A CIVIL RIGHTS ACT FOR THE 21ST CENTURY: THE PRIVILEGES AND IMMUNITIES CLAUSE AND A CONSTITUTIONAL GUARANTEE TO BE FREE FROM DISCRIMINATORY IMPACT

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I. INTRODUCTION

Despite the significant gains made in the struggle for equality under the civil rights legislation of the 1960s,[1] judicial interpretations have restricted the scope and breadth of civil rights laws and the Equal Protection Clause. The intransigence of institutional discrimination has severely limited the ability of individuals, communities, and advocates from achieving the promise of full racial equality.[2] The legal requirement that those challenging discrimination must prove intentional racial animus has not only become a nearly impassable bar—especially given the social opprobrium attached to openly racist conduct[3]—but also necessarily establishes a limiting principle that the Fourteenth Amendment serves only a remedial purpose. It does not

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1. James T. Patterson, Brown v. Board of Education *and the Civil Rights Movement*, 34 STETSON L. REV. 413, 414 (2005).

2. *See, e.g.*, Atiba R. Ellis, *Reviving The Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 794 (2014) ("Though formal American apartheid has been overthrown, the full equality that advocates have hoped for has not been achieved. The idea of equality itself has been continually limited and opposed, even in the twenty-first century.").

3. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *see also* Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that disproportionate impact is not enough to prove "invidious racial discrimination that is forbidden by the constitution").

affirmatively guarantee a prospective societal benefit—specifically, the full and equal inclusion and participation in society.[4] Our courts will approve, and even then only on a limited basis, remedies that target past overt discrimination.[5] Positive race-conscious actions on the part of a governmental decision-maker, even those targeted at addressing the continuing disparate impact of our legacy of legal racial subordination, will likely be struck down under a strict scrutiny and narrow tailoring analysis.[6]

Our current equal protection jurisprudence fails to address the reality of race discrimination in the twenty-first century. The entrenchment of racial inequities caused by the disparate discriminatory impacts of ostensibly facially-neutral policies and practices of government officials. While these policy decisions are often made with full knowledge and foreseeability of the adverse consequences for communities of color, current constitutional jurisprudence demands that unless those decisions are made *because of* those impacts, and not merely *in spite of* them, they are not actionable.[7] Meanwhile, the statutory provisions of the Civil Rights Act and other anti-discrimination laws that recognize discrimination claims under a disparate impact analysis are under attack or have already been eliminated.[8]

The deliberate narrowing of the scope of civil rights law to exclusively focus on intentional discrimination limits our collective vision of equality to a universe circumscribed by non-discrimination, individual rights, process, means, and retroactive remedies. It is a "micro" perspective on civil rights. It is also very much a tort-based approach—there is a bad actor, who has done a bad thing that has caused an injury, the remedy for which can be quantified and implemented.[9] The focus on intent is also largely

4. *See* U.S. v. Price, 383 U.S. 787, 789 (1966) (quoting U.S. v. Williams 341 U.S. 70, 72 (1950) ("We have no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.")).

5. Regents of Univ. of California v. Bakke, 438 U.S. 265, 301 (1978).

6. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (2000).

7. Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

8. *See* Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability,* 41 VILL. L. REV. 1527, 1563 (1996) (noting that although Title VII and the ADEA are almost identical, some courts have not extended discriminatory impact in ADEA context).

9. David G. Owen, *The Five Elements of Negligence,* 35 HOFSTRA L. REV. 1671, 1674 (2007).

premised on the idea that civil rights are exclusively personal and individualized.[10]

Conversely, a theory of racial justice that focuses on discriminatory impacts emphasizes integration, group fairness, substance, ends, and prospective change.[11] This is the "macro" analysis facing social justice advocates in the modern era. It must be noted, however, that even though this macro approach emphasizes forward-looking, affirmative obligations to address discrimination, it is nevertheless grounded in the country's institutional history of both de jure and de facto racial oppression and its continuing impacts.[12]

As the nation reflects on the fiftieth anniversaries of the various civil rights legislation of the 1960s[13] and considers the challenges that remain for fully addressing our history of racial discrimination, segregation, and suppression, we must begin with a very fundamental question: What is the harm that we are seeking to address, and how effectively do our current civil rights laws work towards achieving that goal?

Given our collective success in addressing some of the most egregious intentional discrimination, as well as the intransigent, and evolving nature of institutional racism, it is time for a new Civil Rights Act that focuses on discriminatory impacts and effects. In light of the Court's restrictive interpretation of the Equal Protection Clause,[14] this new Civil Rights Act should look to another portion of the Fourteenth Amendment, the Privileges and Immunities Clause, which should be interpreted to provide the basis for guaranteeing the inclusion of African Americans into the full range of benefits of our community. While the United States Supreme Court undercut the Privileges and Immunities Clause

10. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

11. *See* discussion *infra* pp. 139–42.

12. Jonathan Fishbach et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation after Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 494 (2008) (stating that many of the early discrimination cases, especially in the school context, dealt with de jure segregation, whereas recently the bulk of discrimination law is focused around de facto discrimination).

13. Patterson, *supra* note 1, at 414.

14. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 38 (N.Y.U. Press 1993) ("In *Washington v. Davis* the Supreme Court held that the applicable principle for equal protection clause purposes is the intent principle.").

just five years after the amendment was ratified,[15] the new challenges we face in achieving racial justice demand its revitalization and reaffirmation.

II. Some Historical Context

> "While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring the protection of life, liberty and property of all persons against deprivation without due process and guaranteeing equal protection of the laws. . . . What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes, They were enslaved by law, emancipated by law, disenfranchised and segregated by law. . . ."
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> —Justice Thurgood Marshall[16]

The development of a new civil rights strategy must begin with some appreciation of the history of civil rights legislation and the judicial interpretations that helped implement or limit that legislation. The first era of civil rights—which starkly illustrates the direct interplay between the efforts to expand civil rights for African Americans and the resistance with which those efforts were met—begins even before the Civil War and emancipation.[17] The *Dred Scott* case, widely considered the most notorious decision the Supreme Court ever reached, helped drive the course of the struggle for civil rights through the end of the 19th century.

15. The Slaughter-House Cases, 83 U.S. 36, 77–78 (1873) ("[T]hat no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . . . [T]he effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character. . . .").

16. J. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association, Maui Hawaii, 1987.

17. *See generally* WILLIAM CAIN, WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY (1997) (stating that William Lloyd Garrison was a prominent abolitionist who lived from 1805–1879 and was active at least thirty years before the Civil War).

A. *Dred Scott*

The general parameters of the *Dred Scott* case are well known. Scott, an African slave, travelled with his owner from Missouri to Illinois and (what is now) Minnesota, a free state and a federal territory where slavery was prohibited.[18] Several years later, after returning to Missouri, Scott sued for his freedom based on the time he had spent in the areas where slavery was illegal.[19] Following unsuccessful litigation in state court,[20] Scott subsequently filed a case in federal court based on diversity jurisdiction.[21]

Although the case could have been resolved on relatively narrow grounds,[22] by the time it got to the Supreme Court, it had taken on much a national significance.[23] The arguments presented had broad implications for the balance of power between the free and slave states and for the scope of the federal government's power to regulate or control the expansion of slavery beyond the South.[24]

These broader questions were grounded in the Comity Clause of the Constitution, that states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."[25] The provision was necessary to effectively bind the states together, and it quickly came to be accepted as requiring that visiting citizens from other states be granted the same privileges and immunities that a state provided to its own citizens.[26] The elimination of any discrimination against citizens of other states was a relatively uncontroversial proposition,

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18. Dred Scott v. Sandford, 60 U.S. 393, 394 (1857).

19. *Id.*

20. *Id.* at 396.

21. *Id.* at 400 (explaining that since the parties are citizens of different states, the claim can be heard in federal court under diversity jurisdiction). His owner's successor in interest was a resident of New York, while Scott remained in Missouri. *Id.*

22. *Id.* at 159–60. The district court limited its holding to the ruling and rationale of the Missouri Supreme Court interpreting Missouri slavery laws; *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 276–80 (1978).

23. *Id.* at 160–61.

24. *Id.* at 160.

25. U.S. CONST. art. IV, § 2.

26. *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 21 (2014) ("Following the Revolution, the conferred rights of citizenship transferred to the newly independent states.").

particularly when considered in the general context of balancing state and federal powers.[27] However, the starkly different treatment of African Americans in free and slave states exposed a fundamental inconsistency between the principles of national comity and the elaborate legal infrastructure that propped up the institution of racial slavery.[28] In *Dred Scott,* the Court was forced to directly confront the intersection of race and citizenship in America and the reality that, under the broadly accepted interpretation of the Privileges and Immunities Clause, a free African American citizen of New York that traveled to North Carolina would be constitutionally entitled to the same rights and benefits as a free (read: white) man living in that state.[29]

Chief Justice Roger Taney embraced the full sweep of the issues before the Court.[30] The question of Scott's citizenship, and consequently the jurisdiction of the federal court, could have simply focused on the underlying factual question of whether he was free.[31] If not, he could not be a citizen and therefore not be before the court.[32] Instead, ignoring the historical fact that there were free black citizens in several states at the time of the ratification of the Constitution and living in free states since, Taney begins his opinion with a racialized assessment that no African American was ever intended to or could ever become a citizen.[33]

> The legislation of the States therefore shows . . . the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards . . . we are bound out of respect to State sovereignties, to assume they had deemed it just and necessary to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation. . . . It cannot be

27. *Id.*

28. *Id.*

29. *Id.*

30. Christopher L. Eisgruber, *The Story of Dred Scott: Originalism's Forgotten Past, in* CONSTITUTIONAL LAW STORIES 162 (Michael C. Dorf ed., 2nd ed. 2009).

31. *Id.*

32. *Id.*

33. Dred Scott v. Sandford, 60 U.S. 393, 416 (1857).

> supposed that they intended to secure them rights, and privileges . . . in the new political body. . . .[34]

He then goes on to explain why the idea of African Americans being citizens with the related privileges and immunities of that status is inconceivable in a society based on racial subordination.

