks the franchise.[97] Ratification of the fifteenth amendment in 1870 finally accounted for black suffrage.[98] The framers' initial reluctance to constitutionalize the right to vote, however, further demonstrates that the fourteenth amendment was originally concerned only with a narrow ambit of equality[99] and was not designed as a broad anti-discrimination principle.[100] Nor was it intended to eradicate racial distinctions that did not implicate basic issues of life, liberty, personal security or property.[101] Judicial expansions of the provision in a racially nonspecific fashion[102] have exceeded the framers' narrow vision at the same time that their core racial concerns have been underserved.

The ideology that accommodated slavery in the South, and that gave rise to race-dependent legal burdens in North and South, inspired the limited agenda of the fourteenth amendment. Although the amendment was designed to limit some important substantive effects of prejudice, it also reflected prevailing racist impulses.[103] Three decades later, the Court expressed the abiding depth and vitality of racism in rejecting the notion of a color-blind Constitution.[104] Upholding racial segregation in public accommodations and embracing the separate but equal doctrine,[105] *Plessy v. Ferguson*[106] denied the sense that officially mandated separation connoted black inferiority.[107] Justice Harlan's dissenting plea for constitutional color-blindness[108] further demonstrated the dominance of racist values and ideology. He maintained that "[t]he white race . . . [is] the dominant race in this country. . . . [and] will continue to be for all time, if it remains true to its great heritage."[109] Harlan and the majority

96. *See* Cong. Globe, *supra* note 15, at 704 (statement of Sen. Fessenden).

97. *Id.*; *see also id.* at 358 (statement of Rep. Conkling).

98. The fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Constitution, amend. art. XV, § 1. Congress was also authorized to enforce the amendment "by appropriate legislation." *Id.*, amend. XV, § 2.

99. *See* Cong. Globe *supra* note 15, at 1117 (statement of Rep. Wilson).

100. For a discussion of the inconsistency of the Court's desegregation jurisprudence with the original understanding of the fourteenth amendment, see L. Tribe, God Save This Honorable Court 46-47 (1985).

101. *See* Cong. Globe, *supra* note 15, at 1117-18 (statement of Rep. Wilson).

102. *See supra* note 32 and accompanying text.

103. Congressmen debating the fourteenth amendment discussed the "proverbial hatred of" blacks. Cong. Globe, *supra* note 15, at 257 (statement of Sen. Julian). Senator Davis observed that: "[t]he white race . . . will be the proprietors of the land, and the blacks its cultivators." *Id.* at 935 (statement of Sen. Davis).

104. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

105. *See id.* at 548-52.

106. 163 U.S. 537 (1896).

107. *See id.* at 551-52.

108. *See id.* at 559 (Harlan, J., dissenting).

109. *Id.*

thus shared the sense that racial distinctions and chauvinism were natural and valid[110] and differed only over the context in which they were permissible.[111]

Although the Court subsequently adopted the principle of color blindness,[112] the process of ordering priorities and accommodating dominant interests remains largely unaltered. Even in the rare instances when the Court has recognized constitutional violations against minorities, its remedies have generally been ineffective and nondisruptive of the established order.[113] Modern equal protection jurisprudence not only accepts the dominant culture's limitations upon social change, but also provides an escape from constitutional imperatives.[114] Racial jurisprudence over two centuries has consistently served dominant ideology and priorities: validating slavery, formulating the separate but equal doctrine, limiting the desegregation mandate, and now crafting a principle of color-blindness to defeat race-conscious remediation. Appreciating the jurisprudential continuity is essential to understanding the fourteenth amendment's limited accomplishments and its realistic prospects of accounting for minority interests.

II. A LEGACY OF FALSE STARTS

The equal protection clause has expanded and consumed itself simultaneously. While the Court has used the fourteenth amendment to open up new constitutional territory far beyond the contemplations of its architects,[115] the original agenda of the amendment has remained compara-

110. The majority stated that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane." *Id.* at 552.

111. For the majority, separation of races in public transit was a matter of social equality. *See id.* at 550-51. For Harlan, such separation was a question of constitutional equality. *See id.* at 561-62 (Harlan, J., dissenting).

112. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-500 (1989) (plurality opinion).

113. The difference between de jure and de facto segregation is a matter of degrees, not of absolutes. For instance, the Court has referred to "quite normal patterns of human migration" in distinguishing de facto from de jure residential and attendant school district segregation. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976). Such "patterns" are not truly detached from official action, however, because they have been facilitated by judicial enforcement of restrictive covenants and the racially conscious distribution of federal urban development funds and location of schools and public housing. *See* Lively, *Color-Blindness and Context*, 17 N.Y.U. Rev. L. & Soc. Change 291, 298 (1989).

114. The Court's motive-based test effectively signals to government actors that discrimination is permissible if they disguise their motives. *See* Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 319 (1987).

115. The Court originally expressed doubt that "any action of a [s]tate not directed by way of discrimination against the negroes as a class, or on account of their race, [would] ever be held to come within the purview of" equal protection. The Slaughter-House Cases, 83 U.S. 36, 81 (1873). Contrary to the Court's expectations, equal protection has evolved to account for discrimination based upon gender, *see* Craig v. Boren, 429 U.S. 190, 197-99 (1976), alienage, *see* Graham v. Richardson, 403 U.S. 365, 376 (1971), and

tively underdeveloped.

The history of equal protection racial jurisprudence can be divided into four primary phases: a prefatory period, the separate but equal era, the desegregation interval and the current color-blind phase. Each stage has been characterized by principles that have precluded achievement of the amendment's original goals, even as the Court has dramatically expanded the provision's scope beyond the framers' contemplations.

The first installment of equal protection jurisprudence established a pattern that continued through the period of court-mandated desegregation in the mid-twentieth century: initial assertiveness, subsequent retreat and finally doctrinal negation. The cycle of raised, diminished and foiled possibilities commenced with *Strauder v. West Virginia*,[116] which held that a state law excluding blacks from juries was unconstitutional.[117] The Court observed that the fourteenth amendment precluded official discrimination "implying inferiority in civil society, lessening the security of [the] enjoyment of the rights which others enjoy . . . [and contributing] toward reduc[tion] . . . to the condition of a subject race."[118] It also emphasized the need for special constitutional attention to the historically disadvantaged condition of blacks.[119]

The Court's solicitude in *Strauder* vanished a few years later when, in *The Civil Rights Cases*,[120] the Court determined that the fourteenth amendment reached only state action.[121] The Court observed that

> [w]hen 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 progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[122]

The Court, which in *Strauder* had suggested official implications of inferiority as a constitutional touchstone,[123] determined that the contested practices were not "badge[s] of slavery or involuntary servitude."[124] It

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nonmarital children, *see* Levy v. Louisiana, 391 U.S. 68, 72 (1968). The Court has also held that a state violates the equal protection clause when it discriminatorily impairs a fundamental right. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (discriminatory impairment of right to interstate travel violative of equal protection clause); Harper v. Virginia Bd. of Educ., 383 U.S. 663, 666 (1966) (voting qualification rules that entailed wealth classification violative of equal protection); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (discriminatory application of sterilization penalty violative of equal protection).

116. 100 U.S. 303 (1879).
117. *See id.* at 310.
118. *Id.* at 308.
119. *See id.* at 306.
120. 109 U.S. 3 (1883).
121. *See id.* at 13.
122. *Id.* at 25.
123. *See* Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879).
124. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

noted that "thousands of free colored people" prior to abolition enjoyed basic rights of life, liberty and property, and "no one . . . thought" them compromised by discrimination in public accommodations and the like.[125] The Court concluded that the fourteenth amendment did not reach such institutional racism.[126] In focusing upon the implications of inferiority, the Court discounted the significance of "[m]ere discriminations on account of race or color,"[127] substantially stunting the amendment's potential for challenging official discrimination. *The Civil Rights Cases* thus effectively calibrated fourteenth amendment standards with cultural norms presuming racial superiority and favoring segregation.

The perspective of the dominant culture explains the conclusion in *Plessy v. Ferguson*[128] that racial segregation did not connote black inferiority.[129] The rationalization was essential for exempting official segregation from *Strauder*'s prohibition against discrimination implying inferiority.[130] Investment in the separate but equal doctrine commenced a second constitutional era that would persist until 1954.[131]

The true nature of the separate but equal doctrine became clear a few years after *Plessy*. In *Cumming v. Richmond County Board of Education*,[132] the Court permitted the school board to close a black secondary school while continuing to operate its white counterpart.[133] The Court also tolerated enormous funding disparities between black and white schools.[134] "Separate but equal" in practice translated into "separate and unequal."

