The Once and Future Equal Protection Doctrine?

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Essay

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MARIO L. BARNES & ERWIN CHEMERINSKY

This Essay is the third in a series of pieces assessing Equal Protection Doctrine and jurisprudence. Here, we endeavor to do two things: (1) to utilize constitutional structure, text, and history to interrogate the concept of equality protected under the Fourteenth Amendment; and (2) to critique the Supreme Court’s present approach to adjudicating constitutional discrimination claims. With regard to the meaning of equality, we assert that if the text of the Reconstruction Amendments and the stated goals of Reconstruction are used to inform constitutional analysis, then equality should be understood as a substantive rather than formalist concept. Reconstruction, however, was actually a period where political equality for freed slaves was espoused alongside social norms and laws—as evinced by the Black Codes and Plessy v. Ferguson—designed to maintain segregation. Hence, we ultimately advocate for an antisubordination—i.e., focus on the ways that specific persons or groups are harmed based on difference—rather than an anticlassification—i.e., treat everyone the same—understanding of equality. We justify this position by arguing for what equality would have meant, if the country had been truly interested in the full integration of Blacks, post-slavery. Next we assess how any understanding of equality is currently obscured by the Court’s insistence on using a tiered-system of analysis for suspect classification discrimination claims and its requirement of the presence of purposeful government discrimination—rather than mere disparate impact—for constitutional discrimination claims. Together, these two approaches have foreclosed all but a very narrow scope of discrimination claims. We conclude by suggesting ways the Court might alter these standards in service to a notion of equality capable of responding to the myriad forms of stigmatizing and subordinating treatment suffered by certain individuals within society.
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To the extent . . . you accept the view that African Americans are not inherently inferior and that their present plight was not foreordained by their genes, then I would suggest that it is not overt and unceasing hostility that is the undoing of African Americans. Rather, the racial harm, the embittering and soul destroying exclusion that damages and destroys self worth, proceeds from an atmosphere of alienation that is as pervasive now as it was during the Reconstruction Period.¹

I. INTRODUCTION

This Essay is the third in a series looking at the jurisprudential past, present, and potential future of the Equal Protection Clause of the U.S. Constitution.² Previously, we have challenged current equal protection jurisprudence by looking at the Court’s disparate treatment of race and socioeconomic class under the Constitution.³ We both analyzed the long-existing dispute over whether the Fourteenth Amendment should be understood as protecting minimum entitlements,⁴ and argued that the overlapping and intertwining relationship between race and socioeconomic class has made it difficult to justify the federal courts’ current practice of treating the two categories with such stark difference under equal

¹ Derrick Bell, Reconstruction’s Racial Reality, 23 Rutgers L.J. 261, 262 (1992).
² The Equal Protection Doctrine appears in the Fourteenth Amendment and provides: “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
³ Mario L. Barnes & Erwin Chemerinsky, The Disparate Treatment of Race and Class in Constitutional Jurisprudence, 72 Law & Contemp. Probs. 109, 109–19 (Fall 2009) (articulating the leniency of the Supreme Court’s jurisprudence in the area of socioeconomic class).
⁴ Id. at 110–19.
protection analysis.\(^5\)

More recently, we argued that society’s burgeoning fascination with post-racialism—a belief positing the demise of the salience of race within the United States—has actually existed as a guiding perspective within equal protection jurisprudence for quite some time, but that such a perspective is ill-advised for discerning the contemporary legal meaning of equality.\(^6\) We did so, in part, by analyzing the opinions of early Thirteenth and Fourteenth Amendment cases, which involved the Supreme Court attempting to “move beyond” race by downplaying or denying its significance, only shortly after slavery ended.\(^7\) For example, in *Plessy v. Ferguson*, the Court determined that equality only meant that Blacks and Whites had to receive the same public services but that they could be segregated.\(^8\) On the question of whether this arrangement endorsed a notion of Blacks as inferior, the Court suggested that it was only the attitudes of Blacks that created such an understanding.\(^9\) In other words, since race and racism did not matter to Whites, the state sanctioning of societal preferences for segregation could not be seen as disrupting equality.\(^10\) This message that race was and is something that matters in only the minds of minority group members has created significant and longstanding repercussions. First, attitudes such as this become implicit support for a host of claims which posit, at bottom, that minorities rely upon racial classifications to argue for undeserved benefits or to

\(^1\) *Id.* at 121–30 (noting that rational basis analysis applies to questions of class, while the government’s use of racial categories is subject to strict scrutiny).


\(^3\) *Id.* at 969, 972–74. Specifically, we analyzed the language of the *Civil Rights Cases*, 109 U.S. 3, 20–26 (1883) (interpreting the Thirteenth Amendment and striking down the Civil Rights Act of 1875) and *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896) (holding that racially segregated railway accommodations did not offend the Fourteenth Amendment).

\(^4\) *See* *Plessy*, 163 U.S. at 548 (“[W]e think the enforced separation of the races, as applied to the internal commerce of the State, 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 . . . .”).

\(^5\) The Court providing:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

*Id.* at 551.

\(^6\) *See* Barnes et al., *supra* note 6, at 973–74 (noting that the Court in *Plessy* assumed that race has no meaning to Whites). Professor Martha Mahoney, who has written extensively on whiteness and white privilege, has stated this idea with greater nuance. Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309, 1327 (2000) (“The call to ‘just stop doing race’ is . . . attractive because positioned white perception continually misses the ongoing reproduction of race. Because whites perceive race as meaning ‘Other,’” the call to stop making racial classifications also has appeal beyond its instrumental use in protecting white interests; morally and emotionally, it seems cleansing.”).
improperly allege disadvantage. More broadly, these attitudes provide the foundation for citizens and jurists to subscribe to counter-factual ideologies, such as colorblind constitutionalism and post-racialism.  