> For it they were so received, and entitled to the privileges and immunities of citizens, . . . [i]t would give to persons of the negro race, who were recogni[z]ed as citizens in any one State . . . the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and in subordination among them, and endangering the peace and safety of the State.[35]

Determined to reconcile the issues of race and citizenship, and the privileges and immunities related to the latter, Taney's opinion obliterates any distinction between free blacks and slaves.[36] Taney understood that Article IV would not permit discrimination against inter-state citizens, even if that discrimination was *based on race rather than outsider status*.[37] The only way to accommodate the hierarchy of white supremacy upon which the slave system depended was the Chief Justice's

34. *Id.*
35. *Id.* at 416–17.
36. *Id.*
37. *Id.* at 41.

conclusion that black people in America, whatever their status, could not be citizens and in fact were never intended to be.[38]

> The question before us is whether the class of persons [African Americans] . . . are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and *whether emancipated or not,* yet remained subject to their authority. . . . They had for more than a century . . . been regarded as beings on an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect.[39]

There was no need for the Court to consider the panoply of privileges and immunities to which citizens were entitled; whatever comprised that set of rights and benefits, African Americans were entitled to none of them.[40]

B. *The Civil Rights Act of 1866 and the Fourteenth Amendment*

In the aftermath of the Civil War, the Republican-controlled Congress set out to overrule the Court's holding in *Dred Scott*, to clarify and protect the rights on the newly freed African Americans, and to prevent a return to the racial *status quo*

38. *Id.* at 416 ("[I]t is too clear for dispute that the enslaved African race were not intended to be included and formed no part of the people who framed and adopted this declaration.").

39. *Id.* at 405–06.

40. *Id.* at 405.

ante.[41] At the same time, these goals were tempered by entrenched views about federalism and a restricted view of federal power, particularly regarding areas of law traditionally controlled by the states.[42] Whereas the antebellum debate had focused on *who* was entitled to share in the rights and benefits encompassed by the Privileges and Immunities Clause,[43] during Reconstruction the focus would turn to defining *what* those rights and benefits included.[44]

The Civil Rights Act of 1866 ("CRA")—the first civil rights legislation adopted in the United States[45]—both resolved the citizenship exclusion of the Court's *Dred Scott* opinion and also attempted to define and describe those fundamental rights necessary to secure full inclusion (i.e., citizenship) in American society.[46] The constitutional authority for the CRA was the Thirteenth Amendment,[47] which outlawed not only the institution of slavery, but also any racially discriminatory laws or actions that could be considered "badges and indicia" of slavery.[48]

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States*; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . .

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41. JOHN R. HOWARD, THE SHIFTING WIND 38 (SUNY PRESS 1999) ("[T]he decade following the end of the Civil War witnessed a remarkable body of legislation being put into place. . . .").

42. *See* Michael Kent Curtis, *Reflections on Albion Tourgée's 1896 View of the Supreme Court: A "Consistent Enemy Of Personal Liberty And Equal Right"?*, 5 ELON L. REV. 19, 43 (2013).

43. *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36 (1837) (defining the rights that constitute federal versus state privileges and immunities, while also defining limitations on meaning of state action and rights protected under the Fourteenth Amendment).

44. *See Reconstruction, America's First Attempt to Integrate*, AFR. AM. REGISTRY, http://www.aaregistry.org/historic_events/view/reconstruction-americas-first-attempt-integrate (last visited Dec. 10, 2015).

45. *See* HOWARD, *supra* note 41, at 54.

46. *See The 1866 Civil Rights Act*, RECONSTRUCTION THE SECOND CIVIL WAR (Dec. 19, 2003), http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1866.html.

47. *See* DONALD E. LIVELY, THE CONSTITUTION AND RACE 44–46 (Praeger 1992).

48. *See The 1866 Civil Rights Act*, *supra* note 46.

> *shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens,* and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[49]

The CRA was not only motivated by a determination to overrule *Dred Scott*,[50] but also to undercut the so-called "black codes" that had been adopted by several southern states in the wake of the war to severely limit the rights of the newly freed slaves.[51] The CRA, which was passed over an overtly racist veto by President Andrew Johnson,[52] nonetheless faced some resistance from more moderate Republicans in Congress, primarily over federalism concerns and the scope of the Thirteenth Amendment.[53]

In seeking to ensure that the former slaves were fully included in benefits of membership in American society, the decision to include a brief but specific list of what those benefits

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49. *Id.* (emphasis added).

50. *See* HOWARD, *supra* note 41 at 53 (noting that the Act directly addressed arguments used in *Dred Scott*, specifically citizenship of Black Americans).

51. *Id.* at 49–54.

52. *Veto of the Civil Rights Bill*, TEACHING AM. HIST., http://teachingamericanhistory.org/library/document/veto-of-the-civil-rights-bill (last visited Dec. 10, 2015).

> The grave question presents itself whether . . . it is sound policy to make our entire colored population . . . citizens of the United States. Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizenship of the United States? . . . [The bill establishes] for the security of the colored race safeguards which go indefinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored against the white race.

Id.

53. *See* Darrell A. H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999 (2008) (discussing that there were concerns about state sovereignty and federalism).

entail raises fundamental questions about how we define the universe of "civil rights." That universe could—and ultimately, by the Court would—be broken down into several subcategories with the rights specifically identified in the CRA categorized as "economic" and "judicial" civil rights.[54] Absent from the CRA were rights impacting other subcategories, including political rights (voting, running for office, etc.) or social rights (public accommodations).[55] Whether one believes that the former subcategories might eventually come to encompass the latter ones or (given the growing resistance to equality for African Americans) that subsequent legislation would be needed to secure those additional categories of rights,[56] it is clear that even the arguably limited list contained in the CRA represented a significant shift in the balance of state and federal power, especially with regard to the protection of the rights of African Americans.[57]

The Fourteenth Amendment, ratified in 1868, was in some ways a constitutionalization of the CRA, and Section 1 of the Amendment closely tracks the outline and structure of the CRA.[58] It begins with the citizenship provision[59] and then in broader language sweeps all the specific rights listed in the CRA (and potentially others) under the umbrella of "the privileges and immunities of citizens of the United States."[60] The section concludes with a restatement of the Due Process Clause from the

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54. *See* HOWARD, *supra* note 41, at 53 (1999). An example of economic rights would be the right to enforce contracts and hold property. *Id.* An example of judicial rights would be the right to be secure in one's person and to not be subjected to peculiar race based punishments. *Id.*

55. *See* The Civil Rights Act of 1866, 14 Stat. 27–30 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C §§ 1981–1982 (2000)); *but see* HOWARD, *supra* note 41, at 53 (1999) (stating which rights the Act specifically addresses).

56. Recognizing the primacy of the right to vote in securing and protecting the rights of the freed slaves, and that the operations and oversight of elections were otherwise quintessentially functions of state governments, the fifteenth Amendment guaranteeing African Americans the right to vote was ratified in 1870. As to what might be called "social rights," see discussion *infra* Section D.

57. HOWARD, *supra* note 41, at 53–54 ("The bill also identified specific rights, which could not be denied or constrained for reasons of race. . . .").

58. *Compare* U.S. CONST. amend. XIV, § 1, *with* The Civil Rights Act of 1866, 14 Stat. 27–30 (1866).

59. U.S. CONST. amend. XIV, §1.

60. *Id.*

Fifth Amendment and a guarantee of equal protection, both of which mirror the CRA.[61]

C. The Slaughter-House Cases (1873)

The first test of the constitutionality of the Fourteenth Amendment came just five years after its adoption, and perhaps most significantly, in a case that had nothing to do with the rights, privileges, or equality of the newly freed African Americans.[62] In fact, the test case for the Amendment had nothing whatsoever to do with race, which makes the Court's decision to severely narrow its scope and eviscerate the spirit of racial equity that underlie the Fourteenth Amendment so troubling.[63]

In 1869, the Louisiana state legislature passed a law creating and granting a monopoly to the Crescent City Livestock Landing & Slaughter-House Company to slaughter animals in and near the city of New Orleans.[64] In exchange, the Crescent City Company was required to comply with various state regulations governing, among other things, the quality of facilities and products, the output volume, and the price of livestock.[65] The company was also required to allow independent butchers to work on its grounds at a set rate.[66] Louisiana claimed the measure was within its general police powers and promoted health and safety by centralizing and improving slaughterhouse production.[67] The law also prohibited any other slaughterhouses from operating in New Orleans.[68] Butchers and slaughterhouse owners in the city challenged the legislation, arguing that the creation of the monopoly deprived them of the liberty to work in their chosen

61. *Id.* ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

62. The Slaughter-House Cases, 83 U.S. 36 (1873).

63. *Id.* at 57–60.

64. *Id.* at 38–43.

65. *Id.* at 42.

66. *Id.*

67. *Id.* at 111.

68. *Id.* at 36.

field in violation of the Privileges and Immunities Clause of the Fourteenth Amendment.[69]

Justice Miller's opinion begins with a general analysis of the breadth of police powers[70] and likely could have stopped there and upheld the statute without reaching the constitutional question. At that point in history, however, the jurisprudential doctrine of limiting rulings to the narrowest grounds when possible had not been widely adopted,[71] and so Justice Miller seized the opportunity to announce the Court's interpretation of the Fourteenth Amendment.[72] Interestingly, he begins the analysis with a precise statement that the cause of the Civil War was slavery,[73] and that the Thirteenth Amendment was clear and limited in its purpose to end that nefarious institution.[74] However, Justice Miller acknowledges that the mere elimination of chattel slavery, particularly in light of the southern "Black Codes" that had been adopted in the wake of the Thirteenth Amendment, was not sufficient to address the continuing suppression of African Americans.[75] The overt effort to effectively re-institute slavery under another name

> forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment, they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.[76]

Miller continues his historical summary of the Reconstruction Amendments with a brief discussion of the

69. *Id.* at 57–58.

70. *Id.* at 62–65.

71. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857).

72. *The Slaughter-House Cases*, 83 U.S. at 80.

73. *Id.* at 68 ("[W]hatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.").

74. *Id.*

75. *Id.* at 70.

76. *Id.*

Fifteenth Amendment,[77] then states that the collective intent and purpose of these amendments was indisputably

> the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[78]

Despite this clear analysis, and in the face of a case that contained no issue of race discrimination or "oppressions," Miller immediately rejected the idea that these amendments apply only to African Americans.[79] In doing so he makes reference to the possibility of discriminatory treatment of Mexicans or Chinese in America,[80] but then begins to dissect the language of the Fourteenth Amendment without any further explanation or justification about why such analysis is appropriate given the context he has just set forth and the fact that such context is wholly absent from the case.[81] In fact, the remaining portion of the opinion reads as though none of the preceding passages exist.[82]

Miller's review of the Privileges and Immunities Clause begins appropriately with the assessment that it overrules *Dred Scott* "by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt."[83] Miller then goes on, however, to parse out a distinction between being a citizen of the United States and a

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77. *Id.* at 71.
78. *Id.*
79. *Id.*
80. *Id.* at 72.
81. *Id.* at 73–74.
82. *Id.* at 73–83.
83. *Id.* at 73.

citizen of any particular state.[84] He highlights the distinction in the language of the first and second sections of the clause, stressing that the former refers to both the nation and the states, while the latter only refers to the nation ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").[85] Miller concludes that the clear distinction between the explicit language of the two provisions must mean that there are two distinct and separate types of citizenship in America, each with an attendant set of rights and benefits, and that the protections of the Privileges and Immunities Clause apply only to one—those that derive from being a citizen of the United States.[86]

Having determined that the Privileges and Immunities Clause only protects those rights associated with national citizenship, Miller then goes on to explain that those rights include: coming to the seat of government to assert any claim one may have upon that government, free access to seaports, protection of the Federal government when on the high seas or within the jurisdiction of a foreign government, the writ of habeas corpus, the right to use the navigable waters of the United States, and all rights secured by treaties with foreign nations.[87]

Absent from Justice Miller's universe of rights protected by the Privileges and Immunities Clause are anything that could be considered civil rights, including the specific rights enumerated in the CRA, which the Fourteenth Amendment was intended to constitutionalize.[88] Including those rights within the protection of the federal government would, Miller argued, undermine the fundamental concept of federalism and "destroy the main features of the general system."[89] Such an outcome could not have been what the drafters intended, he concluded, but rather that "our statesmen have still believed that the existence of the State with powers for domestic and local government, *including the regulation*

84. *Id.* at 73–75.