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125. *Id.* at 25.

126. *See id.*

127. *Id.*

128. 163 U.S. 537 (1896).

129. According to the Court, any connotation of inferiority was not attributable to the nature of state enforced segregation; rather, "the colored race cho[se] to put [this] construction upon it." *Id.* at 551.

130. *See* Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880).

131. The separate but equal doctrine reigned effectively for over half of the period following ratification of the fourteenth amendment, from 1896 to 1954. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78, 85-87 (1927) (Chinese child not denied equal protection by segregated schooling); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 162-64 (1914) (upholding constitutionality of separate but equal dining accommodation on trains); Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (upholding constitutionality of segregated railroad cars); *see also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 344-45 (1938) (reaffirming separate but equal doctrine while finding denial of black student's admission to only state law school unconstitutional); Buchanan v. Warley, 245 U.S. 60, 81 (1917) (reaffirming separate but equal doctrine while striking down law that prohibited racially mixed neighborhoods as invasive of property rights). Moreover, even before it formally adopted the separate but equal principle, the Court spoke approvingly of "[m]ere discrimination" in public accommodations. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

132. 175 U.S. 528 (1899).

133. *See id.* at 544-45.

134. For example, South Carolina spent ten times more for white than black public school students on a per capita basis in 1915. *See* A. Lewis, *supra* note 19, at 20. The gap narrowed toward the end of the separate but equal era as the specter of court-ordered desegregation began to loom. *See id.* at 20-21. Even by 1954, however, average per cap-

More than half a century elapsed before the doctrinal facade began to crack. Although equality was possible with respect to tangible aspects of segregated school systems, such as funding, facilities, curricula and activities, the Court eventually determined that elements of segregated education "incapable of objective measurement" were also sources of racial inequality.[135] Noting that disparities in educational opportunity and stigmatization characterized segregated school systems,[136] in *Brown v. Board of Education*,[137] the Court concluded that "[s]eparate educational facilities are inherently unequal."[138]

The *Brown* mandate, which was originally limited to public schools, expanded rapidly into an anti-discrimination principle requiring desegregation of all public venues.[139] For more than a decade, the judiciary pressed the decree cautiously but assertively in the South.[140] In the face of massive resistance, delay and evasion by the states, the Court eventually insisted upon desegregation plans that "promise[d] realistically to work *now*"[141] and authorized judicial implementation of desegregation remedies including busing.[142]

For almost two decades, the Court pressed anti-discrimination principles in diverse contexts. For example, the Court struck down racially arbitrary applications of the death penalty.[143] The Court also construed the 1964 Civil Rights Act to shift the burden of proof to employers in job discrimination cases upon a showing that challenged practices had a dis-

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ita expenditures for white students were almost 50% higher than for black students. *See id.* at 21.

135. Sweatt v. Painter, 339 U.S. 629, 634 (1950). Among the immeasurable intangibles at the professional or graduate school level were faculty reputation, alumni positions and influence, institutional prestige and professional opportunities. *See id.*

136. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

137. 347 U.S. 483 (1954).

138. *Id.* at 495.

139. In the years immediately following *Brown*, the Court invalidated official segregation in a variety of public settings. *See, e.g.*, Schiro v. Bynum, 375 U.S. 395, 395 (1964) (affirming without opinion district court order invalidating segregation of public auditoriums); Gayle v. Browder, 352 U.S. 903, 903 (1956) (affirming without opinion district court order invalidating segregation of public buses); Mayor of Baltimore v. Dawson, 350 U.S. 877, 877 (1955) (affirming without opinion appeals court order invalidating segregation of public beaches); *see also* Muir v. Louisville Park Theatrical Assoc., 347 U.S. 971, 971 (1954) (vacating lower court order permitting segregation of public auditoriums and remanding for reconsideration in light of *Brown*).

140. For a discussion of the Court's insistence upon and the South's resistance to the desegregation agenda from the mid-1950s to late 1960s, see N. Dorsen, P. Bender, B. Neuborne & S. Law, Political and Civil Rights in the United States 623-45 (1979).

141. Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis in original).

142. The Court stated that there was "no basis for holding that local school authorities may not be required to employ bus transportation as one tool of school desegregation." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971).

143. *See* Furman v. Georgia, 408 U.S. 238, 255-56 (1972) (Douglas, J., concurring). The Court later interpreted *Furman* to mean that the death penalty could not be imposed pursuant to "sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976)

parate racial impact unjustified by business necessity.[144] However, growing majority resistance to the Court's equal protection jurisprudence, evidenced prominently in the 1968 election campaign,[145] created pressure for the limitation and eventual undermining of the desegregation principle.

As the Court entered the 1970s, it hinted that the outer limits of equal protection potential had been reached, if not surpassed. The "discriminatory intent" standard, first introduced as a qualification of the *Brown* decision,[146] checked the process of desegregation as it verged upon heavily populated areas of the North and West.[147] Consistent with the white majority's distress over the potential scope of desegregation,[148] the Court invalidated a desegregation plan in Detroit that would have encompassed the city's suburbs.[149]

After limiting the spatial scope of desegregation remedies, the Court fixed temporal limitations upon desegregation plans as well. It held that resegregation of a school district, following implementation of a desegregation decree, was not constitutionally violative absent proof of discriminatory motive.[150] With the limiting principles enumerated in the early

144. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (disparate impact a basis for relief under Title VII if *alleged* practice in question is not based upon "business necessity" or if there is no "demonstrable relationship [between] successful performance" of the job and the practice). The Court significantly eroded the *Griggs* standard in its recent holding that plaintiffs must " 'isolat[e] and identify[]' " the actual practices responsible for disparities. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 984 (1987)).

145. Richard Nixon, who won the election, pledged to alter constitutional jurisprudence by appointing justices committed to principles of restraint. *See* L. Kohlmeier, God Save this Honorable Court 114 (1972); H. Schwartz, The Burger Years xii (1987); *see also* B. Schwartz, Swann's Way: The School Busing Case and the Supreme Court 24 (1986) (discussing Nixon's opposition to court-ordered busing). Nixon won less than a majority of the votes cast. *See* T. White, The Making of the President—1968 396 (1969). When Nixon's electoral support is combined with that of then ardent segregationist George Wallace, it comprises more than half of the electorate. *See id.*

146. *See, e.g.*, Keyes v. School District No. 1, 413 U.S. 189, 208 (1973) (requiring evidence of segregative purpose or intent to establish constitutional violation and consequent duty to desegregate schools).

147. Proving discriminatory motive in sections of the country that had not effected segregation by law was more difficult, for reasons discussed at *supra* notes 159-160 and accompanying text. The confounding consequences of motive-based inquiry were not immediately apparent insofar as the Court, in initially articulating the de jure, de facto distinction, found that the Denver school board had "practiced deliberate racial segregation." *Keyes*, 413 U.S. at 213.

148. *See* Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

149. *See id.* at 752-53. In rejecting the lower court finding of intentional discrimination by the state and refusing to mandate implementation of an interdistrict remedy, *see id.* at 746-47, 752-53, *Milliken* directed operation of the *Brown* mandate to contexts where meaningful desegregation was functionally impossible. A constitutional duty, for instance, existed to eradicate the effects of official segregation in Detroit public schools. *See* Milliken v. Bradley, 433 U.S. 267, 282 (1977). Because interdistrict remedies had been foreclosed and the student population was approximately three-quarters black and one-quarter white, *id.* at 271 n.3, meaningful desegregation was largely a futile aim.

150. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976).

1970s, the Court created an escape route for white flight[151] and assured predominantly white suburban neighborhoods that they would be insulated from the demands of *Brown*. Judicially mandated desegregation thus came to resemble a ritual cleansing performed as a condition for reversion to the societal norm.

Such imagery seems especially apt following the Court's statement in *Board of Education v. Dowell*[152] that school desegregation decrees "are not intended to operate in perpetuity."[153] The Court distinguished desegregation orders from permanent decrees in the antitrust context, where modification is impermissible if a "continuing danger of unlawful[ness] . . . still exist[s]"[154] and, therefore, the aims of a decree " 'have not been fully achieved.' "[155] In the desegregation context, the Court held that judges must limit their inquiry to a determination of whether school officials have "complied in good faith with [a] desegregation decree . . . and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."[156] The return of a district to its prior segregated structure following dissolution of a desegregation decree, even if stigmatic consequences remain attributable to past intentional discrimination,[157] is not sufficient grounds for retention of judicial supervision. Such a standard of review accommodates rather than disrupts a society functionally disposed toward, even if no longer governed by, racial distinctions.