The issues we explored in the two earlier Essays reflect that federal courts have repeatedly been faced with the question of how to interpret the Fourteenth Amendment’s requirement that states not deprive inhabitants of “equal protection of the laws.” Scholars have long noted the struggle of courts to resolve how the concept of equality should be defined and measured. For claims premised upon the relevance of suspect classifications, they have toiled over whether the Equal Protection Clause should be interpreted to require universal treatment of individuals or guarantee commensurate outcomes for certain subordinate minority groups. This dichotomy, especially in the area of race jurisprudence, has also been historically represented as the difference between the principles

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11 As we and others have argued previously, while colorblindness and post-race claims are similar they are not necessarily exact correlates. Colorblindness, for example, appears to include an aspirational goal of racial equality, which is presumed as fully realized by post-racialists. See id. at 997–98; Sumi Cho, Post-Racialism, 94 IOWA L. REV. 1589, 1597–98 (2009) (describing colorblindness as similar to, yet distinct from post-racialism, with the latter uniquely embracing the concept of racial transcendence).

12 See supra notes 3, 6, and accompanying text.

13 Noted scholar, Owen Fiss, has described the problem in this way: The words—no state shall “deny to any person within its jurisdiction the equal protection of the laws”—do not state an intelligible rule of decision. In that sense the text has no meaning. The Clause contains the word “equal” and thereby gives constitutional status to the ideal of equality, but that ideal is capable of a wide range of meanings.


14 See infra notes 82–99 and accompanying text.

15 This perspective has most recently been referred to as “race neutral universalism.” Cho, supra note 11, at 1601–02 (noting that post-race norms eschew race-based policies or remedies); see also Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 EMORY L.J. 1397, 1413–14 (2002) (noting that the “preference for colorblindness can limit the style of legislation that can be passed to protect the interests of or to provide equal results for minority groups”). John a. powell, has described the concept of treating all persons similarly without taking into account the potential effects of treatment and outcomes stemming from social identity as “false universalism.” John a. powell, Post-Racialism or Targeted Universalism?, 86 DENV. U. L. REV. 1, 7–13 (2009). Legal scholar Roy Brooks has described the concept as follows: Although I certainly embrace the liberal notion of similar treatment for similarly situated individuals and groups, I wish to make the logical point that where it can be shown that blacks and whites are not similarly situated in society because of historical forces, blacks must be treated differently if they are to be accorded equal opportunity, or similar treatment.

of antisubordination and anticlassification,\textsuperscript{16} or between the concepts of formal and substantive equality.\textsuperscript{17} Substantive racial equality clearly mattered to the Court once. Although the Reconstruction Amendments and the cases deciding their expanse should have created immediate access to equal opportunity for freed slaves and their descendants, not until \textit{Brown v. Board of Education} did the Court truly acknowledge the inherent presumption of inferiority associated with state sanctioned segregation.\textsuperscript{18} They relied upon this perspective to undo the curious racial minimizing—in the form of the doctrine of separate but equal—that had persisted since the \textit{Plessy} majority opinion was handed down.\textsuperscript{19} The \textit{Brown} opinion clearly took account of the effects of disparate treatment along racial lines in education; the majority, however, also reiterated the universalist commitment to colorblindness,\textsuperscript{20} that was first articulated in Justice

\textsuperscript{16} Antisubordination proponents claim “the guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification,” while the anticlassification principle holds “the government may not classify people either overtly or surreptitiously on the basis of a forbidden category.” Jack M. Balkin & Reva B. Siegel, \textit{The American Civil Rights Tradition: Anticlassification or Antisubordination?}, 58 U. MIAMI L. REV. 9, 9–10 (2003); see also Michael C. Dorf, \textit{A Partial Defense of an Anti-Discrimination Principle}, ISSUES IN LEGAL SCHOLARSHIP (2002), at 1–6, available at http://www.bepress.com/ils/iss2/art2 (discussing the narrow principle of individual antidiscrimination and the broader approach of ensuring antisubordination of minority groups as represented in the work of Owen Fiss); Helen Norton, \textit{The Supreme Court's Post-Racial Turn Toward a Zero Sum Understanding of Equality}, 52 WM. & MARY L. REV. 197, 206–07 (2010) (“Antisubordination advocates urge that the Equal Protection Clause should be understood to bar those government actions that have the intent or the effect of perpetuating traditional patterns of hierarchy... Those who urge an anticlassification understanding of the Equal Protection Clause, in contrast, take the view that the Constitution prohibits government from ‘[r]educing an individual to an assigned racial identity for differential treatment.’” (footnotes omitted)); Reva B. Siegel, \textit{From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases}, 120 YALE L.J. 1278 (2011).

\textsuperscript{17} The breadth of the formalist point is captured in the following passage:

Rhetorical Neutrality is the linchpin of the Court’s colorblind jurisprudence. Three underlying myths—historical, definitional, and rhetorical—serve to shift the interpretative (doctrinal) framework on questions of race from an analysis of systemic racism to a literal conception of equality where the anti-differentiation principle is the guiding touchstone. “The traditional fonts of Fourteenth Amendment jurisprudence—the anti-subjugation and anti-caste principles—have been effectively replaced by an anti-differentiation principle.” Literal equality, without regard to context or history, is the unifying principle of the Court’s race jurisprudence.


\textsuperscript{18} 347 U.S. 483, 485 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

\textsuperscript{19} \textit{Id.} at 494 (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

\textsuperscript{20} See Balkin & Siegel, supra note 16, at 11–13 (arguing that the \textit{Brown} decision can be interpreted as emphasizing both antisubordination and anticlassification discourses); see also Kimberlé W. Crenshaw, \textit{Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law}, 101 HARV. L. REV. 1331, 1335 (1988) (“The civil rights community,
Harlan’s dissent in *Plessy*. As we previously argued, only fourteen years later, those seeds sown as a colorblind approach to racial equality blossomed in Justice Powell’s opinion in *Regents of the University of California v. Bakke*, as the reverse discrimination principle that government quotas designed to assist minorities may constitute unlawful discrimination against Whites who have committed no wrongdoing.

While Powell’s opinion was later used to prop up the consideration of race in higher education admissions (for now), both the Courts of Chief Justices Rehnquist and Roberts have significantly structured an equality jurisprudence that embraces racial equality as resting on race-neutral universalism.