85. *Id.* at 80 (comparing "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States and of the State wherein they reside*," with "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

86. *Id.*

87. *Id.* at 79–80.

88. *Id.*

89. *Id.* at 82.

of civil rights the rights of person and of property was essential to the perfect working of our complex form of government."[90]

D. The Civil Rights Act of 1875

The last piece of civil rights legislation of the nineteenth century—in fact, the last civil rights law to be passed by Congress for 82 years—was in many ways the most forward looking legislation ever adopted in America.[91] The Civil Rights Act of 1875 ("CRA of 1875") was the final attempt of the radical Republicans to ensure the full inclusion of African Americans into the benefits and privileges of membership in the American community.[92] Its target was nothing less than the daily abuses, discrimination, and humiliation that characterized the culture of white supremacy and black subordination, especially in the South.[93]

If one was inclined to parse out various sub-categories of civil rights and assert that the CRA had been limited to legal and economic rights, then the CRA of 1875 promised the full measure of equality as to "social rights."[94] As originally introduced in 1870, the Act prohibited race discrimination in public accommodations: railroads, restaurants, hotels, theaters, public schools, churches, and even cemeteries.[95] Grounded in both the Thirteenth Amendment's prohibition on the badges and indices of slavery and the Fourteenth Amendment's Equal Protection Clause, proponents believed that addressing these immediate and constant manifestations of black oppression was essential to true freedom.[96]

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90. *Id.* (emphasis added). Miller briefly discussed and quickly dismissed the butcher's equal protection claim, explaining that this clause only applied to African Americans and only when states "discriminated with gross injustice and hardship against them as a class." *Id.* at 81.

91. LAWRENCE GOLDSTONE, INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1903, at 99–103 (2011).

92. GERALD M. POMPER, THE NEW YORK TIMES ON CRITICAL ELECTIONS, 1854–2008, at 114 (CQ Press 2010).

93. Aderson B. Francois, *The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy, and Affirmative Action*, 57 HOWARD L. J. 573, 588 (2013).

94. The Civil Rights Cases, 109 U.S. 3, 22 (1883).

95. Francois, *supra* note 93, at 575–76.

96. STEPHEN W. STATHIS, LANDMARK DEBATES IN CONGRESS: FROM THE DECLARATION OF INDEPENDENCE TO THE WAR IN IRAQ 193 (CQ Press 2009).

The debates over the bill forecast many of the arguments that continue to define the struggle over civil rights.[97] There were doubts expressed about the federal government's power to regulate the private actions of individuals,[98] questions raised as to the significance of government involvement (via trespass laws or business licensing) with these otherwise private actions,[99] and concerns regarding possible encroachment on the property rights of whites.[100] The bill eventually passed,[101] although the provisions regarding schools, churches, and cemeteries were removed[102] and an amendment allowing separate but equal facilities was defeated.[103] In addition to outlawing segregation in public accommodations, the Act made persons who violated its prohibitions subject to criminal liability, including fines and imprisonment.

> Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law:
>
> Therefore, Be it enacted . . . That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; . . . applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

97. Francois, *supra* note 93, at 598.
98. STATHIS, *supra* note 96.
99. Francois, *supra* note 93, at 586.
100. 2 CONG. REC. app. 343 (1874).
101. Francois, *supra* note 93, at 580.
102. 3 CONG. REC. app. 939 (1875).
103. *Id.*

> That any person who shall violate the foregoing section by denying to any citizen . . . the full enjoyment of any of the accommodations, advantages, facilities, or privileges . . . shall, for every offence, forfeit and pay the sum of five hundred dollars . . . and shall also, . . . be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year.[104]

E. The Civil Rights Cases (1883)

The CRA of 1875 was declared unconstitutional just eight years after it was ratified.[105] By that time, the federal commitment to Reconstruction had ended as part of the compromise to resolve the contested election of 1876, and racist white Democratic governments had come back into power in a number of southern states.[106] Hundreds of cases under the CRA of 1875 had been tried during the late 1870s and early 1880s, and there was a split in the circuits as to the constitutionality of the law.[107]

The *Civil Rights Cases* were several cases combined that involved racial discrimination in the admittance to a theater, a hotel, and seating on a train.[108] These cases had an enormous significance because they "illuminated the meaning of the racial caste distinctions in the everyday lives of blacks and whites."[109] The 8–1 opinion written by Justice Bradley focused the constitutional analysis not on the nature of the rights at issue as in *Slaughter-*

104. Civil Rights Act of 1875, 18 Stat. 335-336 (1875).

105. The Civil Rights Cases, 109 U.S. 3, 26 (1883).

106. POMPER, *supra* note 92, at 117.

107. John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE: J. NAT'L ARCHIVES 225, 233 (1974).

108. *The Civil Rights Cases*, 109 U.S. at 4–5.

109. HOWARD, *supra* note 41, at 124.

House, but on who could be accountable for the abridgement of those rights.[110]

At its primary level, the Court's discussion focused on the Fourteenth Amendment exclusively as a prohibition on discriminatory action by the state. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."[111] The civil rights guaranteed and protected by the Constitution "cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."[112] The private discriminatory act of an individual, Justice Bradley wrote, "is simply a private wrong" for which the Constitution can provide no redress.[113] While this state action analysis is fairly simple on its face, it should be recognized as the earliest framing of the distinction between differing models of civil rights: one model that is focused on reactive non-discrimination; the other affirmatively promoting equality—and in these cases, by integration.[114] Justice Bradley's opinion clearly confined the Fourteenth Amendment to the former.[115]

> It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore

110. *The Civil Rights Cases*, 109 U.S. at 10–11, 13–15; *see also* Michael J. Horan, *Political Economy and Sociological Theory as Influences Upon Judicial Policy Making:* The Civil Rights Cases *of 1883*, 16 AM. J. LEGAL HIST. 71, 72 (1972).

111. *The Civil Rights Cases*, 109 U.S. at 11.

112. *Id.* at 17.

113. *Id.*

114. *Compare id.* at 13 (asserting that limiting the Fourteenth Amendment to protection against state actions adverse to the right of the citizen, secured by the amendment that embodies reactive non-discrimination as Congress's authority to enforce, is only a reaction to mischief upon citizens), *with id.* at 14 (criticizing the 1875 Civil Rights Amendment as "laying down rules for the conduct of individuals in society towards each other, and impos[ing] sanctions for the enforcement of those rules," which would have affirmatively promoted equality by using Congressional authority to force integration if adopted).

115. *See id.* at 11 (narrowing the scope of the Fourteenth Amendment by limiting Congress's authority to adopt "appropriate legislation for correcting the effect of such prohibited State law and State acts" rather than interpreting the Fourteenth Amendment as broad authority for proactive legislation).

> provide due process of law for their vindication in every case; and that because the denial of a State to any persons of the equal protection of laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection.[116]

Having disposed of the Fourteenth Amendment argument, Justice Bradley turned to an analysis of the constitutionality of the CRA of 1875 under the Thirteenth Amendment, which contains no similar language limiting its application to state action.[117] While he recognized that the Thirteenth Amendment was commonly understood to give Congress the authority to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States," he dismissed the idea that overt, intentional, racial segregation in public accommodations could possibly be considered a badge or indicia of slavery.[118] The opinion concluded with a prescient summary of what has become a mantra of the modern-day push to restrict all civil rights for African Americans, made more haunting perhaps by the realization that it was written only eighteen years after the end of slavery in America.[119]

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken of the inseparable concomitants of that state, there must be some stage in the progress of his elevation where he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.[120]

Justice Harlan's powerful dissent decries the majority's abandonment of its duty to ensure that "the full effect be given to

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116. *Id.* at 13.

117. *See id.* at 23. *Compare* U.S. CONST. amend. XIII, § 1 (lacking reference to state action), *with* U.S. CONST. amend. XIV, § 1 (containing language limiting to state action).

118. *Id.* at 21. "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain . . . or admit to his theater, or deal with in other matters of intercourse or business." *Id.*

119. *Id.* at 25.

120. *Id.*

intent" of the Thirteenth and Fourteenth Amendments.[121] In determining that intent, Justice Harlan explained that because the institution of slavery "rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, *because of their race*."[122] According to Justice Harlan, if the amendments have any substantive meaning at all, they must at a minimum protect African Americans from discrimination "in respect of any civil right belonging to citizens of the white race in the same State."[123] As to the idea that the CRA of 1875 is an attempt to give blacks some favored legal status, Justice Harlan saw the exact opposite.[124] "The one underlying purpose . . . has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens and to secure the enjoyment of privileges" that come with that status.[125]

Although not as well known today as the decision thirteen years later in *Plessy v. Ferguson*,[126] the *Civil Rights Cases* were seen at the time as a crippling blow for African Americans and their nascent struggle for equality.[127] Looking back from our current perspective, the decision and the dissent frame out several of the elements and arguments that have defined the struggle for civil rights over time and continue to define the debate today, including questions about institutionalized discrimination, group fairness, individual rights, affirmative action, and the idea of "special rights" and so-called identity politics.

F. Plessy v. Ferguson *(1896) and the End of the First Civil Rights Era*

In the aftermath of the election of 1876 and the concomitant end of Reconstruction,[128] the often violent

121. *Id.* at 26.

122. *Id.* at 36 (emphasis added).

123. *Id.* at 48.

124. *Id.* at 61.