During the 1970s, equal protection doctrine became captive to the "discriminatory intent" standard. The Court determined that claims of disproportionate impact in employment, housing and criminal justice were constitutionally insignificant because a racially disproportionate impact by itself did not satisfy the purposeful discrimination requirement.[158] Motive-based inquiry is notoriously unfavorable to constitutional claims because subjective intent is easily concealed.[159] The

151. *See, e.g., Milliken*, 418 U.S. at 782 (Marshall, J., dissenting) (black children afforded same "separate and inherently unequal education" as in past as result of Court's refusal to permit multidistrict remedy).

152. 111 S. Ct. 630 (1991).

153. *Id.* at 637.

154. *Id.* at 636.

155. *Id.* (quoting United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968)).

156. *Id.* at 638.

157. *See id.* at 644 (Marshall, J., dissenting).

158. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 240-41 (1976); *see also* McCleskey v. Kemp, 481 U.S. 279, 297-98 (1987) (racially disproportionate impact not enough in itself to demonstrate equal protection violation).

159. The Court refused to apply an intent standard in freedom of speech cases for precisely this reason. *See* United States v. O'Brien, 391 U.S. 367, 383-84 (1968); *see also* Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) (criticizing application of motive-based inquiry in establishment clause case); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting) (criticizing application of inquiry into legislature's motive in commerce clause case).

Court has foresworn such an inquiry when other important constitutional interests are at stake.[160] It thus may be reasonable to conclude that for equal protection purposes the standard's disutility is its real utility as a judicially conceived limiting device.

Such a possibility is buttressed by the Court's failure to adhere to its own criteria when results would unsettle official policy. The Court suggested, for instance, that a historical pattern of segregation would count as evidence that an illegal motive infected a challenged action.[161] It turned a blind eye, however, to substantial disparities in the operation of a state death penalty[162] and the legacy of a dual justice system.[163] The Court's investment in discriminatory purpose criteria has enabled newly developed suburban communities to repulse constitutional challenges to zoning rules[164] and avoid reconfigurations of school districts in response to demographic changes.[165] By resorting to motive-based inquiry, the Court extended to state governments and their subsidiaries the benefit of any doubt and effectively foreclosed equal protection claims by plaintiffs unable to identify a smoking gun. The most salient feature of equal protection doctrine in the post-*Brown* retrenchment period, therefore, is a constitutional principle with minimal potential for societal disruption.[166]

The current era of equal protection jurisprudence not only confounds constitutional claims by minorities but facilitates challenges to remedial

160. *See, e.g., O'Brien*, 391 U.S. at 384 (first amendment "stakes are sufficiently high . . . to eschew guesswork" concerning motivation of legislature).

161. *See Village of Arlington Heights*, 429 U.S. at 266-67.

162. Georgia prosecutors "sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims" during the 1970s. McCleskey v. Kemp, 481 U.S. 279, 287 (1987). Georgia courts assessed the death penalty "in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* at 286.

163. *See id.* at 329-33 (Brennan, J., dissenting) (describing Georgia's dual system of criminal justice from colonial period to Court's invalidation of portions of death penalty "three times over the past 15 years").

164. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 254-55 (1977) (upholding use of zoning ordinance that excluded low-income housing from suburban community).

165. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) ("having once implemented a racially neutral attendance pattern" and achieved unitary status, no obligation to readjust plan in response to population change unprompted by discriminatory purpose); *see also* Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 Ohio St. L.J. 117, 118-19, 123-24 (1987) (suburban development patterns frustrate equal protection goals).

166. The Court reasons that without a discriminatory intent standard for the fourteenth amendment, "a whole range of tax, welfare, public service, regulatory, and licensing statutes" would be endangered. Washington v. Davis, 426 U.S. 229, 248 (1976). The Court greatly exaggerates this risk, however. A standard that focuses only upon state actions having racially stigmatizing effects would substantially limit the fourteenth amendment's purview.

initiatives. Motive-based inquiry may be unresponsive to the workings of subtle and unconscious racism, which have largely displaced overt discrimination against minorities, but it affords a powerful methodology to defeat race-conscious programs. The Court has increasingly evinced a reluctance to differentiate between remedial and non-remedial racial classifications.[167] As a result, it has largely eviscerated affirmative action as a means of accounting for the consequences of racial discrimination.[168]

Recent decisions consolidate more than a decade of Supreme Court debate over the pragmatic utility and constitutionality of affirmative action programs. From the outset the Court did not respond enthusiastically to the concept of race-conscious remediation. In *Regents of the University of California v. Bakke*,[169] the Court tolerated limited considerations of race in university admissions programs designed to diversify the educational process.[170] The Court declined, however, to endorse the notion that "[i]n order to get beyond racism, we must first take account of race."[171]

More than a decade ago, the Court, deferring to Congress' power to effectuate the aims of the fourteenth amendment,[172] approved a set-aside policy for public works projects.[173] Since then, however, the Court has become increasingly hostile to race-conscious remedies. In *Wygant v. Jackson Board of Education*,[174] for instance, the Court refused to permit a state to use a race-conscious policy to cure the effects of discrimination, concluding that the remedial purpose was too amorphous.[175] Before *Wygant*, Justice Stevens had "assume[d] that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class."[176] After *Wygant*, the Court substantially rejected the notion of a link between past discrimination and present disadvantage and hardened doctrinal justifications for disal-

167. *See supra* notes 39-44; *infra* notes 169-84 and accompanying text.

168. Only the Congress appears to retain significant leeway in designing affirmative action programs. *See supra* note 44.

169. 438 U.S. 265 (1978).

170. *See id.* at 311-15.

171. *Id.* at 407 (Blackmun, J., concurring in part, dissenting in part).

172. Fullilove v. Klutznick, 448 U.S. 448, 490-92 (1980). A comparable policy by a municipality was invalidated and distinguished on grounds that only Congress has "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.).

173. *See Fullilove*, 448 U.S. at 492.

174. 476 U.S. 267 (1986).

175. *See id.* at 276. Even when a state establishes the predicates necessary for application of a race-conscious remedy, the plan may reach no further than the proven effects of prior discrimination. *See* United States v. Paradise, 480 U.S. 149, 176 n.27 (1987). Moreover, even when a state agrees to enter into a consent decree to remedy prior discrimination, the terms of such a decree may be open to constitutional challenge by a nonparty. *See* Martin v. Wilks, 490 U.S. 755, 759-62 (1989).

176. Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting).

lowing remediation.[177]

The Court grounds its conclusion that remedial race-conscious classifications are suspect[178] upon explicit and implied suppositions that such classifications create limitless preserves for beneficiaries,[179] stigmatize minorities,[180] injure innocent victims[181] and foster racially divisive politics.[182] Although largely invalid, the Court's premises conform to a jurisprudential legacy consistently attuned to the interests of the majority. Concern that advantages granted to racial minorities by the government will be overbroad and endure beyond the point when the legacies of racial discrimination are overcome is unfounded. Decisionmakers that ultimately formulate and implement affirmative action programs are elected officials who serve with the consent of the governed.[183] When a majority of the relevant citizenry is disinclined to persist in self-sacrifice, it may curtail such programs by appropriate political action. Remedial schemes also are susceptible to inherent limits of self-sacrifice and competing self-interest, as evidenced by vitiation of a preferential lay-off policy that was collectively bargained for but challenged when its terms were actuated.[184]

The Court has also exaggerated the risk of racial stigmatization supposedly prompted by remedial policies. Affirmative action programs do not label minorities as incompetent or unable to succeed without special help. Rather, those stereotypes reflect of misperceptions deeply rooted in the society's history. Successful operation of affirmative action programs should actually overcome more stigma than they cause, as white males would no longer be perceived as having achieved success against limited competition. Experience also confirms that affirmative action may help overcome racial stereotyping and stigmatization.[185] As institutions become culturally diversified, the majority tends to accept the presence of minorities and traditional perceptions dissipate. Even if affirmative action does not erase stereotypes, it does not cause them, and is a means of achieving the constitutional aim of equal economic opportunity.