Such an approach is possible because, “[t]he equal protection clause is too general and open-ended to compel any particular
conception of substantive equality." Still, we argue in its recent approach to equality, the Court has largely ignored the history of the moment that produced the Reconstruction Amendments and created a framework for equal protection analysis that all but ensures only a narrow group of discrimination claims will be actionable or succeed. In Part II of this Essay, we offer some insights on how the history and structure of the Reconstruction Amendments should be seen as informing present-day concepts of equality. In Part III, we critique the Court's present framework for resolving suspect classification equal protection claims, including its over-reliance on "purposeful" conduct and near complete refusal to acknowledge that many forms of discrimination are unconscious. In Part IV, we briefly sketch an alternative course for equal protection suspect classification analysis. We do so by focusing on the disparate life outcomes produced by social identity differences and thus return to more directly serving the ends of the Reconstruction Amendments—to undo the ills of societal subordinating enterprises, which now manifest themselves in new and myriad ways. In Part V, we end with a number of concluding thoughts on the dangers of leaving current equal protection analysis unchanged.

II. CONSTITUTIONAL TEXT, STRUCTURE, HISTORY, AND THE QUESTION OF SUBSTANTIVE EQUALITY

We should acknowledge up front that we are not suggesting that the only way to understand present-day Equal Protection Doctrine is as a function of the legislative impetus and societal conditions that gave rise to the Fourteenth Amendment and its companion Reconstruction Amendments. Inquiring into structure and history, as well as the intent of the drafters, are but a few of the several tools useful for interpreting the Constitution. The application of these interpretive tools can pose additional challenges. Therefore, rather than espousing the competing virtues of particular ideological commitments to interpretation, our point is

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30 See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 17 (3d ed. 2006) (explaining the nonoriginalist view that the Constitution is evolving and can be used to "protect rights that are not expressly stated or clearly intended"); cf. Robert J. Kaczorowski, Searching for the Intent of the Framers of the Fourteenth Amendment, 5 Conn. L. Rev. 368, 370–71 (1972–73) (explaining the inadequacy of lawyers trying to interpret the historical intent of the Framers).

31 As noted scholar Mark Tushnet has previously surmised with regard to evaluating history, for example, "the richest kinds of historical understanding do not rest on the isolation of discrete and determinate beliefs or intentions of historical actors." Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 797 (1983). It is also true that history—or those who record it, to be more precise—privileges some stories and ignores others altogether. See Anna M. Kupenda et al., Political Invisibility of Black Women: Still Suspect but No Suspect Class, 50 Washburn L.J. 109, 110–11 (2010) (noting that whose stories are represented in history is a function of race and gender identity).
merely to suggest that in divining the contemporary meaning of equality, it is helpful in part to look to the structural, historical, and textual contours of the Reconstruction Amendments.

A. The Reconstruction Amendments and Constitutional Structure: Undoing Slavery and Remaking Citizenship

The federal Congress drafted the Reconstruction Amendments and they were ratified by the several states in 1865 (Thirteenth Amendment), 1868 (Fourteenth Amendment), and 1870 (Fifteenth Amendment), respectively. The language of the Thirteenth and Fourteenth Amendments structurally addressed to Article I, Section 2, Clause 3, of the Constitution, which directed an apportionment of representatives and direct taxes based upon "respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Slaves, not being free persons, indentured servants, or Indians, counted in the "three fifths of all other persons" until the amendments were ratified. The Thirteenth Amendment abolished the institution of slavery, and Section 2 of the Fourteenth Amendment included new apportionment language that referred only to counting the "whole number of persons in each State, excluding Indians." The Fourteenth Amendment also sounded an additional structural note by directing that all persons born in the United States were citizens. This

32 For a detailed discussion of the congressional debates surrounding the proposal and ratification of the Reconstruction Amendments, see generally THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS (Alfred Avins ed., 1967). Of note, the legality of the ratifications by former Confederate states has been challenged. See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. CHI. L. REV. 375, 377-78 (2001) (discussing the claim that "some or all of the southern state legislatures that ratified the Thirteenth and Fourteenth Amendments lacked the legal power to act for their states . . . [and] those ratifications, even if made by valid state legislatures, were void because they were made under unlawful political pressure from the national government").

33 U.S. CONST. art I, § 2, cl. 3.

34 Id. amend. XIII, § 1. The Thirteenth Amendment also had the effect of negating the Fugitive Slave Clause. See id. art IV, § 2 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

35 Id. amend. XIV, § 2. This section, ironically, also set the stage for disenfranchising large numbers of African Americans, by allowing their voting rights to be abridged due to participation in "rebellion, or other crime." Id.; see also Pamela S. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement, 56 STAN. L. REV. 1147, 1160-61 n.72 (2004) (stating that the "purpose of Section 2 of the Fourteenth Amendment was to repeal the Three-fifths Clause and to ensure that states that continued to disenfranchise black men would lose representation in the House and influence over presidential elections").

36 U.S. CONST. amend. XIV, § 1.
language negated the decision in *Dred Scott*, but also meant that the rights of citizens delineated in the other parts of the Constitution would also be extended to freed slaves.

In addition to textually amending earlier parts of the Constitution, the Fourteenth Amendment has been interpreted as opening up a new mode of analysis for the Fifth Amendment. The wording of the Fifth Amendment provides, in part, "[n]o person . . . shall be deprived of life, liberty or property without due process of law." Though the Amendment makes no reference to equal protection, in *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education*, the Court stated:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

In effect, even though it does not contain the Fourteenth Amendment’s additional equal protection language, the Court has read equal protection analysis into the Fifth Amendment Due Process Clause. Hence, however the concept of equality came to be defined, the Court has made the decision to read that understanding across the Constitution and to create a uniform standard for the federal and state governments. Discerning the meaning of equality, however, is difficult to do without both looking to the particular history that produced the Amendments and the challenges of the contemporary society in which the language now reverberates.