125. *Id.*

126. HOWARD, *supra* note 41, at 131.

127. *Id.* Responding to the ruling, Frederick Douglass said: "We have been, as a race, grievously wounded." *Id.*

128. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 575–87 (LSU Press 1984).

ascendancy of white supremacist "Redeemer" state governments in the former Confederate states,[129] and the holding in *Civil Rights Cases* that "social equality" (as represented by opposition to racial segregation) was outside the scope of the Fourteenth Amendment,[130] several states adopted laws mandating segregation in public accommodations.[131] These Jim Crow laws, along with a coordinated campaign of black disenfranchisement, were an important tool for the re-emergent white power structure in dampening down class tensions and potentially bi-racial populist sentiment.[132] White privilege, black subordination, and strict racial segregation, which were the core components of Jim Crow, helped support political unity between poor and economically elite whites, united in racist solidarity.[133]

Given the centrality of the lack of state action in the *Civil Rights Cases* holdings, however, these new statutes seemed particularly vulnerable to legal challenge.[134] While the holdings of the *Slaughter-House Cases* and the *Civil Rights Cases* were setbacks in the struggle for racial equality, each case included language that strongly suggested that state laws requiring and enforcing—in some places with criminal sanction—segregation would be unconstitutional.[135] Black and white civil rights advocates quickly organized to mount a legal challenge.[136]

Louisiana passed its law requiring the racial segregation of railroad passengers in 1890.[137] A carefully crafted test case was subsequently brought relying on both the Thirteenth and

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129. HOWARD, *supra* note 41, at 116.

130. *The Civil Rights Cases*, 109 U.S. at 59 (Harlan, J., dissenting).

131. By 1892, nine states had adopted laws requiring racial segregation in public transportation and railroads. *See* Cheryl I. Harris, *The Story of* Plessy v. Ferguson: *The Death and Resurrection of Radical Formalism, in* CONSTITUTIONAL LAW STORIES, *supra* note 30, at 181, 194.

132. *Id.* at 197; *see also* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877–1913, at 211 (1951).

133. *Id.*

134. *The Civil Rights Cases*, 109 U.S. at 11 (majority opinion).

135. *See id.* at 13 (explaining that "prohibitions of the amendment are against State laws and acts done under State authority"); *see also* The Slaughterhouse Cases, 83 U.S. 36, 78–79 (1873) (holding that "privileges and immunities . . . are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government . . . until some case involving those privileges makes it necessary").

136. *See* Harris, *supra* note 131, at 201–02.

137. *Id.* at 200–01.

Fourteenth Amendments.[138] In its consideration of the case, the Louisiana Supreme Court upheld the statute, discounting the Thirteenth Amendment claim and explaining that "in such matters, equality, and not identity or community of accommodations"[139] is the test of compliance with the Equal Protection Clause, and "the statute applies to the two races with such perfect fairness and equality." [140]

By the time the case reached the U.S. Supreme Court, racial subordination and white supremacy had grown more entrenched in America,[141] and the dominant mood politically had almost completely turned against any notions of racial equality.[142] The now well-known outcome of the case, endorsing the fictional idea of "separate but equal," was effectively a *fait accompli*.[143]

The Court's 8–1 ruling quickly dismissed the Thirteenth Amendment claim that state-sanctioned segregation imposed a "badge of slavery" on blacks.[144] As to the Fourteenth Amendment, the opinion's focus was not on the outcome seemingly mandated by the *Civil Rights Cases* (since *Plessy* challenged state and not private action).[145] Instead, the majority holding harkened back to the *Slaughter-House* logic, explaining that there were different components of civil rights, and that while the Fourteenth Amendment was written

> undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, *or to enforce social, as distinguished from political equality,* or a commingling

138. *Ex parte Plessy*, 11 So. 948, 949 (La. 1892).

139. *Ex parte Plessy*, 11 So. at 948.

140. *Id.* at 951.

141. *See* Harris, *supra* note 131, at 208.

142. *Id.*

143. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

144. *Id.* at 542–43 ("That it does not conflict with the Thirteenth Amendment . . . is too clear for argument. . . . A statute which implies merely a legal distinction between the white and colored race . . . has no tendency to . . . reestablish a state of involuntary servitude.").

145. *Id.* at 543–44.

> of the two races upon terms unsatisfactory to either.[146]

The opinion reaffirmed the idea that the Constitution and its civil rights protections had a limited scope, and that rights like those complained of here, although admittedly impacted by state action, are outside that scope.[147] "Separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment."[148] The Court closed by tersely blaming the victims of racial segregation for any alleged disability that such treatment imposed.[149] If segregation by race is itself a badge of inferiority, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[150]

Justice Harlan's dissent was a powerful endorsement of a more sweeping view of the Thirteenth Amendment and its prohibition of "any burden or disabilities that constitute badges of slavery or servitude."[151] He argued that such burdens were not only the effect of laws enforcing segregation, but their intent.[152] He anticipated that the decision would lead to greater encroachment on "the admitted rights of colored citizens"[153] and wholly undermine the Reconstruction Amendments, which were specifically designed to protect those rights.[154] Justice Harlan took particular issue with the states' role in adopting these Jim Crow laws, insisting that the Constitution cannot "permit the seed of race hate to be planted under the sanction of law."[155] Here was the most egregious example of the kind of racial discrimination that every previous decision of the Court had identified as prohibited by the Reconstruction Amendments, but now the Court refused to

146. *Id.* at 544 (emphasis added).
147. *Id.* at 556 (Harlan, J., dissenting).
148. *Id.* at 548.
149. *Id.* at 551.
150. *Id.*
151. *Id.* at 555 (Harlan J., dissenting).
152. *Id.* at 554–55.
153. *Id.* at 560.
154. *Id.* at 560–61.
155. *Id.* at 560.

act.[156] Ironically, the most famous phrase made in support of a broader vision of racial equality—"Our constitution is colorblind"[157]—has been removed from its context and now is the mantra of the opponents of civil rights.[158]

While *Plessy* did not represent a major change or shift in attitudes or practices regarding race, it did add the Court's imprimatur to the practice of racial segregation, thereby resorting to the one potentially counter-majoritarian branch of government.[159] The decision consolidated the wholesale exclusion of blacks from the benefits and privileges of membership in the American community and divorced the status and treatment of African Americans (and the constitutional amendments designed to ensure their equality) from any context, purpose, or history, recasting the then existing inequitable hierarchy of white supremacy and black subordination as "equal."[160] As a result, the constitutional mandate of equal protection was reduced to a question of equal treatment (e.g., blacks cannot ride in white-only cars, whites cannot ride in black-only cars) regardless of any underlying or actual inequalities.[161] Over one hundred years and another civil rights revolution later, the Court continues to interpret a colorblind constitution as one divorced from context, history, or entrenched racial disparities.[162]

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156. *See id.*

157. *Id.* at 559.

158. *See* Ian Haney-López, *Colorblind White Dominance*, *in* WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 157–58 (N.Y.U. Press 2006) ("In the wake of the civil rights movement's limited but significant triumphs, the relationship between colorblindness and racial reform changed remarkably. Whereas colorblindness in the context of Jim Crow was heavy with emancipatory promise, in the civil rights era and since, its greatest potency instead lies in preserving the racial status quo.").

159. F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 37–38 (N.Y.U. Press 2013) (discussing the necessity of racial classification to the maintenance of racial paradigms in the post-slavery era and the *Plessy* Court's sanction thereof).

160. *See* Plessy v. Ferguson, 163 U.S. 537, 559–60 (1896) (Harlan, J., dissenting).

161. *Id.*

162. *See* Chris Edelson, *Judging in a Vacuum, Or, Once More, Without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in* Plessy v. Ferguson, 45 AKRON L. REV. 513, 514 (2011) (examining the jurisprudential similarities between the majority in *Plessy v. Ferguson* and more recent Supreme Court Justices).

III. THE PATTERN REPEATS

"It's like déjà vu all over again."

—Yogi Berra[163]

The breathtaking expansion and subsequent backlash and contraction of civil rights for African Americans over the approximately thirty-five year span from the ratification of the Thirteenth Amendment to the decision in *Plessy* has lamentably repeated itself—albeit somewhat more slowly—over the last decades of the twentieth century.[164] The sweeping revolution promised by the decision in *Brown v. Board of Education*,[165] the Civil Rights Act of 1964,[166] and other civil rights legislation has been curtailed in many respects by modern Supreme Court decisions limiting the scope and impact of that promise,[167] which reflects a narrow vision of the benefits and privileges of full inclusion for people of color in our society.

Although it represents the culmination of decades of a coordinated litigation strategy to challenge legal segregation, *Brown's* reversal of the "separate but equal" doctrine for public schools is often considered the beginning of the "Second Reconstruction"—a new era of expanded civil rights legislation and advocacy and the prospect for meaningful equality for African Americans.[168] Despite the promise of *Brown*, however, it took

163. Yogi Berra, *Yogisims*, YOGI BERRA MUSEUM, http://yogiberramuseum.org/just-fo r-fun/yogisms (last visited Dec. 14, 2015).

164. *See* Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.–C.L. L. REV. 369 (2002) (explaining that a large driving force for racial equality in the United States was pressure of the Soviet Union and communism and without the risk of a communism in African Americans, the U.S. government lacked the incentive to expand civil rights).

165. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1953); *see also* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 70–72 (Oxford U. Press 2001).

166. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

167. *See, e.g.*, Schutte v. Coal. to Def. Affirmative Action, 134 S. Ct. 1623, 1683 (2014); Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 745 (2007); Gratz v. Bollinger, 539 U.S. 244, 275 (2002).

168. Francisco Valdes, *Original Sins, Continuing Wrongs: Equality, Democracy, and Supremacy in the U.S. Under Judicial Review*, *in* CONTROVERSIES IN EQUAL PROTECTION CASES IN AMERICA: RACE, GENDER AND SEXUAL ORIENTATION 30, 36 (Anne Richardson Oakes ed., 2015); *see also* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8–9 (Oxford U. Press 1955).

another ten years and a massive grassroots movement that exposed the depth and violence of American racism before Congress adopted the Civil Rights Act of 1964.[169] The Act was sweeping in scope—its provisions combatted discrimination in public accommodations, education, employment, and the expenditure of federal funds, and also created a federal investigation and enforcement mechanism to help effectuate the law.[170] Anticipating a challenge to the law as an unconstitutional attempt to regulate private conduct pursuant to the nineteenth century holding in the *Civil Rights Cases*,[171] Congress grounded its authority for the Act not only on the Fourteenth Amendment, but on the Commerce Clause.[172] In affirming the constitutionality of the Act, the Court relied on this provision to distinguish, but not overrule, its 1883 holding.[173]

The passage of the 1960s civil rights legislation, with its focus on the intentional and everyday discrimination that was the primary manifestation of white supremacy and black subordination of Jim Crow America, successfully challenged that discrimination and led to massive changes in all aspects of American society.[174] In the years following the adoption of these laws, the nation experienced—yet again—an expansion of civil rights and the opportunities for full inclusion, and then a coordinated legal effort, ratified by the Court, to contract and constrain those opportunities.[175]

A. Employment Discrimination

The struggle for racial equality took a momentous step forward with the 1971 decision *Griggs v. Duke Power*.[176] Prior to the

169. Valdes, *supra* note 168. The Voting Rights Act arose a year later with the Fair Housing Act following in 1968. *Id.*

170. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

171. The Civil Rights Cases, 109 U.S. 3, 23–25 (1883).

172. Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 159 (Bernard Grofman ed., 2000).