The Court's concern for the innocent victims of affirmative action—

177. "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

178. *Id.* at 493-95.

179. *See id.* at 498.

180. *See id.* at 493-94.

181. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986).

182. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

183. *But see id.* at 499 (arguing that racial preferences based on statistical generalizations may result from exercise of local political power by national minority).

184. The dispute in *Wygant* arose from a challenge to the implementation of a preferential lay-off provision that was part of a collective bargaining agreement. *See Wygant*, 476 U.S. at 270-72.

185. *See* Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1331 (1986).

those who do not receive jobs or promotions because programs grant advantages to minorities—manifests an especially visible link between contemporary equal protection jurisprudence and a history of judicial accommodation to the interests of the dominant culture. Individual innocence is illusory when majority group members benefit from advantages obtained and accumulated at the expense of minorities.[186]

Finally, the Court's concern with the risks of racial polarization is both belated and selective. Racial classifications played a central role in determining the distribution of civil and political rights when the republic was founded,[187] and were subsequently instrumental in minimizing the influence of blacks in the political process.[188] Race continues to be a significant determinant of voting patterns.[189] Concern that government actions intended to vindicate the interests of minorities will fuel racially divisive politics attaches unique significance to an enduring and common reality. In a society still inclined toward race-dependent classifications,[190] the selective reference to racial politics seems more a function of convenience than principle.

Successful challenges to race-conscious remediation reveal the enduring propensity of legalistic reasoning to preclude constitutional accounting for the legacy and reality of racial discrimination. Affirmative action decisions appear to be an extension of racial jurisprudence that has almost invariably accommodated the dominant culture for over two centuries. The Court's animus toward race-conscious remediation is troublesome, however, for reasons beyond the Court's failure to deviate from an established juridical norm.

Judicial resistance to affirmative action is strikingly intense, given the relatively limited reach of most remedial initiatives.[191] Hostility to affirmative action is especially puzzling given the Court's allowance of leg-

186. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting).

187. *See supra* notes 75-81 and accompanying text.

188. Congress enacted the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1988), to prohibit schemes that diminished or denied black voting rights, such as literacy tests and poll taxes. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2437.

189. *See* Pinderhughes, *Legal Strategies for Voting Rights: Political Science and the Law*, 28 How. L.J. 515, 531 (1985); *see also* Thornburg v. Gingles, 478 U.S. 30, 54 (1986) (discussing racial voting patterns); Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 Geo. L. Rev. 819, 866-68 (1984) (discussing District of Columbia racial voting patterns).

190. Even if not formally required, racial separation as a functional reality remains evident in society's most basic venues. The reality prompted Justice Rehnquist to note that "[e]ven if the Constitution required it, and it were possible for federal courts to do it, no equitable decree can fashion an 'Emerald City' where all the races, ethnic groups, and persons of various income levels live side by side." Cleveland Bd. of Educ. v. Reed, 445 U.S. 935, 938 (1980) (Rehnquist, J., dissenting from denial of certiorari). For a discussion of the pervasive segregation that persists in housing, see J. Kushner, Apartheid in America 1-63 (1980).

191. "What is so remarkable—and ominous—about the affirmative action debate is that so modest a reform calls forth such powerful resistance." Kennedy, *Persuasion and*

islative favoritism outside the racial context.[192] Concern that racial preferences may hold the political process hostage to tribal conflict[193] relates to a system of governance that routinely dispenses special advantages to particular groups. The Court itself has upheld veterans' benefits programs against challenges of overbreadth and intrinsic unfairness like those that have ensnared affirmative action.[194] Because legislatively conferred group advantage is a norm, the Court's rejection of affirmative action remedies appears essentially and unnecessarily race-dependent.

For minorities claiming constitutionally significant discrimination, the Court's equal protection criteria[195] present a challenge analogous to a demand that Gulliver, while immobilized by innumerable Lilliputian restraints, identify exactly what is holding him down. Precluding remediation of pervasive and accumulative discrimination because the causal link between discriminatory acts and racially disparate impact is overly conjectural seems unreasonable.[196] As the Court has noted when economic regulation and other constitutional concerns have been jointly implicated, "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. . . . [that] underlie much lawful state regulation."[197] Even when especially profound constitutional interests have been asserted, the Court has adhered to the principle that "unprovable assumptions about what is good for the people . . . [are] not a sufficient reason to find [a] statute unconstitutional."[198]

The Court's concern that remedies designed to address racial discrimination are founded upon speculation[199] reveals a commitment to color-blindness that is actually race-dependent. In limiting the viability of affirmative action remedies, some Justices have expressed concern that race conscious policies foster racial divisiveness[200] or aggravate racism.[201] Thus, the Court has fashioned a jurisprudence rooted in formal equality

Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327, 1334 (1986).

192. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 280-81 (1979) (upholding state hiring schemes granting preference to veterans against equal protection challenge).

193. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinions).

194. *See, e.g., Feeney*, 442 U.S. at 280-81 (acknowledging that preferences favoring veterans are "awkward," possibly afford "more than a square deal" and may reflect "unwise" policy).

195. Race-conscious remediation is permissible only to the extent necessary to redress specific instances of past discrimination, *see J.A. Croson Co.*, 488 U.S. at 493, which presumably must be established by satisfying the confounding discriminatory purpose requirement.

196. The *J.A. Croson Co.* Court disagreed, saying that the "sorry history of . . . discrimination in this country has contributed to a lack of opportunities for black entrepreneurs," but that "this observation, standing alone, cannot justify a rigid racial quota." *Id.* at 499.

197. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

198. *Id.* at 62.

199. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).

200. *See id.* at 495 (plurality opinion).

201. *See id.* at 520-21 (Scalia, J., concurring).

and projecting symmetry. Lost or disregarded in the analytical process is the reality that racial inequality and conflict will remain unchallenged so long as equal protection doctrine accounts for only the most blatant and indisputable manifestations of racial discrimination.

Even if the implementation of affirmative action programs entails some of the risks of unfairness the Court has identified,[202] judicial intervention to invalidate such initiative is unjustified and even hypocritical. Displacement of legislatively inspired or collectively bargained initiatives requires precisely the sort of judicial social-engineering and micromanagement of state affairs that proponents of institutional restraint regularly condemn.[203]

Judicial obstruction of realistic and limited attempts to remedy the consequences of racial discrimination coexists with the Court's promise to eliminate the vestiges of official discrimination "root and branch."[204] Such rhetoric implies a socially transformative goal at odds with the will of contemporary society. Evisceration of the desegregation mandate, short of a full accounting for the legacy of discrimination, suggests a commitment that is less than comprehensive and focused essentially upon self-evident official differentiations. Invalidation of remedial initiatives ensures that the gap between equal protection terms and results will persist rather than narrow.

In responding to the agenda of the fourteenth amendment, the Court has offered rhetorical imagery but rarely achieved substantive progress. The reality is that racially dependent attitudes remain "deeply rooted in this Nation's history and tradition."[205] A judicial commitment to eradicate discrimination altogether,[206] if fully subscribed to, would exceed the original understanding of the fourteenth amendment and might actually impair societal confrontation with enduring discriminatory realities. So long as the culture trades in legal images suggesting a state of moral development that does not actually exist, the Court may continue to em-

202. *See supra* notes 179-182 and accompanying text.

203. The Court's objection to affirmative action is partially attributable to the justices' skepticism concerning the fairness and workability of race conscious remedies. *See supra* notes 178-182 and accompanying text. For an exposition of the view that the judiciary should not compete on matters of policy, see R. Bork, *supra* note 54, at 81-82.

204. *See* Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (charging school board with duty to eliminate discrimination entirely).

205. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). The Court examines social traditions to determine whether an asserted interest, although unmentioned by the Constitution, rises to the level of a fundamental right or liberty. *Compare* Roe v. Wade, 410 U.S. 113, 152 (1973) (after historical inquiry, recognizing right to privacy encompassing right to abortion) *with Bowers*, 478 U.S. at 192-94 (following historical inquiry, rejecting right to consensual homosexual sexual relations).

206. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989). *Patterson* recognized that "discrimination based on the color of one's skin is a profound wrong of tragic dimension." *Id.*

ploy restrictive standards of review to frustrate genuine progress. As a result, incentive for moral progress will be diminished, if not defeated.