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37 *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404-05 (1856) (holding that slaves and former slaves within the United States were not and could not ever be citizens of the United States).

38 At this point in our nation’s history, it would seem particularly important to draw attention to the example in Article 2, Section 1. U.S. CONST. art. II, § 1 (providing that “[n]o person but a natural born citizen . . . shall be eligible to the Office of President”).

39 Id. amend. V.


41 Id. at 499 (citations omitted).

42 See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (deciding whether campaign finance legislation was in violation of the First and Fifth Amendment rights to freedom of expression and due process, respectively); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–38 (1975) (considering whether a gender-based distinction in the provision of social security benefits violated the Due Process Clause of the Fifth Amendment).
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B. History: Reflecting the Tension Between Desire and Reality

In addition to their textual and structural significance, the Reconstruction Amendments and the historical moment that surrounds their production are important to informing contemporary equality jurisprudence. The Amendments were not just about undoing the Constitution’s previous textual acceptance of slavery. As the following passage attests, the Reconstruction Amendments answered abolitionist movement demands to have Blacks redefined as citizens as a matter of birthright:

The long contest over slavery gave new meaning to such key ideas as personal liberty, political community, and the rights attached to American citizenship. In elaborating their criticism of slavery and attempting to reinvigorate the idea of freedom as a truly universal entitlement, the abolitionists developed what might be called an alternative constitutionalism. Even as slavery spawned a racialized definition of American democracy and citizenship that became increasingly hegemonic in the prewar years, the struggle for abolition gave rise to its opposite, a purely civic understanding of nationhood.43

As a practical matter, “[t]he Reconstruction Amendments to the United States Constitution were enacted because of the post-Civil War concern that former slaves would experience discriminatory treatment by the states and would have their interests trampled by a hostile majority.”44 To the extent the Amendments both outlawed forms of servitude and opened up the availability of citizenship, they were paving the way for freed slaves to fully participate in American society. However, even though the formerly seceded slave states ratified the Amendments, this move was largely political and not a signal that emancipation would serve to create interracial social equality.45 The truth of this circumstance can be seen in

44 Jonathan Thompson, The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?, 69 TEMP. L. REV. 1247, 1252 (1996) (footnote omitted); see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (Miller, J.) (acknowledging that one prevailing purpose of the Fourteenth amendment was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen”); Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 EMORY L.J. 1397, 1419 (2002) (asserting the Fifteenth Amendment, “operationalized the legal and political equality of black citizens and was the last step necessary” for the full integration of Blacks).
45 See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 189–90 (1998) (discussing the deep divisions between the Northern and Southern states in the Constitutional Convention and Congress that drafted the Reconstruction Amendments); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 129–30 (2d ed. 1994) (discussing how the former Confederate states ratified the
the Black Codes that various southern states adopted after the ratification of the Thirteenth Amendment. These Codes were generally designed to limit the social and political lives of freed slaves, and were a precursor to the emergence of Jim Crow laws—state and local laws designed to produce the state of *de jure* racial segregation—from the 1870s and beyond. Moreover, even most of the historical accounts of the period of Reconstruction represented decidedly negative views of freed slaves. Whatever equality was intended to mean when the Amendments were drafted, from ratification until the *Brown* decision, the Amendments were not interpreted to be concerned with creating a commensurate quality of political and social life for Blacks.

C. Interpreting Textual Enforcement Powers: What They May or May Not Mean

Finally, perhaps the text of the Reconstruction Amendments—separate from the language that merely amended or replaced earlier constitutional text—can be seen as instructive on the question of what measure of equality was intended. One can argue that granting Congress the power to enforce the language of both the Thirteenth and Fourteenth Amendments signals that the Reconstruction Amendments were not merely about endowing freed slaves with status, but also protecting freed slaves from state-sanctioned and individual mistreatment.

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46 See W.E.B. Du Bois, *Black Codes, in RACE, CLASS & GENDER IN THE UNITED STATES* 556, 556–64 (Paula Rothenberg ed., 6th ed. 2004) (discussing laws enforced against Blacks in Southern states, including for innocuous activities such as vagrancy and apprenticeship); Harrison, *supra* note 32, at 401 (noting that a number of the Codes were passed between 1865 and 1866 and limited Blacks in their abilities to own property and give testimony in courts).


48 W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 1860–1880, at 711–12 (Free Press Ed. 1998) (1935) (asserting that the majority of textbooks covering Reconstruction described Blacks as ignorant, lazy, extravagant, dishonest and responsible for bad law-making during the period); see also ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* 1863–1877, at xx–xxi (1988) (describing the popular understanding of Reconstruction, which was built upon a notion of “negro incapacity” and Du Bois and others’ critiques of that approach).


Amendment provides “Congress shall have power to enforce this article by appropriate legislation.”\(^5\) Similarly, the Fourteenth Amendment includes Section 5, which directs, “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”\(^5\) This power was rendered somewhat limited, however, when the Court determined that the Fourteenth Amendment applied to only state action.\(^5\)

Not only did the text of the Fourteenth Amendment fail to specify the breadth of the equality it sought to protect, but the courts have only intermittently seen the enforcement clauses as tools for ensuring a more substantive understanding of equality. For example, the Court has interpreted the Thirteenth Amendment as authorizing Congress to abolish the “badges and incidents of slavery.”\(^5\) As such, the Amendment has been used to justify the curtailment of even private forms of discrimination.\(^5\)

This application, however, has not been uniform. In the Civil Rights Cases, Justice Bradley concluded that abolishing slavery was not the same thing as defending against race, color, or class discrimination and that mere race discrimination should not be understood as a badge of slavery.\(^5\) Perhaps, most ironically, the case also suggested that only eighteen years after slavery ended, it was time for former slaves to stop using the experience as a crutch.\(^5\)

As obviously overstated as this pronouncement was in 1883, it at least started from the premise that up until that time, the Thirteenth Amendment and subsequent legislation\(^5\) had been used to mitigate the negative life consequences slavery had created in the lives of the Blacks who had been freed. That understanding of slavery as producing real and lingering effects has been minimized within