173. Heart of Atlanta Motel v. U.S., 379 U.S. 241, 250–52 (1964).

174. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); *id.*

175. *Thornburg*, 478 U.S. at 38–39.

176. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment

implementation of the anti-employment discrimination provisions of Title VII of the Civil Rights Act, Duke Power Company had policies in place to maintain a rigidly segregated workforce by restricting black workers to the lowest positions in its plants.[177] When the new civil rights law took effect, the company announced the desegregation of its workforce and abandoned its overt discriminatory policies.[178] In their place, the company adopted employment testing and educational criteria that replicated the existing racial hierarchy of its workplace and prevented African Americans from being hired or promoted to non-menial positions.[179]

The legal challenge, brought by legendary civil rights advocate Julius Chambers and the NAACP Legal Defense and Education Fund,[180] was based on the theory that the disparate racial impacts of the facially neutral policy adopted by Duke Power represented the same noxious and unconstitutional harms as more intentional disparate treatment cases.[181] According to Chambers, the new employment policies allowed the company to lock the prior patterns of inequality and discrimination in place, thereby maintaining institutionalized inequities even in the absence of the former racialized policies.[182] Conversely, Duke argued that any consideration of its actions or history vis-à-vis its African American workers prior to the adoption of Title VII was improper since its discriminatory employment practices were not illegal at that time.[183] All that mattered was that Duke had

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when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

177. *Id.* at 427.

178. *Id.* at 427–28.

179. *Id.* (explaining that the new policy required new employees or those seeking to transfer to any position other than menial "labor department" possess a high school diploma and pass a standardized test).

180. David J. Garrow, *Toward a Definitive History of* Griggs v. Duke Power Co., 67 VAND. L. REV. 197, 206–08 (2014).

181. Griggs v. Duke Power Co., 420 F.2d 1225, 1229 (4th Cir. 1970) (plaintiffs brought suit because new requirements preserved and continued the effects of past racial discrimination), *rev'd*, 401 U.S. 424 (1971).

182. *Id.*

183. Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968) ("Since the discrimination occurred prior to July 2, 1965, it is not remedial under the 1964 Civil Rights Act."), *aff'd in part, rev'd in part*, 420 F.2d 1225, 1229 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971).

eliminated those practices when the new law went into effect.[184] The company's position meant that any appropriate analysis of its actions must begin at the adoption of the Act, disconnected from the context and history within which the Civil Rights Act was adopted.[185]

The Supreme Court disagreed.[186] Its unanimous decision recognized that employment practices and procedures "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[187] The Court also found that disparate impact was distinct from, but no less nefarious than disparate treatment, stating that "good intent or the absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups."[188] The focus was not on the motivation behind the challenged practices, but on their consequences.[189]

The opinion was a forceful endorsement of a sweeping vision of civil rights, and one that was vital if the law was to reach the practices that created and maintained institutional discrimination. The disparate impact analysis at the core of the Court's holding recognized the subtle but no less malignant forms of race discrimination that continued to plague people of color, even as more blatant discriminatory actions became illegal (and over time, socially unpopular).[190] Critical to the decision in *Griggs*, and to the disparate impact theory more generally, is that recognition of the context and continuing effects of our history of intentional racial discrimination is necessary to our efforts to fully remedy existing inequities.[191]

While the Court embraced the concept of disparate impact within the context of Title VII, just four years later it rejected a

184. *Id.* at 248.

185. *Id.*

186. *Griggs*, 401 U.S. at 424.

187. *Id.* at 430.

188. *Id.* at 432.

189. *Id.*

190. *See, e.g.*, Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 656–60 (2015) (discussing *Griggs* and reviewing disparate impact as a way to reach covert intentional discrimination, implicit bias, and structural discrimination).

191. *Id.*

similarly broad vision for claims under the Equal Protection Clause.[192] Like *Griggs*, *Washington v. Davis* involved the disparate impact of an employment test, in this case, given to recruits for the Washington, D.C., police force.[193] Because Title VII did not apply to federal employees at the time of complaint, the African American applicants excluded by the test results filed suit directly under the Constitution and under 42 U.S.C. § 1981.[194] The Court of Appeals analogized the case to *Griggs* and, relying on the disparate impact model established there, ruled in favor of the applicants.[195]

The Supreme Court reversed that ruling, emphasizing that the statutory disparate impact paradigm of racial discrimination "is not the constitutional rule."[196] While agreeing that a showing of a "disproportionate impact is not irrelevant," the majority nonetheless held that proof of intentional discrimination was necessary to trigger a constitutional equal protection claim.[197] In reaching this conclusion, the Court expressed "difficulty in understanding how a law establishing a racially neutral qualification . . . is nevertheless racially discriminatory . . . simply because a greater proportion of Negroes fail to qualify."[198] Gone was the bold and promising language about "freezing"[199] the racial status quo or "built-in headwinds."[200] Instead, the Court focused on the slippery slope of what institutional racism—the privileges and immunities (or conversely, the badges and incidents)—that these provisions were designed to address.[201]

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one

192. Washington v. Davis, 426 U.S. 229, 232 (1976).

193. *Id.* at 232–33.

194. *Id.* at 233. Section 1981 is the modern codification of the Civil Rights Act of 1866.

195. *See generally* Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd sub nom.* Washington v. Davis, 426 U.S. 229 (1976).

196. *Washington*, 426 U.S. at 239.

197. *Id.* at 242.

198. *Id.* at 245.

199. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

200. *Id.* at 432.

201. *Davis*, 426 U.S. 229, 248 (1976).

> race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public services, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[202]

Exactly. The Court identifies a number of aspects of society where we would likely find racially disparate impacts of facially neutral policies, and then simply states that they are beyond the reach of the Fourteenth Amendment.[203]

Although *Davis* was an employment discrimination case factually focused on a narrow question of employment tests, the decision established the constitutional requirement for proving intent in *any* discrimination case brought under the Equal Protection Clause.[204] Even the decision maker's knowledge of the foreseeable and predictable discriminatory effects of a proposed policy or procedure was insufficient.[205] Following *Davis,* and re-affirmed repeatedly by similar cases,[206] plaintiffs would have to prove that such policies were adopted *because of* those discriminatory outcomes and not merely *in spite of them.*[207]

By the late 1980s, the Court was making a concerted effort to limit the scope of Title VII.[208] In two major decisions recasting

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202. *Id.* (footnote omitted) (citing Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271 (1965); Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972); William Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972)).

203. *Id.*

204. *Id.* at 246–48.

205. *Id.*

206. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995); McCleskey v. Kemp, 481 U.S. 279 (1987); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

207. *See, e.g.*, Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (finding that "discriminatory purpose" implies that the employer selected or reaffirmed a course of action "because of," and not merely "in spite of," its potential adverse effects on a particular group); Washington v. Davis, 426 U.S. 229, 246 (1976) (finding that while the facially-neutral test had a disproportionate impact on African-American applicants, it was not a discriminatory device).

208. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (limiting the scope of actionable conduct under 42 U.S.C. § 1981 to not apply to on-the-job racial harassment), *superseded by statute*, Civil Rights Acts of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72, (codified at 42 U.S.C. § 1981 et seq.); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (tightening the standards of proof required for a disparate impact claim), *superseded by statute*, Civil Rights Act of 1991, *supra.*

the law more favorably for employers, the Court substantially increased the burden of proof on plaintiffs in disparate impact cases,[209] and determined that in disparate treatment cases even if the plaintiff could prove a discriminatory motive, the employer could avoid liability by showing it would have taken the adverse action even absent the illegitimate motive.[210] In the wake of these and other decisions circumscribing civil rights legislation,[211] Congress adopted the Civil Rights Act of 1991 specifically to address the impacts of the Court's actions.[212] Among other elements, the Civil Rights Act of 1991 formally codified the disparate impact paradigm for proving employment discrimination.[213]

Most recently, the Court has considered whether the disparate impact model and the related remedies might in and of themselves constitute intentional discrimination against white workers.[214] The City of New Haven refused to certify the results of a test for promotions in the firefighting department because it concluded that the test had a disparate impact on African American and Hispanic firefighters.[215] A group of white firefighters that passed the exam then filed suit, claiming the city's refusal to certify the test constituted intentional racial discrimination against them.[216] In attempting to reconcile the interests of the disparate impact and disparate treatment

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209. *Wards Cove Packing Co.*, at 659–60 (holding that the burden of persuasion always remains with the plaintiff to show lack of business in a disparate impact claim under Title VII necessity).

210. *See Patterson*, 491 U.S. at 187 (holding that an employer can rebut the inference of discriminatory intent by presenting evidence that the applicant was rejected for a legitimate nondiscriminatory reason).

211. *See, e.g.*, Martin v. Wilks, 490 U.S. 755 (1989) (permitting collateral attack of a consent decree containing an affirmative action plan); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (limiting liability for an employer in a mixed-motive claim under Title VII).

212. *See* Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1071 (codified as amended in part in 42 U.S.C. §§ 2000e to 2000e-16 (1991)). Further, the Act stated that the Supreme Court's decision in *Wards Cove Packing Co.* weakened the scope and effectiveness of Federal civil rights protections." *Id.* at § 2.

213. *See* Civil Rights Act of 1991, 42 U.S.C. § § 703(k) (2012).

214. *See* Ricci v. DeStefano, 557 U.S. 557 (2009) (questioning whether an employer can reject results from a valid exam when the results unintentionally block the promotion of minority candidates).

215. *Id.*

216. *Id.* at 574.

components of Title VII, and more specifically whether the intent to comply with the former could be a legitimate defense to claims under the latter, the Court tipped the scales in favor of intentional discrimination.[217]

Analogizing to its narrow view of affirmative action remedies under the Fourteenth Amendment, the Court concluded that an employer would have to demonstrate "a strong basis in evidence" that it would face disparate impact liability in order to justify what the Court accepted would constitute intentional discrimination against white workers.[218] In his concurrence, Justice Scalia goes a step further, arguing that disparate impact is fundamentally at odds with the Court's Fourteenth Amendment jurisprudence regarding intentional discrimination.[219] Disparate impact remedies "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on [because of] those racial outcomes. That type of racial decision making is . . . discriminatory."[220] Put another way, the attempts to address institutionalized racism necessarily constitutes intentional discrimination against whites and therefore cannot be constitutional.[221] Scalia's opinion concludes with a prediction—or perhaps more candidly an invitation—that the Court must soon address "the war" between disparate impact and equal protection.[222]

B. Education

The window of opportunity for addressing institutional discrimination in education was short lived. The decade following the landmark ruling in *Brown v. Board of Education* (in part because of its ambiguity about remedy and its cryptic demand for resolution with "all deliberate speed")[223] foreshadowed the

217. *Id.* at 583.