Contemporary equal protection doctrine frustrates proof of discrimination against minorities and precludes remedial initiatives on their behalf. Like their antecedents, modern fourteenth amendment criteria account primarily for the interests of the dominant culture. Constitutional standards that fail to address modern forms of discrimination against minorities, but are lethal to affirmative action, disclose continuity attributable to cultural premises that throughout their evolution have accommodated the majority's race-related or implicating priorities.

III. MORAL REALITY AND DOCTRINAL POSSIBILITY

Even evaluated by the limited expectations of its framers,[207] who understood that the fourteenth amendment would accommodate "mere discriminations,"[208] the equal protection clause has yet to fulfill its purpose. Minorities have substantially secured rights to travel without inordinate constraint,[209] to own, possess and convey property[210] and to make and enforce contracts.[211] The Court, however, has accepted "[a]pparent disparities in sentencing [as] an inevitable part of our criminal justice system"[212] even when the discrepancies are pronounced.[213] The Court has also limited the reach of a civil rights statute precluding racial discrimination in employment contracting so that it does not reach post-formation harassment in the employment context.[214] The equal protection guarantee's failure is even more profound when measured against readings more ambitious than the limited agenda of the framers. During the 1980s, the Court found only three instances in which states denied mi-

207. The fourteenth amendment's architects merely contemplated that the provision would guarantee equality of contract and property rights and unitary standards for individual security and punishment. *See supra* notes 89-96, 101 and accompanying text.

208. *See supra* notes 100-101, 125-127 and accompanying text.

209. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000a(a)-2000a(b) (1988), precludes discrimination in public accommodations and facilities that affect interstate commerce. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (sustaining federal prohibition of discrimination by restaurants that adversely affects interstate commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (sustaining federal prohibition of discrimination in public accommodations that are "local incidents" of interstate commerce).

210. *See* Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948) (finding racially restrictive covenants constitutionally violative).

211. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 171-72 (1989) (42 U.S.C. § 1981 (1988) precludes racial discrimination with respect to making and enforcing of contracts). *Patterson* held, however, that section 1981 does not reach racial harassment after formation of an employment contract. *See id.* at 177. The dissent argued that the majority failed to recognize that racial harassment during employment "denie[s] the right to make an employment contract on [an equal] basis." *Id.* at 215 (Brennan, J., dissenting).

212. McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

213. For a discussion of racial disparities in the operation of the death penalty, which the Court nonetheless discounted, see *supra* note 162 and accompanying text.

214. *See Patterson*, 491 U.S. at 177.

norities equal protection of the laws. In *Batson v. Kentucky*,[215] the Court overturned a prior holding and precluded prosecutorial use of racially discriminatory peremptory challenges in criminal cases.[216] In *Hunter v. Underwood*,[217] the Court invalidated a state criminal law enacted nearly a century ago for a discriminatory purpose.[218] The significance of *Hunter* is minimized by the fact that the challenged statute was a relic of official segregation and, because of its self-evidencing nature, did not present the now pervasive problem of proving wrongful intent. The decision also left open the possibility that the challenged law might be constitutional if reenacted pursuant to a racially neutral rationale.[219] Finally, a state ballot initiative denying local school boards the power to order busing for desegregation purposes was found to be at odds with equal protection in *Washington v. Seattle School Dist. No. 1*.[220]

The Court's detection of only three minority-burdening equal protection violations in an entire decade reflects its hesitancy to probe the implications of racial disparities surviving the demise of official segregation.[221] Such reluctance contrasts sharply with its increased attention and hostility toward affirmative action.[222] As currently con-

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215. 476 U.S. 79 (1986).

216. *See id* at 89. In Swain v. Alabama, 380 U.S. 202 (1965), the Court had rejected a challenge to racially motivated use of peremptory challenges by a prosecutor. *See id.* at 221-22. Finding the record insufficient to support the constitutional challenge, the Court effectively saddled future claimants with the impossible task of showing that the same prosecutor, over an extended time, struck every prospective black juror "whatever the circumstances, whatever the crime and whoever the defendant or the victim may be." People v. Wheeler, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978) (citing *Swain*, 380 U.S. at 223); *see* United States v. Pearson, 448 F.2d 1207, 1213-16 (5th Cir. 1971); United States v. McDaniels, 379 F. Supp. 1243, 1246-48 (E.D. La. 1974). Courts and commentators criticized *Swain* for demeaning the Constitution insofar as the Court had recognized a fundamental right and then effectively placed it beyond reach. *See Wheeler*, 22 Cal. 3d. at 287, 583 P.2d at 768, 148 Cal. Rptr. at 909-10; Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 13 (1982). Unsurprisingly, equal protection challenges to the discriminatory use of peremptory challenges were unsuccessful until the Court reversed itself in *Batson*. *See, e.g.*, United States v. Newman, 549 F.2d 240, 246 (2d Cir. 1977) (decision to set aside peremptory challenges vacated where defendants failed to meet "very heavy burden of proof" under *Swain* standard); Billingsley v. Clayton, 359 F.2d 13, 24 (5th Cir.) (mere showing that blacks not proportionately represented on civil juries does not rise to level of discrimination), *cert. denied*, 385 U.S. 841 (1966). Thus, a reality that the Court could no longer ignore may have inspired change.

217. 471 U.S. 222 (1985).

218. *See id.* at 232-33.

219. *See id.* This prospect is supported by the rule that constitutional remediation is not required absent proof of official intent. *See supra* notes 45-47 and accompanying text.

220. 458 U.S. 457, 462-63, 487 (1982). The decision's potential was limited, however, by contemporaneous validation of a state constitutional amendment prohibiting busing absent *de jure* segregation. *See* Crawford v. Board of Educ., 458 U.S. 527, 531-32, 545 (1982).

221. *See* McCleskey v. Kemp, 481 U.S. 279, 329-33 (1987) (Brennan, J., dissenting).

222. The Court invalidated or hindered race-conscious remediation in several instances during the 1980s. *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 761 (1989) (non-parties entitled to challenge consent decree arising from employment discrimination suit); City of

figured, equal protection doctrine affords no real avenue for confronting subtle discriminatory practices that deny equal opportunity and connote racial inferiority as effectively as overt strategies of the past.[223] Contemporary equal protection jurisprudence thus fails to articulate the potential not only of *Brown*[224] but *Strauder* as well.[225]

The Court's failure to confront racism's legacy and subtleties is demonstrated by its retreat from expansive renderings of the anti-discrimination principle[226] and resistance to remedy-friendly doctrinal development. The Court has expressed hostility toward theories that would mitigate the harsh requirements and consequences of the discriminatory purpose standard.[227] Responding to the Court's observation that motive-based inquiry is improper when constitutional "stakes are sufficiently high,"[228] some critics argue that courts should inquire into the racial significance of challenged state action.[229] A racial significance standard would consider whether society perceives a challenged action as racially stigmatizing rather than the result of a racially discriminatory purpose.[230] Proponents argue that such a jurisprudential reorientation would allow the equal protection clause to reach the subtleties of modern discrimination.[231]

Equal protection results probably would not vary, however, if standards are simply reformulated to appear more sensitive to contemporary racial realities. The notion that updated criteria would improve performance ignores the central lesson of two centuries of racial jurisprudence. Despite its recognition of the nation's legacy of racial discrimination,[232]

Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (plurality opinion) (striking down municipal minority contractor preference program); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (invalidating layoff scheme granting minority preference); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-79 (1984) (invalidating court-ordered minority protective layoff scheme). The drift of equal protection jurisprudence has narrowed the window of opportunity for affirmative action to narrowly tailored remedies that correct the effect of specifically proven instances of discrimination, *see* United States v. Paradise, 480 U.S. 149, 176 n.27 (1987), or when Congress pursuant to an appropriate power promotes an important governmental interest. *See* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3008-09 (1990); *supra* notes 191-201 and accompanying text.

223. For a description of the nature and impact of modern racism, see Lawrence, *supra* note 114, at 328-44.

224. The *Brown* mandate was redefined to qualify the aims of equal educational opportunity. *See supra* notes 148-158 and accompanying text.

225. The *Strauder* Court intimated that the fourteenth amendment was concerned with discrimination "implying inferiority." Strauder v. West Virginia, 100 U.S. 303, 308 (1879); *see supra* note 117 and accompanying text.

226. *See supra* notes 148-161 and accompanying text.

227. *See, e.g., infra* note 237 and accompanying text (discussing thirteenth amendment challenge to traffic barrier between white and black residential neighborhoods).