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51 U.S. CONST. amend. XIII, § 2.
52 Id. amend. XIV, § 5.
53 See United States v. Morrison, 529 U.S. 598, 621 (2000) ("Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."); The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (concluding that the Fourteenth Amendment prohibits state action, not individual action).
55 See, e.g., Alfred H. Mayer Co., 392 U.S. at 441-43 (limiting the ability of individuals to discriminate in the provision of rental properties).
56 The Civil Rights Cases, 109 U.S. at 24-25.
57 Id. at 25; see also Banes et al., supra note 6, at 973 & n.26 (criticizing the jurisprudence of early Thirteenth and Fourteenth Amendment cases).
58 See, e.g., Civil Rights Act of 1866, 14 Stat. 27 (defining birth right citizenship and prohibiting discrimination in contracting); Reconstruction Acts of 1867 and 1868, 14 Stat. 428, 15 Stat. 2, 15 Stat. 14, 15 Stat. 41 (extending to all men the right to vote and required all former seceded states to ratify the Fourteenth Amendment); Civil Rights Act of 1875, 18 Stat. 335 (seeking to eliminate discrimination in the provision of public accommodations, although the Act was ultimately struck down by the Court in the Civil Rights Cases).
contemporary discussions of racialized disadvantage.\textsuperscript{59}

Though Congress has also attempted to employ Section 5 of the Fourteenth Amendment to pierce state sovereign immunity and enforce equality across the suspect classifications by authorizing citizen suits, its use has been infrequent and the results have been mixed. In fact, it has been the Commerce Clause that has justified the legislative acts that have gone the furthest toward ensuring racial equality.\textsuperscript{60} While early cases signaled that Section 5 might be used by the federal government to reign in discriminatory state practices,\textsuperscript{61} including prophylactic measures,\textsuperscript{62} the Rehnquist Court seems to have largely dismissed this interpretation.\textsuperscript{63} The following recent commentary on the text, structure, and history of the Reconstruction Amendments captures how the Court has effectively stripped them of power:

[M]odern doctrine has not been faithful to the text, history and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments were designed to give Congress broad powers to protect civil rights and civil liberties: Together they form Congress’s Reconstruction Power. Congress gave itself these powers because it believed it could not trust the Supreme Court to protect the rights of the freedmen; and the Supreme Court soon realized Congress’s fears, limiting not only the scope of the Reconstruction Amendments but also Congress’s powers to


\textsuperscript{60} See \textsc{U.S. Const.} art I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); \textit{see also Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241, 261–62 (1964) (holding that the Commerce Clause was the justification for portions of Civil Rights Act of 1964 which eliminated discrimination in public accommodations upheld); \textit{Katzenbach v. McClung}, 379 U.S. 294, 298 (1964) (reaching a similar holding to that of \textit{Heart of Atlanta Motel} with regard to restaurant whose supplies had traveled in interstate commerce).

\textsuperscript{61} See, \textit{e.g.}, \textit{Katzenbach v. Morgan}, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

\textsuperscript{62} \textit{Kimel v. Florida Bd. of Regents}, 528 U.S. 62, 88 (2000) ("Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.").

\textsuperscript{63} See, \textit{e.g.}, \textit{Nev. Dep’t of Human Res. v. Hibbs}, 538 U.S. 721, 728 (2003) ("Valid § 5 legislation must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’") (quoting \textit{City of Boerne v. Flores}, 521 U.S. 507, 520 (1997)); \textit{Boerne}, 521 U.S. at 527–29 (asserting Congress had no non-remedial power to act under Section 5 and upholding Section 5 actions for claims of gender discrimination protected through the Family and Medical Leave Act). In \textit{Board of Trustees of the University of Alabama v. Garrett}, the Court rejected \textit{Title I} suspect classification causes of actions against states under the American with Disabilities Act (ADA). 531 U.S. 356, 360 (2001). In a later case, however, the Court authorized suits against states based on ADA \textit{Title II} claims, which were premised upon infringement on the exercise of a fundamental right—access to the courts. \textit{Tennessee v. Lane}, 541 U.S. 509, 522–29 (2004).
D. On Assessing History and Meaning in Context

There are, of course, dangers in heavily relying upon the structural and historical significance of the Reconstruction Amendments to inform present day conceptions of equality. First, although it is clear that Congress, in the Reconstruction Amendments and subsequent legislation, sought to promote some form of inclusion, complete racial integration in all areas of life was not necessarily desired.65 Second, there is a danger in considering, in part, the post-ratification actions of Congress and the Court to infer pre-ratification meaning.66 Finally, history can be tricky to decipher, especially for Justices.67 While we read the history and structure

64 Balkin, supra note 50, at 1805 (internal citation omitted).
65 See Chemerinsky, supra note 30, at 12 (positing that the Framers likely neither favored racial desegregation nor gender equality when the Fourteenth Amendment was ratified); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 950–51 (1995) (asserting that nothing in the history of the Reconstruction debates suggested that the Amendments were designed to prohibit segregated education or anti-miscegenation laws); Steven A. Bank, Comment, Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875, 2 U. CHI. L. SCH. ROUNDTABLE 303, 311–12 (1995) (noting that politicians advocating for equal rights under the Fourteenth Amendment were not advocating for the right of interracial marriage).
66 Certainly legislation such as the Civil Rights Act of 1875 was attempting to engineer substantive social equality amongst racial groups. See Bank, supra note 65, at 303 (“The Civil Rights Act of 1875 . . . sought to overturn many of the bars to interaction between the races after the end of slavery. . . . Proponents of the Act confined their arguments largely to the issue of desegregating public places . . . .”). This does not, however, necessarily represent the desires of the drafters of the amendments. See Raoul Berger, “The Original Intent”—As Perceived by Michael McConnell, 91 Nw. U. L. REV. 242, 245–47 (1996) (arguing that the debates around the Civil Rights Act of 1875 do not reveal original intention of the drafters of the Fourteenth Amendment, stating that “the words are words of art whose meaning is historically confined to the intention of the framers; it cannot include later interpretations”).
67 See, e.g., Alden v. Maine, 527 U.S. 706, 722–27, 762–64 (1997) (providing an example of opinions which present dramatically different interpretations of the history of sovereign immunity, written by Justices Kennedy and Souter); Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth (1999) (arguing that historical claims made by the Justices and legislators about Reconstruction are significantly contested). Some academics have subsequently complained that certain jurists were particularly bad at ascertaining historical meaning. See, e.g., John Phillip Reid, Law and History, 27 Loy. L.A. L. REV. 193, 203 (1993). (“Historians have particularly singled out Hugo Black for criticism. He had a talent for constructing historical arguments that were caricatures of what academics understand to be history.”). The following similar claim is a particularly relevant assessment of how history is somewhat abandoned when considering Reconstruction:

In cases where they found it politically convenient, the conservative Justices were obsessively attentive to constitutional history. They exalted the understanding of the Anti-Federalists over the Federalists, of Lincoln over Calhoun. But in the race cases, there is a conspicuous silence. Discussions of the original meaning of the Reconstruction amendments—from which the conservatives claim to derive the principle that the Constitution is color-blind—are nowhere to be found. And no wonder. An examination of the historical evidence suggests that the original intentions of the radical Republicans in 1865 are flamboyantly inconsistent with the color-blind jurisprudence of the conservative Justices in 1995.

of the Amendments as capable of supporting an understanding of substantive equality, certain historical factors weigh in favor of a more formalist approach.  

Beyond the challenge of discerning “what happened back then,” it is not necessarily clear how to translate historical facts in light of contemporary circumstance. The Reconstruction Amendments, for example, were designed to mitigate the effects of slavery on one minority group—Blacks. Would anyone currently argue that either history or originalist arguments weigh in favor of limiting contemporary equal protection claims to that one group? The Court has rejected this idea, by logically concluding that anti-discrimination statutes and the Equal Protection Doctrine were designed to protect groups other than just Blacks and Whites. What mattered for the Court was whether the racial group—Mexican Americans in Hernandez v. Texas, for example—existed within a community.  

The impulse to use contemporary considerations to shape particular constitutional interpretations is completely understandable. Still, the court ultimately determined that their decision in Hernandez logically flowed from the meaning of equality within the Equal Protection Clause. If the meaning of constitutional text can be expanded to cover situations not imagined at the time particular Amendments were ratified, there should also be some utility in considering historical context as providing a conceptual framework or as helpful for resolving the question of the

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68 See supra notes 65-66 and accompanying text (discussing how the Framers were not attempting to create a fully racially integrated society).
71 One reason contemporary approaches to constitutional interpretation matter is that societal behaviors are repeated in such a way that significant confluences exist between present and past moments of legal contest and interpretation. See, e.g., Mark V. Tushnet, Civil Rights and Social Rights: The Future of the Reconstruction Amendments, 25 Loy. L.A. L. Rev. 1207, 1208 (1992) (noting the similar dichotomies with regard to the treatment of civil/political and social rights at the present and during Reconstruction, asserting that “[t]he future of the Reconstruction Amendments . . . may resemble their past: seemingly immutable definitions of fundamental categories of legal analysis may change before our eyes”).
72 This approach is similar to the approach taken in Brown v. Board of Education, in that both cases included a substantive concept of equality.
73 Michael Klarman, for example, has discussed setting full-scale history, premised upon political and social factors to one side, in favor of an enterprise he described as “conceptual history,” which “tell[s] a story about the evolution of equal protection as a legal concept.” Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 215 (1991). This more
choice between formal and substantive equality. The conflicted nature of the history of the Reconstruction Amendments, however, requires a shift toward a moral or normative standard. This is so because we cannot know precisely what equality could mean in a society that sought to simultaneously free slaves while keeping Blacks socially subordinated. We can, however, ask the question of what equality would need to mean if one genuinely sought to free slaves from all of the ills of the slavery enterprise—including political disenfranchisement and social stigma. Relying upon history in this more conceptual or meta way, the Reconstruction Amendments—to be at all meaningful—would need to have been read as designed to ensure an equivalent measure of opportunity for freed slaves, whose nascent rights were clearly under attack.

limited historical analysis was engaged by carefully analyzing significant turns in equal protection jurisprudence.

Yale Professor Reva Siegel has articulated the usefulness of such an approach to history in a number of her writings:

Why examine the ways in which earlier generations of Americans justified the subordinating practices of their day? Is the point of such an exercise to make excuses for our predecessors? To the contrary: it is to discuss the practices of our predecessors in terms that more deeply implicate us in the present. It is now commonplace to condemn slavery and segregation—a rhetorical practice presumably intended to bind Americans ever more closely to principles of equality. Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111, 1113 (1997) [hereinafter, Siegel, No Longer Protects]; see also Reva Siegel, Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification, 88 CALIF. L. REV. 77, 81 (2000) (“By looking at how the legal system began to disestablish gender and race inequality in the nineteenth century, we can learn something about the operations of antidiscrimination law today.”).

Such a conflicted perspective may not be unique. See Siegel, No Longer Protects, supra note 74, at 1112 n.3 (1997) (noting that according to various sociological studies, there is now data confirming that white Americans claim to be committed to racial equality even as they continue to manifest forms of racial bias.).

This is merely an acknowledgment that constitutional intent and interpretation can be constrained by the effects of particular historical moments. One might imagine, for instance, that the Korematsu case, see infra notes 85–86 and accompanying text, may have produced a very different understanding of permissible government considerations of race and national origin, if it had not been for the effect of war on that decision. See Mary L. Dudziak, Law, War and the History of Time, 98 CALIF. L. REV. 1669, 1690 (2010) (discussing Korematsu and the effects of war on equality rights).

Here, we find ourselves in agreement with legal scholar Charles Lawrence, who has described the Equal Protection Clause as a committed to a “new substantive value of ‘nonslavery’ and antisuubordination to replace the old values of slavery and white supremacy.”). Charles R. Lawrence III, Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy), 114 YALE L.J. 1353, 1395 (2005).