218. *Id.* at 585. The Court acknowledged that while "the racial adverse impact here was significant," the city failed to meet the new evidentiary standard; therefore, it granted summary judgment for the white firefighters. *Id.* at 586–87.

219. *Id.* at 594 (Scalia, J., concurring).

220. *Id.*

221. *Id.* at 594–95.

222. *Id.* at 595–96.

223. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

arguments in *Griggs*: Did *Brown* require that school districts simply stop deliberately segregating students by race, or that they take affirmative measures to integrate schools?[224] Following outright resistance to the Court's holding, school districts and state governments begrudgingly chose the former.[225] As a result, there was minimal change in the racial demographics in American public schools for more than ten years.[226]

It was not until *Green v. New Kent County* that the Court resolved that the Constitution demanded more than simply ending de jure school segregation and adopting purportedly race neutral policies that locked in place the racial hierarchy of the status quo.[227] The unanimous decision in *Green* established that once a school district has been found constitutionally liable for operating a segregated system, it has an "affirmative duty to take whatever steps necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[228] A desegregation plan must be "meaningful and immediate," and the Court identified specific factors to measure whether a district had in fact become fully integrated.[229] Recognizing that the legacy of legal residential segregation in the United States could, without direct intervention, allow school districts to easily maintain a system of racially isolated schools, the Court went on to authorize specific, direct remedies to affirmatively achieve school integration, including the use of cross-district busing.[230]

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224. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (finding that Congress did not intend for Title VII to require an employer to provide a job for every applicant regardless of qualifications; rather, Title VII seeks to remove employer practices that are overtly discriminatory and practices that are facially-neutral, but discriminatory in operation); *Brown II*, 349 U.S. 294 (holding that courts have authority to force school districts to integrate to achieve a system of admissions to public schools on a nonracial basis and that school districts have the authority to implement integration programs in accordance with constitutional principles).

225. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 234–42 (Oxford U. Press 1994) (illustrating how *Brown's* scope was limited in practice because it opened the door to various, non-explicit methods of noncompliance).

226. *See* RICHARD KLUGER, SIMPLE JUSTICE, 755–56 (Vintage Books 2004); DERRICK BELL, SILENT COVENANTS, 94–97 (Oxford U. Press 2004).

227. Green v. New Kent Cnty., 391 U.S. 430 (1968).

228. *Id.* at 437–38.

229. *Id.* at 439. The six *Green* factors are (1) student assignment, (2) faculty, (3) staff, (4) transportation, (5) extracurricular activities, and (6) facilities. *Id.*

230. *Id.* at 442 n.6.

Keyes v. School District No. 1 presented the Court with an opportunity to more fully address the exclusion and segregation of students of color in public schools.[231] The case out of Denver was the first the Court considered from outside the South,[232] and consequently, the first where the school district effectively created and maintained segregated schools without a formal de jure policy of racial segregation—which, to this point, had been the basis of constitutional liability.[233] This factual scenario offered the Court had the opportunity to adopt a discriminatory impact standard for school segregation.[234] There were, in fact, five members of the Court prepared to recognize that de facto segregation—and facially neutral policies or practices that furthered or exacerbated such segregation—violated the Equal Protection Clause.[235] Justice Powell was the necessary fifth vote to abandon the distinction, but he wanted his colleagues to pull back on the holding in *Swann* and its endorsement of busing, to which he remained staunchly opposed.[236]

Unable to put together the five votes necessary to adopt a disparate impact model for school segregation, the Court nonetheless held that the district policies and practices in Denver had intentionally created racially segregated schools.[237] While this meant that school districts anywhere in the country could potentially be liable for unconstitutional racial segregation,[238] what had been lost was summed up by Justice Powell's concurring and dissenting opinion.[239] He noted that school segregation was always traceable to some form of state action or inaction, and identified a range of racially neutral policy decisions that could have the effect of increasing segregation—or failing to remedy it—for which school districts should be held liable, including school construction and siting decisions, the creation of attendance

231. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 191 (1973).

232. *Id.* at 217.

233. *Id.* at 198–99.

234. *Id.* at 198–200 (noting Denver's school system never had a statutorily imposed dual system like many states in the South).

235. *Id.* at 201–202.

236. *Id.* at 237–39, 242, 248–51.

237. *Id.* at 213.

238. *Id.* at 200, 208–09.

239. *Id.* at 217–53 (Powell, J., concurring in part and dissenting in part).

zones, recruitment and assignment of teachers, and school closures and consolidation.[240]

Education cases decided in the wake of *Keyes* relied on and further entrenched the de jure/de facto (read: intent/impacts) distinction.[241] As a result, ostensibly neutral school board policies and practices that produced the same segregative outcomes and related harms as intentional discrimination would remain untouched by the courts.[242] *Milliken v. Bradley* was in many respects the crystallization of what had been lost in *Keyes*. [243] In the late 1960s and early 1970s, white flight from Detroit left the city school district overwhelmingly racially isolated. By 1973, 133 of Detroit's schools were over ninety percent African American, while the city was surrounded by over fifty suburban, majority white districts.[244] The lower courts found intentional discrimination and held that the only way to achieve desegregation was through a multi-district plan that would include the city and the suburban schools.[245] The Supreme Court reversed this decision, holding that since no intentionally segregative actions of the suburban districts had created the discrimination in Detroit, it was "wholly impermissible" to impose an inter-district remedy.[246] Noting that judicial action encroaching on local control of schools "is contrary to the history of public education in our country,"[247] the decision sanctioned "white flight" away from attempts at integration and insulated the suburbs from the continuing efforts to desegregate urban school districts.[248]

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240. *Id.* at 240–42 (Powell, J., concurring in part and dissenting in part).

241. *See* Freeman v. Pitts, 503 U.S. 467 (1992); Milliken v. Bradley, 418 U.S. 717 (1974).

242. HIGGINBOTHAM, *supra* note 159, at 128 (noting that many school desegregation plans failed because of white flight).

243. *Milliken*, 418 U.S. at 717.

244. *Id.* at 735, 740, 800.

245. *Id.* at 717–18.

246. *Id.* at 745.

247. *Id.* at 741.

248. *Id.* at 742–43. Justice Marshall, in an eloquent and portentous dissent, wrote:

> Today's holding, I fear is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is of neutral principles of law. In the short run, it may seem the easier course to allow our great metropolitan areas to be divided up into two cities—one white and one black—but it is a course, I believe, our people will ultimately regret.

Id. at 814–15 (Marshall, J., dissenting).

By the 1980s and 1990s, the movement away from school integration as a constitutional and civil rights priority accelerated as districts formerly under court order to desegregate were declared unitary (fully integrated), removed from judicial oversight, and then prohibited from considering race in any future efforts to maintain or promote the integration they had worked so hard to achieve.[249] In *Freeman v. Pitts*, in addition to holding that school districts under court order could achieve partial or incremental determination of unitary status,[250] the Court held that that the causal connection between any current racial imbalances and the de jure constitutional violation (formerly a presumption that the school district would have to rebut) may have been broken years prior to the declaration of unitary status, and that a district could still be declared unitary despite having become resegregated.[251]

The case from Dekalb County, Georgia, involved a black student population that went from 5.6% at the time the desegregation order was entered in 1969 to 47% in 1986.[252] The Court found that demographic shifts were the cause of significant racial imbalances in the county schools, and that these current disparities were unrelated to prior de jure segregation.[253] This ahistorical view of residential segregation, severed from its Jim Crow roots, led the Court to ignore the present statistical evidence showing that the ratio of black students to white students in individual schools varied to a significant degree from the system-wide average—the judicial benchmark for determining student integration.[254] The Court then concluded that the district's student assignment plan to close black schools and reassigning pupils to neighborhood schools[255] fully complied with the desegregation orders and that unitary status had already been

249. Freeman v. Pitts, 503 U.S. 467, 490–92 (1992).

250. *Id.* at 489–91.

251. *Id.* at 496, 498.

252. *Id.* at 475.

253. *Id.* at 494–96.

254. *Id.* at 476, 495; *see also* Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 25 (1971) ("Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.").

255. *Freeman*, 503 U.S. at 493 (1992).

achieved in the area of student assignment, regardless of the disparities that existed in the years that followed.[256]

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.[257]

Finally, in 2007, the Court issued a *coup de grâce* for school diversity advocacy in the federal courts.[258] While the divided opinions in *Parents Involved in Community Schools v. Seattle School District No. 1*[259] nominally reaffirmed the constitutional value of promoting racial diversity in public K–12 education, the decision significantly restricted what school districts could do to accomplish integration with student assignment.[260] The case involved two different school districts—Seattle, Washington, and Jefferson County (Louisville), Kentucky.[261] Both districts had implemented voluntary student assignment plans that included consideration of race as one of several factors used to assign students and promote school diversity.[262] The Seattle school district was never subject to a

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256. *Id.* at 493–94.

257. *Id.* at 495. The Court also emphasized that the passage of time since the de jure violation may be a critical factor in determining the significance of any current racial imbalances. *See id.* at 496.

258. Parents Involved in Cmty. Sch. v. Sch. Dist. No. 1, 551 U.S. 701, 720–721 (2007).

259. *Id.* at 724, 771, 782.

260. *Id.* at 720–21, 730–33. Ironically, in overruling a school-district-implemented voluntary student integration plans, the *Parents Involved* court ignored its almost universal precedents lionizing the principal of local control of schools. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 43 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."); Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.").

261. *See Parents Involved*, 551 U.S. at 701.

262. *Id.* at 710.

judicial desegregation order. Jefferson County had been under court order for decades but was declared unitary in 2000.[263]

The Court issued a fractured opinion finding that these voluntary integration plans violated the Constitution.[264] A majority of the Justices, in an opinion by Justice Kennedy, agreed that promoting diversity and eliminating racially isolated schools was a legitimate and compelling interest for school boards,[265] and that they could adopt voluntary assignment plans to further that interest, but that the plans adopted in Seattle and Louisville were not sufficiently limited to survive strict judicial scrutiny.[266] Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, argued vehemently that racial integration and student diversity are not compelling interests in K–12 schools, and therefore would prohibit any consideration of race.[267]

Although Justice Kennedy voted to strike down the particular Seattle and Louisville plans, he stressed that the holding did not ban districts from developing policies to promote diverse schools, as long as those policies did not include any specific *race-based* classifications or assignment of a particular student.[268] School districts remained free, however, to devise *race-conscious* measures that address the problem of segregation and resegregation in a general way.[269] Ironically, some of the very measures Justice Kennedy recommended—siting of new schools, drawing attendance zones, and targeted recruitment of students and teachers[270]—were the very ones Justice Powell listed as the kind that can produce the discriminatory disparate impacts that the Court said (then and now) were beyond the reach of the Constitution.[271]

263. *Id.* at 716 (internal citations omitted).