228. United States v. O'Brien, 391 U.S. 367, 384 (1968).

229. *See* Lawrence, *supra* note 114, at 324.

230. *See id.* at 349-55.

231. *See id.* at 354-55.

232. *See supra* note 24 and accompanying text.

the Court has almost invariably has refused to impose remedies that would demand substantial restructuring of the established social order.[233] Even the discriminatory purpose test, however, could establish constitutional violations if facts and circumstances were examined in a reasonably rigorous and sensitive fashion.[234]

Results in diverse constitutional contexts where minority concerns are implicated suggest that the failure of equal protection jurisprudence is not attributable to mere faults in the Court's analytical methods. In *City of Memphis v. Greene*,[235] for example, the petitioners argued that a traffic barrier separating black and white neighborhoods constituted a "badge or incident of slavery" and thus contravened the thirteenth amendment.[236] In its failure to recognize the barrier's manifest racial significance,[237] the Court's thirteenth amendment review was no more discerning than it would have been if the petitioners had framed their case as a fourteenth amendment challenge. Judicial blindness to the cultural meaning of state action in *Greene* permitted the Court to avoid imposing a remedy with a potentially disruptive effect upon the social order.

Modern establishment clause review also demonstrates the Court's inability to discern the cultural significance of challenged state actions. By finding that nativity scenes,[238] references to God on coinage[239] and legislative prayer[240] do not offend the establishment clause, the Court demonstrates an insensitivity to non-mainstream religious views, or at least reveals a disinclination to inquire seriously into the significance of such images and statements.

In other constitutional settings where sensitivity to cultural diversity is necessary, the Court has demonstrated an "acute ethnocentric myo-

233. *See supra* Parts I-II.

234. Cases involving grossly disparate applications of the death penalty and state facilitated segregation of city and suburban schools appear on their face to be constitutionally violative, even under a rigorous discriminatory intent test. Yet the Court explained away duality in the death penalty context as a mere "discrepancy that appears to correlate with race . . . . [and] an inevitable part of our criminal justice system." McCleskey v. Kemp, 481 U.S. 279, 312 (1987). Moreover, the Court brushed aside a trial court's findings of fact in a school segregation case and avoided ordering intermunicipal desegregation. *See* Milliken v. Bradley, 418 U.S. 717, 745-47 (1974).

235. 451 U.S. 100 (1981).

236. The city, Memphis, Tennessee, had a long and pervasive history of official segregation, as well as traditions connoting racial inferiority. *See id.* at 137 (Marshall, J., dissenting). The city erected the barrier at the request of those residing in the white neighborhood. *See id.* at 135 (Marshall, J., dissenting).

237. *See id.* at 119.

238. *See* Lynch v. Donnelly, 465 U.S. 668, 685 (1984). *Lynch* rejected an establishment clause challenge to a municipally subsidized and maintained creche on public property. *See id.* at 671, 687. Characterization of the display "as a traditional and essentially secular element of a holiday celebration demonstrate[d] no acuity for how [it] might be offensive for those whose religious heritage, if any, is not Christian or the object of government lavishment or attention." Lively, *The Establishment Clause: Lost Soul of the First Amendment*, 50 Ohio St. L.J. 681, 691 (1989).

239. *See Lynch*, 465 U.S. at 676.

240. *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983).

pia"[241] and "depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities."[242] The Court thus defined sexually explicit language as indecent and offensive,[243] despite evidence that such language is accepted and employed in significant cultural contexts.[244]

The Court's refusal or inability to demonstrate respect for cultural pluralism outside the equal protection context suggests that fourteenth amendment results would not change substantially if racial significance, rather than motive-based inquiry, were the touchstone. The fundamental barrier to fulfillment of the equal protection agenda is not inapt criteria but an abiding sense that, at least with respect to race, the guarantee's impact upon society should be limited.

In order to revitalize the equal protection agenda, it is necessary to determine the reason for the profound gap between what equal protection jurisprudence has purportedly accomplished and what it has actually accomplished. *Brown* is often cited as evidence of a general commitment to principles of racial equality.[245] *Brown* and its progeny offered powerful rhetoric, but they failed to deliver comprehensive social change. The Court ultimately abandoned its desegregation mandate[246] for the most part, exchanging "separate but equal" for "separate and unequal."

The *Brown* Court delayed implementation of the desegregation remedy in hopes of securing popular acceptance of its decision.[247] As desegregation demands narrowed and weakened, deferral ultimately transformed into denial of relief.[248] *Brown* emphasized that desegregation was essential to equal educational opportunity,[249] so the Court propounded deseg-

241. FCC v. Pacifica Found., 438 U.S. 726, 775 (1978) (Brennan, J., dissenting).

242. *Id.*

243. *See, e.g., id.* at 749-51 (equating broadcast satire of words precluded from broadcast airwaves by federal regulation to presence of a "pig in the parlor" and thus regulable).

244. Justice Brennan noted that "[t]he words . . . [found] so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation." *Id.* at 776 (Brennan, J., dissenting). Justice Brennan quoted academic research demonstrating that " '[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations.' " *Id.* (quoting Bins, *Toward an Ethnography of Contemporary African American Oral Poetry*, in Language and Linguistics Working Papers No. 5 82 (1972)).

245. *See supra* notes 139-144 and accompanying text.

246. *See supra* notes 29-31, 146-151 and accompanying text.

247. *See* Lively, *supra* note 165, at 120-21.

248. *See infra* notes 250-252 and accompanying text.

249. The Court originally intimated that education was a fundamental right, describing it as "the most important function of state and local governments. . . . the very foundation of good citizenship. . . . succe[ss] in life . . . [and] a right which must be made available to all on equal terms." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). In mandating desegregation of federal school systems in the District of Columbia, despite the absence of an explicit equal protection provision in the fifth amendment, the Court

regation as a means of achieving racial equality and not merely as an end in itself. In theory, successful implementation of *Brown* would reduce racial inequalities in education. Post-*Brown* jurisprudence, however, has largely foreclosed that avenue toward equal opportunity. By refusing to recognize a fundamental right to education,[250] holding that wealth classifications are not suspect[251] and determining that racially disproportionate impact by itself is not constitutionally significant,[252] the Court effectively undermined the desegregation mandate's potential. In retrospect, *Brown* stands as a preface to a period of doctrinal regression.

The values and interests of the dominant culture have been and remain so central to equal protection jurisprudence that advocates of change routinely have noted how majority interests will benefit.[253] Invocation of the equal protection clause to reach classifications unrelated to race[254] illustrates that equal protection doctrine can be creative and flexible when attuned to interests of the dominant culture. Such doctrinal pliability intimates that racial jurisprudence is a function of selective rather than transcendent principles of qualification.

Evidence suggests that in recent years blacks have increased their influence upon the political process significantly. The near passage of the Civil Rights Act of 1990,[255] which responded to restrictive Supreme Court constructions of federal civil rights statutes,[256] is a recent example of a group, formerly excluded from the legislative process altogether, acquiring a capacity to build coalitions that translate into political accomplishments. Congress failed to override President Bush's veto of the bill by one vote.[257] The experience suggests, at least on the federal level, that a previously excluded minority is no longer entirely disabled by prejudice and, like any other nondominant group, occasionally may prevail.

Process-sensitive constraints resulting from rigorous judicial scrutiny

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reinforced the notion that education was a fundamental right. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

250. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

251. *See id.* at 28-29.

252. *See id.*

253. For example, advocates argued that desegregation would enhance the image of the United States as it vied for international favor during the Cold War. *See, e.g.*, Brief for American Civil Liberties Union *et al.* as Amicus Curiae at 28-31, Brown v. Board of Educ., 347 U.S. 483 (1954) (noting that unfavorable comparison between United States' words and deeds injures nation's image); Brief of American Federation of Teachers as Amicus Curiae at 25-26, Brown v. Board of Educ., 347 U.S. 483 (1954) (arguing that elimination of racial barriers in United States creates "reservoir of good will for us in the vast world of color").

254. *See supra* note 32 and accompanying text.

255. *See* S. 2104, 101st Cong., 1st Sess. (Oct. 1990) (LEXIS, Genfed Library, Bills file).

256. The bill would have insulated certain consent decrees incorporating affirmative action plans from subsequent court challenges, *see id.* § 6(m), shifted the burden of proof onto employers after an initial showing that employer actions had a racially disparate impact, *see id.* § 4(a), and permitted victims of gender discrimination to receive compensatory and punitive damages. *See id.* at § 8(a).