For example, some claim that the Fourteenth Amendment was an attempt by congressional drafters to directly respond to the Black Codes. See William N. Eskridge, Jr., Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?, 50 WASHBURN L.J. 1, 3 (2010) (“During the ratification debates, supporters of the Fourteenth Amendment repeatedly announced that a central purpose of the Equal Protection Clause was to attack class legislation—
Reconstruction era Congresses attempted to provide protection for such rights through legislation, so the Court failed to use the Fourteenth Amendment's malleable concept of equality to prop up these efforts. This demonstrates that even if serving the ends of antisubordination and true integration was a goal of the Equal Protection Doctrine, the framework a court adopts for analyzing constitutional claims has a significant ability to undermine this goal. We consider the Court's current framework next.

III. THE STRUCTURE OF EQUAL PROTECTION ANALYSIS AND ITS CONSEQUENCES

Over the course of about a decade, from the end of the Warren Court and especially through the beginning of the Burger Court, the Supreme Court devised the structure of modern equal protection analysis. Two structural choices were crucial: the development of the rigid tiers of scrutiny and the requirement for a discriminatory purpose. These developments profoundly limited the ability of the judiciary to use equal protection to remedy social inequalities. First, the rigid levels of scrutiny mean that unless alleged government discrimination receives heightened scrutiny the odds are overwhelming that the government will prevail. Second, the requirement for a discriminatory purpose in order to prove discrimination means that countless government acts which have a terrible discriminatory impact, but where discriminatory intent cannot be proven, will receive only minimal scrutiny and will be upheld. In other words, the Court's structural choices have created a framework that dramatically limits the reach of equal protection.

especially laws adopted by southern legislatures to marginalize the new citizens of color. Alfred H. Kelly, The Fourteenth Amendment Reconsidered: The Segregation Question, 54 MICH. L. REV. 1049, 1057–58 (1956) (noting that the Republican radicals were unwilling to wait for the congressional committee on the Fourteenth Amendment, and "soon made it clear in debate that they were determined to destroy the Black Codes and guarantee the Negro instead full citizenship and a concomitant body of civil rights."). Even still, scholars have acknowledged that from the ratification of the Fourteenth Amendment to the opinion in Brown v. Board of Education, African Americans were left largely unprotected by the Equal Protection Clause. See, e.g., Richard L. Aynes, Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation, 39 AKRON L. REV. 289, 303–07 (2006) (describing the history of equal protection for African Americans and concluding that "African Americans received almost no protection under the Equal Protection Clause . . . [resulting in] the orphaning of African Americans. . . . [T]his neglect over a period of almost a hundred years was not only an unintended result of the Amendment, but a result contrary to its purpose.").

80 See supra note 58.

81 Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (describing the emergence of the "new" equal protection, the tiers of scrutiny, and their effects).

A. The Rigid Tiers of Scrutiny

The familiar tiers of scrutiny can be traced back in concept, though not in their modern articulation, to the famous *Carolene Products* footnote.\textsuperscript{83} In that footnote in 1938, the Supreme Court expressed the idea that different constitutional claims would be subjected to varying levels of review. The Court explained that the judiciary should generally presume that laws are constitutional and that laws regulating the economy—such as the federal law prohibiting the sale of milk mixed with vegetable oil which was before the Court in *Carolene Products*—almost always will be upheld.\textsuperscript{84} However, the Court also expressed that “more searching judicial inquiry” is appropriate when it is a law that interferes with individual rights, or a law that restricts the ability of the political process to repeal undesirable legislation, or a law that discriminates against a “discrete and insular minority.”\textsuperscript{85} It is a framework of general judicial deference to the legislature, but with exceptions for particular areas deemed to merit more intensive judicial review.

In the years following *Carolene Products*, the Court developed the rational basis test as the floor for equal protection analysis and repeatedly made clear that under it government actions are overwhelmingly likely to be upheld. The Court consistently held that economic regulations—such as laws regulating business and employment practices—will be upheld when challenged under the Due Process or Equal Protection Clauses so long as they are rationally related to serve a legitimate government purpose.\textsuperscript{86} The government’s purpose can be any goal not prohibited by the Constitution: in fact, it does not need to be proved that the asserted purpose was the legislature’s actual objective, as any conceivable purpose is sufficient.\textsuperscript{87} The law need only be a reasonable way of attaining the end; it need not be narrowly tailored to achieving the goal. Not surprisingly, few government actions have ever been found unconstitutional under this

\textsuperscript{83} United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
\textsuperscript{84} Id. at 152.
\textsuperscript{85} Id. at 152 n.4.
\textsuperscript{86} See, e.g., Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (upholding state law prohibiting an optician from making lenses without a prescription from an optometrist or an ophthalmologist and stating that “the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536–37 (1949) (upholding a state law that provided that no one could be denied a job for failure to join a union and declaring that states could legislate against “injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional provision, or some valid federal law”).
\textsuperscript{87} See, e.g., U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (“Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’ because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.” (internal citations omitted)).
During the 1960s, strict scrutiny emerged for analysis of government actions infringing fundamental rights or discrimination based on race or national origin. Ironically, the first use of the phrase “suspect” classification and heightened scrutiny came in *Korematsu v. United States*, which upheld the evacuation of Japanese-Americans from the West coast during World War II. The Court began its opinion by declaring, “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”

The contemporary articulation of the test for strict scrutiny slowly emerged in the 1960s. In the 1963 case, *Sherbert v. Verner*, the Court reasoned that a law burdening religion violates the free exercise clause of the First Amendment unless there is “a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.” By 1966, in *Harper v. Virginia Board of Elections*, the Court had created the test of strict scrutiny for infringements of fundamental rights and discrimination based on race and national origin and declared: “We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”

By *Shapiro v. Thompson*, three years later, the Court declared, in protecting the right to travel as a fundamental right:

At the outset, we reject appellants’ argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. . . . But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest,

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88 See, e.g., *Romer v. Evans*, 517 U.S. 620, 635–36 (1986) (invalidating a law discriminating on the basis of sexual orientation); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (refusing to recognize the mentally retarded as a “quasi-suspect class,” stating that legislation “that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose”).