264. *Id.* at 707.

265. *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment).

266. *Id.* at 786–87 (Kennedy, J., concurring in part and concurring in the judgment).

267. *Id.* at 746 (Roberts, C.J., dissenting). Claiming that the use of race in this case was as pernicious as the legal segregation challenged in *Brown*, the Chief Justice wrote, "When it comes to using race to assign children to schools, history will be heard." *Id.*

268. *Id.* at 797–98 (Kennedy, J., concurring in part and concurring in the judgment).

269. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment).

270. *Id.*

271. *See* discussion *infra* Section III.B.

C. Title VI

Title VI of the Civil Rights Act was one of the broader provisions of the statute, prohibiting discrimination in any programs or activities receiving federal financial assistance.[272] Commenting on this portion of the legislation, President John F. Kennedy said, "Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination."[273] Given the federal funding of a broad range of state and local government programs, Title VI created a tool to challenge governmental discrimination in housing, transportation, land use planning and zoning, environmental regulation, education (K–12 and higher education), and health care.[274] Like other sections of the Act, Title VI provided that a party challenging discrimination could file an administrative civil rights complaint with the federal agency that provided the funding or pursue direct legal action in the judicial system.[275]

For decades, Title VI and its implementing regulations were interpreted to prohibit both intentional and disparate impact discrimination.[276] As a practical matter, the availability of a cause of action to challenge discriminatory effects was particular crucial to effectuating the full measure of the Civil Rights Act since the subject matter of the challenge was often some government decision or policy for which the likelihood of proving intent was nearly impossible, especially under the *Washington v. Davis* "because of" standard.[277] The disparate impact theory was often critical to challenging the placement of hazardous waste facilities and other unwanted land uses in minority communities,[278] in

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272. 42 U.S.C. § 2000d (2012).

273. Memorandum from Jocelyn Samuels, Acting Ass't Att'y Gen. for Civ. Rts at U.S. Dep't of Justice to Title VI Staff 2 (July 24, 2014), http://www.justice.gov/crt/title-vi-civil-rights-act-1964-42-usc-i-2000d-et-seq (discussing the 50th anniversary of the Civil Rights Act of 1964 and announcement of the new government-wide Title VI Coordination Initiative).

274. *Id.* at 1.

275. *Id.* at 4.

276. *Id.* at 2.

277. CIV. RTS. DIV., U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 52 (1998), http://www.justice.gov/sites/default/files/crt/legacy/1998/09/23/legalman.pdf.

278. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486 (D. N.J. 2003).

securing access to basic public services in those same communities,[279] and to combatting other disparate land use decisions.[280] Disparate impact implicitly recognizes the legacy and continuing patterns of intentional residential discrimination and segregation, and the institutionalization of those patterns by ostensibly neutral practices that in fact serve to permanently freeze the discriminatory status quo.

Although a private cause of action to challenge disparate impact discrimination under Title VI had been recognized and endorsed by every U.S. Court of Appeals,[281] the Supreme Court reached out and granted *certiorari* in 2001 in *Alexander v. Sandoval* case to determine solely "whether private individuals may sue to enforce the disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964."[282] The case involved a class action suit against Alabama's Department of Public Safety that, pursuant to the state's 1990 "English-only" policy, chose to administer the driver's license exam only in English.[283] The plaintiffs claimed, under Title VI, that the policy had a discriminatory impact on non-English-speakers based on their national origin.[284] The Federal District Court for the Middle District of Alabama and the Court of Appeals for the Eleventh Circuit ruled in favor of the plaintiffs, agreeing that Alabama's policy violated the statutory prohibition against discrimination.[285]

Interestingly, the Court specifically set aside the substantive question of whether the English-only policy constituted impermissible discrimination, and instead singularly focused on the wholly procedural issue of whether a private right of action existed to sue for disparate impact discrimination, or whether only federal agencies could pursue such litigation.[286] In a 5–4 decision written by Justice Scalia, the Court held that careful reading of the

279. *See* Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690 (9th Cir. 2009).

280. *See* Houston v. City of Cocoa, NO. 89-82-CIV-ORL-19 (M.D. Fla, Dec. 22, 1989) (consent order).

281. Alexander v. Sandoval, 532 U.S. 275, 294 (2001) (Stevens, J. dissenting).

282. *Id.* at 278.

283. *Id.* at 279.

284. *Id.*

285. *Id.*

286. *Id.* at 279–80 (stating there was no dispute that there was a private right of action to challenge intentional discrimination).

implementing regulations demonstrated that the language creating a private right of action to challenge intentional discrimination did not apply to the disparate impact regulations.[287] Despite the dissent's urging that the statute be read in context: "[A]ny statutory provision whose stated purpose is to 'effectuate' the eradication of racial and ethnic discrimination has as its 'focus' those individuals who, absent such legislation, would be subject to discrimination,"[288] the only remedy for disparate impact under Title VI in the wake of *Sandoval* is through the administrative complaint and enforcement process.[289]

D. Housing

Of all the 1960s era civil rights legislation, the Fair Housing Act ("FHA") was envisioned to be the most far reaching.[290] The legislative history, language, and ongoing interpretation demonstrate that the legislation was deliberately designed to have a broader scope than simply eliminating housing discrimination against people of color.[291] In the debates leading to the passage of the bill, sponsor Senator Walter Mondale stated that the purpose of the act was to create "truly integrated and balanced living patterns."[292] New York Congressman William Ryan said the FHA would help the nation "achieve the aim of an integrated society."[293]

The FHA itself is explicit on this point by requiring the Department of Housing and Urban Development ("HUD") to "administer programs and activities related to housing . . . in a manner *affirmatively to further the policies* of [the FHA]."[294] This language evokes the ruling in *Green* and its message that merely ending overt discrimination would not be sufficient to address the constitutional liabilities of decades of white supremacy and black

287. *Id.* at 288. Justice Scalia's parsing of the language of Section 601 and Section 602 is evocative of the Court's dissection of the citizenship language in the Fourteenth Amendment in the *Slaughter-House Cases. Id.*; The Slaughter-House Cases, 83 U.S. 36 (1873).

288. Sandoval, 532 U.S. at 316 (Stevens, J., dissenting).

289. *Id.* at 315 (Stevens, J., dissenting).

290. 113 CONG. REC. 22,689 (1967) (statement of Rep. Montgomery).

291. 114 CONG. REC. 9,566 (1968) (statement of Rep. Latta).

292. 114 CONG. REC. 3,422 (1968) (statement of Sen. Mondale).

293. 114 CONG. REC. 9,591 (1968) (statement of Rep. Ryan).

294. Fair Housing Act, 42 USC §3608(e)(5)(1968) (emphasis added).

subordination.[295] The Court emphasized this broad vision of the FHA in one of its earliest rulings, when it held that white tenants in a building that excluded African Americans has standing to sue because the white tenants had suffered a direct injury to a right protected by the FHA—the right to live in an integrated community.[296]

Given this sweeping affirmative mandate, HUD regulations and enforcement have depended substantially on the disparate impact paradigm to achieve the legislative goals.[297] As Senator Mondale recognized, much of the housing segregation in America was the result of "the policies and practices of agencies of government at all levels."[298] Because many of those policies and practices are implemented without any overt or express racial animus, it is necessary to be able to challenge the discriminatory effects of exclusionary land use and zoning decisions, denial of development permits, attempts to concentrate or prohibit low-income housing, and a range of other facially neutral government actions that undermine or inhibit racial integration—in other words, to address the structural component of residential segregation.

It is no wonder then—given the Court's growing hostility to considering discriminatory effects—that the FHA has been in its crosshairs. In the last few years, the Court granted certiorari in three cases specifically to consider the issue of whether the FHA permits the use of disparate impact.[299] Anticipating that the Court has taken these cases with the goal of eliminating disparate impact under the FHA, advocates worked diligently to settle two of the cases before the Justices had an opportunity to rule.[300]

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295. Green v. New Kent Cnty., 391 U.S. 430, 440 (1967).

296. Trafficante v. Metro. Life Ins., 409 U.S. 205, 212 (1972).

297. *See* 24 C.F.R. § 100.500 (2014); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460–70 (Feb. 15, 2013); POVERTY & RACE RES. ACTION COUNCIL, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD (Jan. 2013), http://www.prrac.org/pdf/HUDFirstTermReportCard.pdf.

298. 114 CONG. REC. 2,277 (1968) (statement of Sen. Mondale).

299. William F. Fuller, *What's HUD Got to Do With It?: How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard*, 83 FORDHAM L. REV. 2047, 2049 (2015). As was the case with *Sandoval* and Title VI, there is no dispute on the issue among the circuit courts. *Id.*

300. Magner v. Gallagher, No. 10-1032 (U.S. 2001), was granted certiorari on November 7, 2001, and was set to be argued February 29, 2012. It was settled and dismissed on February 10th. A little more than a year later on June 17, 2013, another case,

The Court finally had a chance to fully consider the question in 2015, and in a decision that surprised (and relieved) many civil rights advocates,[301] the Court affirmed the use of disparate impact under the FHA.[302] *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.* involved an FHA challenge to the process by which Texas allocated its Low Income Housing Tax Credits, arguing that the program disproportionately concentrated affordable housing developments in minority neighborhoods and away from majority white areas.[303] In a 5–4 decision, Justice Kennedy affirmed the use of disparate impact, noting that litigation targeting government decisions like zoning laws or affordable housing policies "reside at the heartland of disparate-impact liability,"[304] and that such actions permit "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[305]

The opinion was neither an unqualified endorsement, nor a complete break from rulings that narrowed or eliminated any consideration of race in government decision-making.[306] With specific nods to *Parents Involved* and *Ricci*, Justice Kennedy made a point to note there were limitations on disparate impact, that such cases must require more than evidence of statistical disparity, and that when disparate impact liability is found, "remedial orders must be consistent with the Constitution[, and] [C]ourts should strive to design them to eliminate racial disparities though race-neutral means."[307] Despite these cautions and a call for strict review of disparate impact claims, however, the opinion ends on the positive note that "against the backdrop of disparate-impact liability . . . many cities have become more diverse. . . . The Court

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Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013), came before the court. The case was set for argument on December 4, 2013, and was settled on November 15, 2013. *Id.*

301. Pema Levy, *Justice Anthony Kennedy Just Saved a Major Civil Rights Law*, MOTHER JONES (June 25, 2015, 11:13 AM), http://www.motherjones.com/politics/2015/06/supreme-court-fair-housing-act.

302. *Id.*

303. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015).

304. *Id.* at 17.

305. *Id.*

306. *Id.* at 18.