257. *See* 136 Cong. Rec. S16,562, S16,589 (daily ed. Oct. 24, 1990).

made sense when statutes implying black inferiority, perpetuating white privileges and denying minorities economic and social opportunities were common. Given the dismantling of laws explicitly designed to deny black equality and minorities' enhanced ability to express their interests in the political process,[258] suspect classification doctrine is of vestigial importance. Continuing operation of the concept actually favors accumulated racial advantage, insofar as the Court employs it primarily to defeat affirmative action. Fourteenth amendment doctrine now imposes barriers upon legislation designed to account for minority interests. Its most perverse irony is that rigorous fourteenth amendment scrutiny supports discrimination claims brought by members of the white majority.[259]

The Supreme Court developed rigorous equal protection standards in response to dysfunctional legislative processes.[260] Recently crafted standards now compromise the representative system's progress in addressing the legacy of societal discrimination. When Richmond, Virginia, the "capital of the Confederacy," sought to remedy its heritage of official discrimination, the Court employed suspect classification inquiry to invalidate the city's affirmative action plan.[261] Equal protection doctrine, formulated to protect minority interests, now compounds the failure to effectuate constitutional promises.

Constitutional law that evolves without a clear textual basis is invariably susceptible to allegations that the judiciary has usurped legislative power.[262] Legal scholars devote substantial effort to debating the limits of judicial review. The principle of judicial restraint underlies theories of strict constructionism[263] and originalism,[264] as well as the analytic quest

258. Bruce Ackerman has challenged the conventional wisdom that blacks constitute a discrete and insular minority. *See* Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 722-31 (1985). Ackerman also argues that, insofar as racial groups are truly discrete and insular, that attribute may increase such minorities' political power by minimizing organizational costs and facilitating effective lobbying. *See id.* at 726. Ackerman acknowledges, however, that such advantage may be offset by the damage that prejudice inflicts. *See id.* at 731-32.

259. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 505-06 (1989).

260. *See infra* notes 269-273 and accompanying text.

261. *J.A. Croson Co.*, 488 U.S. at 528 (Marshall, J., dissenting); *see id.* at 505-06; *id.* at 561 (Blackmun, J., dissenting).

262. *See, e.g.*, R. Bork, *supra* note 54, at 11 (arguing that "judicial assumption of ultimate legislative power" violates separation and assignment of powers).

263. Strict constructionism is predicated upon the notion that "the Court has no power to add to or subtract from the procedures set forth by the Founders." *In re* Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting). The doctrine directs courts to pay close attention to the words of the constitutional text. Given the inadequacy of a purely textual approach to construing the many critical open-ended terms of the Constitution, it is unsurprising that constitutional strict constructionists constitute "a very underpopulated subgroup." G. Gunther, Constitutional Law 529 n.10 (11th ed. 1985).

264. Originalism requires that courts confronting vague or indeterminate constitutional provisions construe those provisions with reference to the subjective intent of the framers of the Constitution. *See* D. Lively, Judicial Review and the Consent of the Governed: Activist Ways and Popular Ends 56-59 (1990).

for neutral principles of constitutional construction.[265] Such "interpretivist" doctrines compete with the premise that the Constitution cannot operate without reference to extra-textual values.[266]

The debate is especially animated in the equal protection context, where judicial accounting for minority interests most noticeably confronts the legislative process and dominant preferences. A multiplicity of competing theories has sought to animate the equal protection guarantee.[267] The theoretical debate is, however, academic. Despite elegant craftsmanship or moral attractiveness, any principle that is perceived as an affront to the democratic process is unlikely to survive. Unless equal protection doctrine is clearly grounded in the text and historical purpose of the fourteenth amendment, any judicial decision that voids a statute enacted by a democratically elected legislature invites widespread resistance. As recent history demonstrates,[268] the typical judicial response to such outcry is retreat and accommodation that leaves the constitutional interest unattended.

Decisions based upon political or social science theory risk victimization by their own creativity. Process theory has been the foundation for much racial jurisprudence of the past half-century.[269] Its premise is that

265. Neutrality calls upon courts to employ objective interpretive principles that favor no particular group, even when the interpretation proves subjectively unsatisfying. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 7-8 (1971); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 805-06 (1983); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 11-12, 15 (1959). The neutral principles model suffers from a misplaced assumption that a singular principle links serial decisions and that factors can invariably be advanced, as in the case of affirmative action, to distinguish circumstances from the general rule.

266. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703, 706 (1975) (arguing that extra-textual sources offer best support for results of some constitutional cases); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 784-85 (1983) (arguing that both interpretivist and neutral principles doctrines are derived from notions of continuity of both history and meaning that are themselves dependent upon communitarian notions inconsistent with the doctrines' political premises).

267. Prominent theorists offer various views concerning the proper focus of equal protection jurisprudence. Paul Brest argues that courts should construe the equal protection clause as an anti-discrimination principle directed toward race-dependent practices. *See* Brest, *The Supreme Court 1975 Term: Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 5-6 (1976). Owen Fiss argues that courts should focus upon group disadvantage, because proving discrimination is problematic and strains judicial resources. *See* Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 127, 153-54 (1976). Charles Lawrence III argues that equal protection jurisprudence should consider the cultural significance of government action to determine whether it is racially stigmatizing or implies inferiority. *See* Lawrence, *supra* note 114, at 355-62. Bruce Ackerman argues for an equal protection jurisprudence that moves beyond process defect theory and formulates "a legally cogent set of higher-law principles." Ackerman, *supra* note 258, at 744. Chief Justice Rehnquist has argued in favor of limiting the equal protection clause's scope to instances of racial discrimination. *See* Sugarman v. Dougall, 413 U.S. 634, 649-57 (1973) (Rehnquist, J., dissenting).

268. *See supra* notes 145-237 and accompanying text.

269. The Court's strict scrutiny of racial classifications is rooted in its belief that "prej-

courts must intervene to vindicate constitutional interests when discrete and insular minorities have substantially been denied access to the democratic process.[270] The notions of suspect classification and strict scrutiny evolved from recognition that minorities systematically had been excluded from the political process and victimized by discriminatory legislation.[271] Review of racial classifications became " 'strict' in theory and fatal in fact,"[272] as official distinctions were consistently felled in the judicial gauntlet.[273] Doctrine responsive to a closed or dysfunctional political process, however, is outmoded, inapt, and even cynical when used against the output of a system finally amenable to minority participation and influence.[274]

Current equal protection doctrine actually may be more pernicious than the discredited jurisprudence of *Plessy*. Unlike that decision, which accommodated dominant conventions at the expense of minority interests, current fourteenth amendment jurisprudence impedes a political majority, or collective bargaining process, when it attempts to cure its own past wrongs through remedial legislation. The notion that race presumptively cannot be a factor in official action[275] may represent a desirable ideal, but it frustrates any constitutional remediation of present inequities. By making race unmentionable, even though its presence and implications are pervasive, contemporary equal protection doctrine seriously confounds even the most limited aims of the fourteenth amendment.[276] Moreover, equal protection jurisprudence not only fails to vindicate, but actually impairs, minority interests.

Any theory that would compete with established jurisprudence must

udice against discrete and insular minorities . . . curtail[s] the operation of . . . political processes." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

270. *See id.*; *see also* J. Ely, Democracy and Distrust 121-25 (1980) (outlining process theory in voting context).

271. *See Carolene Products*, 304 U.S. at 152 n.4. The concepts of suspect classification and strict scrutiny first appeared in Korematsu v. United States, 323 U.S. 214, 216 (1944) (official curtailment of "civil rights of a single racial group are immediately suspect . . . [and] must [be] subject . . . to the most rigid scrutiny").

272. Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

273. The wartime relocation of persons of Japanese-American descent was upheld in Korematsu v. United States, 323 U.S. 214 (1944). After declaring officially segregated public schools unconstitutional in 1954, the Court routinely invalidated non-remedial racial classifications. *See, e.g.*, *supra* note 139. Justice Black suggested, however, that racial classifications are permissible when required to maintain "security, discipline, and good order in prisons and jails." Lee v. Washington, 390 U.S. 333, 334 (1965) (Black, J., concurring). Justice Scalia has expressed his agreement with Black's position. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

274. *See supra* notes 255-257 and accompanying text.

275. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (equal protection guarantee is race neutral under all but narrowly excepted circumstances).

276. For a discussion of the agenda of the amendment's framers, see *supra* notes 83-103 and accompanying text.

account for both moral ideals and doctrinal possibilities. Notwithstanding the limited aims of the fourteenth amendment's architects, a return to the framers' unachieved aims presents the greatest promise for doctrinal fecundity. The reference point may not support expansive constructions of the amendment's purview.[277] An originalist premise, however, would oblige the judiciary to effect the amendment's incontrovertible goals of ensuring legal equality and economic opportunity.[278] Reversion to the original intent of the fourteenth amendment would thus make it difficult for the judiciary to avoid responding to or accounting for pertinent minority interests. Deviation or retreat from original intent is undeniably activist and at odds with the will of the governed.

Staking fourteenth amendment jurisprudence to original intent necessitates discarding dated and unproductive theories and principles in favor of core fourteenth amendment concerns. Such peripheral issues as discriminatory intent, process dysfunction and the speculative cultural implications of racial classifications would not be reviewed. Instead, the judiciary would determine whether a law or action comports with the original understanding of the fourteenth amendment.

The equal protection jurisprudence of original intent would focus on whether (1) a contested policy or action implicates a central concern of the fourteenth amendment's framers and (2) a manifest nexus exists between the policy or action and the original intent of the fourteenth amendment. Racially conscious statutes directed toward furthering basic elements of the amendment's historical agenda would be subject to minimal judicial scrutiny. Conversely, when the relationship between the original agenda of the amendment and challenged state action is attenuated, judicial review would become more rigorous.

The proposed standard would enhance the significance of the equal protection guarantee without eliciting the usual complaint of anti-democratic usurpation of power. Fourteenth amendment jurisprudence grounded in original aspirations would not pose an absolute barrier to all arguably discriminatory classifications or state action that has a racially disparate impact. The parade of horribles that the Court sought to avoid by adopting motive-based inquiry would not ensue. Tax regulation which routinely makes discriminatory classifications, for example, would not ordinarily be subject to substantial equal protection challenge under the proposed standard.[279] Similarly, a reduction in public benefits that disproportionately affects the poor would be subject to minimal four-

277. *See supra* note 267. For examples of the Court's expansive interpretation of the amendment, see *supra* note 32.

278. *See supra* notes 88-101 and accompanying text.

279. A tax that without adequate justification singled out an interest protected by the equal protection guarantee, however, would be susceptible to constitutional challenge. *Cf.* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating state use tax singling out press, and especially impacting large newspapers, as violation of first amendment). Although not directly adverting to the equal protection guarantee, the Court cited authority for the proposition that such regulation

teenth amendment scrutiny. Despite their disproportionate impact upon racial minorities,[280] such governmental actions are minimally related to the amendment's original aims.[281]

Racial disparities, however, would be constitutionally significant when they implicated the original agenda of the fourteenth amendment. Disproportionality in employment, education and other venues critical to ensuring equal economic opportunity would deserve special judicial attention. The jurisprudence of original intent, for instance, would recognize a governmental duty to provide equal educational opportunity in functionally segregated school systems, regardless of the reasons for racial disparities. Discrepancies in the operational impact of state criminal justice systems would be scrutinized closely pursuant to the framers' intent to ensure blacks equal status before the law.[282] A traffic barrier between black and white neighborhoods would survive equal protection review.[283] Attention to original aims, however, might engender more sensitive thirteenth amendment analysis.

Initiatives that facilitate equal economic opportunity for racial minorities would be constitutionally permissible if they were adopted in a procedurally proper manner.[284] A jurisprudence of original understanding would recognize voluntary governmental attempts to integrate the educational process or workplace as policies legitimately tied to equal protection aims. Review of affirmative action programs would ensure that diversification schemes actually facilitated minority opportunities and were adopted without procedural defect.[285] Attention to the relationship between state action and original understanding would enable the judiciary to identify and invalidate remedial schemes not rooted in the fourteenth amendment's initial design. Any risk that a locally powerful minority might use an affirmative action scheme to secure unfair advan-

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even if unrelated to suppression of expression would be "presumptively unconstitutional." *Id.* (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)).

280. Denial of government funds for abortions thus would not likely present an equal protection claim under the proposed standards. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 469-70 (1977) (statute limiting Medicaid reimbursement to abortions that are "medically necessary" not violative of equal protection clause); *see also* Harris v. McRae, 448 U.S. 297, 326 (1980) (denial of federal funds for certain medically necessary abortions not violative of due process clause of fifth amendment).

281. Depending on the benefit scheme, however, it at least may be arguable that denial or reduction merits close review if it impairs equal economic opportunity. The claim would likely be defeated, however, insofar as the nexus between government action and original aim was not manifest.

282. *See supra* notes 89-94 and accompanying text.

283. The barrier might be found violative of the thirteenth amendment, however, pursuant to a non-motive based inquiry. *See supra* notes 235-237 and accompanying text.

284. Judicial scrutiny to insure that states enact laws with procedural regularity would ensure that any affirmative action scheme fairly accounted for the interests of any dissidents. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 318 (1986) (Stevens, J., dissenting).

285. *See id.* at 317-19.

tages, as suggested by the *J.A. Croson Company* decision,[286] would be subject to the proposed standard.

Although a jurisprudence of original intent would presumptively favor voluntary remedial initiatives, such policies would not be reviewed pursuant to a deferential "mere rationality" standard.[287] Absent demonstration that a challenged program promoted a legitimate state interest in facilitating racial diversity—specifically that it facilitated original fourteenth amendment aims and was adopted without procedural aberration—the policy would be defeasible. Rather than inquiring into the relative political power of black and white political interests, the proposed inquiry would focus upon whether a challenged plan was tied to an identifiable fourteenth amendment purpose.

Attempts to address the failures of equal protection jurisprudence will be unsuccessful if based on doctrinal creativity that is at odds with either society's moral development or the representative process. Any viable theory should be grounded not on innovation but on original aims affording an irrefutable constitutional baseline. Absent reorientation of equal protection analysis toward effectuating the original agenda of the fourteenth amendment, theories may multiply but actual accomplishments will remain scarce.

CONCLUSION

Since the fourteenth amendment was ratified, the Court has failed to address enduringly and effectively the persistent and pervasive reality of racial discrimination. Although acknowledging that racism is an abiding reality, the Court appears to be bent on frustrating attempts to reckon with it directly. Judicial failure to allow remediation of an acknowledged social ill reflects both institutional and doctrinal deficiencies. A century ago, the Court halted progress toward even the limited racial equality contemplated by the fourteenth amendment's architects.[288] More than half of the twentieth century elapsed before the Court and Congress acknowledged that the basic rights guaranteed by the fourteenth amendment were still being denied.[289] Notwithstanding that historical reality, the Court has introduced standards suggesting again that the time has come for those who have been systematically disadvantaged to cease being "the special favorite of the laws."[290]

286. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989).

287. A rationality standard governs contemporary equal protection review to the extent that neither a suspect or comparable classification nor fundamental right is implicated. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 27-28, 33-35 (1973). Review pursuant to a rational basis test translates into deference to legislative judgment. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("judiciary may not sit as a superlegislature to judge the wisdom" of enactment).

288. *See supra* notes 120-135 accompanying text.

289. *See supra* notes 131-138 and accompanying text.

290. The Civil Rights Cases, 109 U.S. 3, 25 (1883); *see supra* notes 120-127 and accompanying text.

Even if the time has come for every person's rights "to be protected in the ordinary modes by which other men's rights are protected,"[291] the fact remains that the Constitution is one of those "ordinary modes." In its rush toward an all-purpose color-blind standard, the Court has ignored the reality that the original agenda of the fourteenth amendment has yet to be fulfilled.

Brown may be criticized for attempting to impose dramatic social change upon an unprepared and unwilling majority. Modern doctrine, however, has similarly failed to adapt its equal protection jurisprudence to dominant morality. The standard of constitutional color-blindness wrongly presupposes a society free of pervasive racism and discrimination. The criterion also imposes a barrier to achievement of the very nondiscriminatory society that it posits. Undifferentiating color-blindness and motive-referenced criteria actuate modern equal protection in terms that accommodate the legacy of discrimination against minorities and defeat legislative initiatives designed to account for that reality. The original, relatively modest agenda of the fourteenth amendment remains unfulfilled. A heritage of racial discrimination is unlikely to be overcome until equal protection is calibrated to respond to the amendment's original agenda.

291. The Civil Rights Cases, 109 U.S. at 25.