307. *Id.* at 22.

acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[308]

IV. WHAT IS TO BE DONE?

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.
>
> —Justice Harry Blackmun[309]

The primary good we distribute to one another as a society is full and equal membership in the human community. Visualize American society as a circle. Within that circle everyone enjoys the same rights, privileges, benefits, and opportunities as every other person within the circle. But individuals and groups that are left outside the circle are effectively and deliberately excluded from the benefits—the civil rights—that those inside the circle share. To justify that exclusion, those on the inside render those excluded as subordinate and dehumanized. This rationalization not only ensures that those on the outside—those "non-persons"—do not share the benefits of the membership, but also institutionalizes the belief that they are inferior or unworthy individuals or groups who neither deserve, nor are entitled to be included. That is the lie of the "other," and it depends upon separation and isolation in our schools, in our neighborhoods, in our jobs, and in our access to political power.

The struggle to expand that circle of inclusion is the continuing struggle for civil rights. The long and arduous movement for equality has been, at some fundamental level, grounded in the belief that the American promise means that the circle can and must expand and embrace us all.[310] Yet even as society has been able to reduce or eliminate many of the most overt forms of discrimination, the vestiges of our legacy of

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308. *Id.* at 24.

309. Regents of Univ. of California v. Bakke, 468 U.S. 265, 407 (1978).

310. *See, e.g.*, Symposium, *Promoting Racial Equality: Constitutional Lawyering in the 21st Century*, 9 J.L. POL'Y 347 (2000).

institutionalized inequity persist and are even reinforced.[311] Statistical data on a number of societal metrics show significant disparities between whites and blacks in education,[312] employment,[313] income and wealth,[314] exposure to environmental hazards or unwanted land uses,[315] health,[316] and interaction with the criminal justice system.[317] Yet the Court's limited interpretation of the Equal Protection Clause and other civil rights legislation applying only to intentional discrimination puts many of these ongoing inequities beyond their reach.[318] As a result, society finds itself at a point in the continuing civil rights struggle not unlike the United States post-*Plessy*. The Court has again realigned the relationship of the law and the nature of discrimination faced by people of color, detaching the actual status and experience of African Americans from the goals, context, and history of the movement towards full inclusion, and once again attempting to define as a matter of constitutional law that the existing inequities are in fact a balanced, "post-racial" clean slate.[319]

What are civil rights laws designed to do? What are the harms they are—or should be—expected to address? The continuing reliance on intent imposes a narrow, personal tort-based approach to civil rights with a focus on a bad actor motivated by a conscious desire to do harm. But that is no longer the reality of discrimination in America. If tort law is the analogy on which we rely, perhaps the model for civil rights should be more like product liability, where the motive of the manufacturer

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311. Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn't Budged in 50 Years*, WASH. POST (Aug. 28, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *See* Symposium, *supra* note 310 (explaining the difficulties of combating discriminatory practices within the context of policing because of the lack of explicit intent and racial animus).

319. *See, e.g.*, Shelby Cnty., v. Holder, 133 S. Ct. 2612, 2633, (2013) (Ginsburg, J., dissenting) ("[T]he Court today terminates the remedy that proved to be best suited to block that discrimination.").

of a defective product is not important; the issue is whether the product causes an injury.[320] The law in that context looks at impacts and effects, not intent. Civil rights law should do the same.

Given the many success of the civil rights legislation of the 1960s in addressing the intentional discrimination that characterized our nation for the one hundred years preceding their passage,[321] we now need a Civil Rights Act for the twenty-first century specifically intended to address the continuing manifestations of institutional discrimination that characterize our nation today.

The new legislation should be grounded in the Thirteenth Amendment and its developed jurisprudence about the badges and indicia of slavery and a renewed assessment of the Fourteenth Amendment's Privileges and Immunities Clause, which recognizes that the full and equal inclusion in American society is at the core of that provision. With that constitutional pedigree, the new Civil Rights Act should target the policies and practices that produce, compound, or exacerbate racial disparities across the full spectrum of our society. The new legislation should be modeled on the general principles and theory of disparate impact discrimination. Upon a showing by a plaintiff that a facially neutral policy or action produced significantly disproportionate racial outcomes, the burden of proof would switch to the defendant to demonstrate some important interest that justified that action or policy.[322] The plaintiff would then have the opportunity to show that this reason was insufficient or, merely pretextual, and to offer some reasonable, less-discriminatory alternative.[323] The new legislation would apply to the full range of government actions that produce disparate racial outcomes, as well as impose an additional burden on government decision-making, particularly

320. DAVID G. OWEN, PRODUCTS LIABILITY LAW 245 (3d. ed. 2015).

321. Marianne Engelman Lado, *Unfinished Agenda: The Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery*, 6 TEX. F. ON C.L. & C.R. 1, 5 (2001).

322. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The term "important" is used here specifically in relation to intermediate scrutiny pursuant to equal protection jurisprudence. The specific intent of this proposed new law—to dismantle institutional racism—justifies requiring heightened scrutiny to any proffered justification for racially disparate impacts.

323. *Id.* at 804.

when the disparate impacts on any proposed policy are foreseeable and predictable.

It is important to note that what is being suggested here is not an affirmative action or other retroactive remedial program aimed at addressing the effects of some particular past intentional discrimination that no longer takes place.[324] That paradigm, which is the one that persists in education, for example, maintains the de jure/de facto distinction and creates a temporal limitation on addressing the continuing segregation and resegregation of schools.[325] The requirement of showing that intentional discrimination is directly and causally linked to current racial disparities necessarily characterizes and limits any integrative efforts as purely remedial of this prior intentional injury. As the country moves further in time from the era of de jure segregation, the causal connection becomes more challenging to demonstrate despite widespread resegregation.[326] This limited focus on intent relieves a school district of any liability for the new or continuing segregative impacts of actions it has taken (or failed to take) since the elimination of legal segregation. The country is back in the days before *Keyes*, when a school's only obligation with regard to race is to not intentionally assign individual students by race.[327] The fact that schools in many parts of the country are as segregated as they were before 1970—primarily as a result of policies and practices of school boards—is of no legal consequence.[328] The segregated ends are judicially irrelevant; all that matters are the means by which the nation arrived there. A new Civil Rights Act would invert that retrogressive paradigm.

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324. Such programs remain a critical component in dismantling the hierarchy of institutional discrimination and are often blurred with efforts to address foreseeable disparate impacts. Court decisions on affirmative action, however, have significantly narrowed their scope and reach. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989).

325. *See* Jonathan Fischbach, Will Rhee & Robert Cacace, *Race as the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 493–94 (2008).

326. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 753 n.6 (Thomas, J., concurring).

327. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1609 (2003).

328. GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 13 (The Civil Rights Project Harv. Univ. ed., 1999).

Opposition to a disparate impact-based Civil Rights Act would likely echo criticisms of current legislation that recognizes such discrimination: it leads to decision-making based on race, which is antithetical to the struggle for civil rights; it exacerbates racial tension and hostility by making race the central issue in evaluating or implementing public policy; it violates the ideal of a color-blind society; and it transforms individual and personal rights into amorphous group rights and racial entitlements.[329] The law, critics assert, can only guarantee equal treatment, not equal outcomes.

The primary problem with this critique is that it decontextualizes the nature of modern race discrimination and the practical experiences of people of color in America. It is an analysis of race and racism completely divorced from its structural foundations of white supremacy, black subordination, and the institutionalized qualities of racial segregation and exclusion. The idea that considering discriminatory racial impacts will increase racial tension is premised on the belief that there is little or no racial tension now—a belief that grows out of the ability of many whites to externalize the concept of race, and which was most recently exposed as false by the high profile killings of black men by white police officers in Ferguson,[330] Staten Island,[331] Charleston,[332] and Charlotte.[333]

Limiting the reach of civil rights law to intentional discrimination or remedial efforts only to equal treatment is premised on the fundamentally flawed idea that the adoption of laws prohibiting discriminatory treatment—the civil rights

329. *See, e.g.*, Roger Clegg, *The Supreme Court's Bad 'Disparate Impact' Decision*, NAT'L REV. (June 25, 2015, 3:00 PM), http://www.nationalreview.com/article/420319/supreme-courts-bad-disparate-impact-decision-roger-clegg.

330. Ray Sanchez, *Michael Brown Shooting, Protests Highlight Racial Divide*, CNN (Aug. 15, 2014, 10:14 AM), http://www.cnn.com/2014/08/14/justice/ferguson-missouri-police-community/index.html.

331. Ray Sanchez, *Police Chokehold Death Sparks New York Protest March*, CNN (Dec. 8, 2014, 8:48 PM), http://www.cnn.com/2014/08/23/us/new-york-choke-hold-rally/index.html.

332. Dana Ford, *South Carolina Ex-police Officer Indicted in Walter Scott Killing*, CNN (June 8, 2015, 5:30 PM), http://www.cnn.com/2015/06/08/us/south-carolina-slager-indictment-walter-scott.

333. Jessica King & AnneClaire Stapleton, *Charlotte Police Kill Ex-FAMU Player Who May Have Been Running to Them for Help*, CNN (Sept. 16, 2013, 8:22 AM), http://www.cnn.com/2013/09/15/justice/north-carolina-police-shooting/index.html.

legislation of the 1960s[334] and the Reconstruction Amendments of the 1860s[335]—placed all races of Americans on equal footing; and that this "equality" could now be maintained by ensuring that everyone is held to the same standards going forward. It is the elevation of process over substance, of means over ends, and of a mechanical rather that transformative vision of justice. It is also a misunderstanding of the nature of racial inequality and its effects in the modern world, which is more consistently and perniciously characterized by the discriminatory impacts of facially neutral policies not on individuals, but on communities of color. Most troubling, however, is that this limited construction resurrects a failed vision of civil rights law whereby the Constitution only prohibits discrimination, rather than affirmatively guaranteeing that people of color the full measure of equal inclusion in our society.[336] Chief Justice Roberts provided an eerie reminder of Justice Bradley's "special favorite of the laws" when he perfunctorily explained that "the way to stop discriminating based on race is to stop discriminating based on race."[337]

The desire to ultimately eliminate racial considerations from government policy making may be a laudable one, but it will require that we first actually address both the continuing impacts of our legacy of legal discrimination, and the entrenchment and compounding of those impacts through otherwise facially neutral policies and practices. The legal system is not there yet. As my colleague Ted Shaw often points out, African Americans have been enslaved or segregated by law for all but the last fifty of the 400 years they have been in America. The law still has a long way to go before we potentially get to that vision of a "post-racial" society. A new Civil Rights Act, designed to meaningfully address the racially disparate outcomes that define race discrimination today and to ensure the full measure of inclusion of membership—and the privileges and immunities of our society—for people of color, is the necessary next step.

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334. *See, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. (2012).

335. *See* U.S. CONST. amend. XV; U.S. CONST. amend. XIV; U.S. CONST. amend. XIII.

336. *See* Parents Involved in Cmty. Sch. v. Sch. Dist. No. 1, 551 U.S. 701, 743–44 (2007).

337. *Id.* at 748.