90 Id. at 216.
93 Id. at 670 (declaring a poll tax unconstitutional based on the Equal Protection Clause, as the right to vote is “too precious, too fundamental to be so burdened or conditioned”).
is unconstitutional.\textsuperscript{94}

The test for strict scrutiny was so clearly established and the results under it so familiar that in 1972, Professor Gerald Gunther famously described it as "strict in theory and fatal in fact."\textsuperscript{95} His point was that the Court's choice of a level of scrutiny was likely to be decisive: under rational basis review the government virtually always won and under strict scrutiny the government almost always lost.

Intermediate scrutiny first appeared in 1976 in \textit{Craig v. Boren}.\textsuperscript{96} Three years earlier, in \textit{Frontiero v. Richardson}, four Justices took the position that gender classifications should be subjected to strict scrutiny.\textsuperscript{97} Justice Brennan—writing for a plurality that included Justices Douglas, White, and Marshall—said that "classifications based upon sex, like classifications based upon race, alienage or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."\textsuperscript{98}

But within a few years, it was apparent to the Justices that there was not a fifth vote for strict scrutiny. In \textit{Craig v. Boren}, the Court declared: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."\textsuperscript{99} It is interesting that the Court stated that "previous cases establish" this test because this is the first case in which the test is articulated and used.\textsuperscript{100}

The familiar tiered framework for judicial analysis means that the results in equal protection cases will almost always depend on the ability to convince a court that there is a racial or gender classification present or discrimination with regard to a fundamental right. This framework creates a strong presumption in favor of rationality review: only in exceptional circumstances—if there is a fundamental right or a suspect classification—does the Court apply heightened scrutiny. These levels of scrutiny allow the Court to justify rulings in favor of the government with little analysis of the competing constitutional interests. To explain a denial

\textsuperscript{94} 394 U.S. 618, 634 (1969) (internal citations omitted). The Court invalidated a state law that required residency for one year as a prerequisite to receiving welfare benefits, \textit{id.} at 621–62, and explained that the Court "long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." \textit{id.} at 629.

\textsuperscript{95} Gunther, \textit{supra} note 81, at 8.

\textsuperscript{96} 429 U.S. 190 (1976).

\textsuperscript{97} 411 U.S. 677, 688 (1973).

\textsuperscript{98} \textit{id.}

\textsuperscript{99} \textit{Craig}, 429 U.S. at 197.

\textsuperscript{100} \textit{id.; see also William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century}, 100 Mich. L. Rev. 2062, 2257–58 (2002) (explaining that \textit{Craig v. Boren} was the first time the Supreme Court held that gender classifications are subject to an intermediate standard of review). \textit{But see} Eskridge, \textit{supra} note 79, at 10 (questioning whether political powerless is and should be a requirement of suspect classification).
of a constitutional claim, the Court need only state why the interest involved warrants analysis under the rational basis test; that is, why the matter does not rise to the level of a fundamental right or a suspect classification. Since these are viewed as quite limited categories, the Court can conclude with relatively minimal reasoning why new interests do not meet the high threshold. The Court then can summarily explain why the government action is rationally related to legitimate government purpose.

An alternative analytical framework, such as the “sliding scale” proposed by some Justices, would require much more judicial discussion of the competing interests and the basis for the Court’s holding. For example, when the Court rejected claims that government age discrimination violated the Equal Protection Clause, the opinions explained that as compared to racial minorities, the elderly possess more political power and have not been historically disadvantaged. Concluding that rational basis review was warranted, the Court easily held for the government. If the Court had been required to analyze factors such as the constitutional and social importance of the interest adversely affected and the invidiousness of the basis on which the classification was drawn, its conclusion might have been different and, at the very least, its explanation would have been more enlightening.

The irony is that a judicial approach that was intended to expand judicial protection for minorities actually has the opposite effect. The levels of scrutiny are essentially balancing tests—each test determines how the weights on the scale are to be arranged. Strict scrutiny puts the weights strongly against the government and rational basis places the weights in its favor. If the Court sharply limits access into this tier of review, however, it can effectively use the levels of scrutiny to make it exceedingly difficult to successfully prove an equal protection violation.

B. The Requirement for a Discriminatory Purpose

The levels of scrutiny combined with a development of the 1970s—the requirement for proving a discriminatory purpose in order to demonstrate a

101 See, e.g., Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring) (arguing for “an approach that allows for varying levels of scrutiny depending upon ‘the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn’” (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973))); Craig, 429 U.S. at 212–14 (Stevens, J., concurring) (rejecting the two-tiered analysis of equal protection claims as illogical, and analyzing the case according to varying factors and statistics); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109–10 (1973) (Marshall, J., dissenting) (arguing that a variable standard of review is “part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document”).


103 Id. at 314.
rational or a gender classification—tremendously limited the ability of the courts to deal with inequalities. *Washington v. Davis* was the key case articulating this requirement for proof of discriminatory intent. In that case, applicants for the police force in Washington, D.C., were required to take a test, and statistics revealed that Blacks failed the examination much more often than Whites. The Supreme Court, however, explained that proof of a discriminatory impact is insufficient, by itself, to show the existence of a racial classification. Justice White, writing for the majority, said that the Court never had held that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” The Court explained that discriminatory impact, “[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”

In other words, laws that are facially neutral as to race and national origin will receive more than rational basis review only if there is proof of a discriminatory purpose. Absent proof of discriminatory purpose, the government is almost certain to prevail because it would receive only rational basis review. Thus, the combination of the tiers of scrutiny and the requirement for a discriminatory purpose combine to immunize from judicial review countless government actions which create great social inequalities.

The Court has repeatedly reaffirmed the principle that discriminatory impact is not sufficient to prove a racial classification. For example, in *Mobile v. Bolden*, the Supreme Court held that an election system that had the impact of disadvantaging minorities was not to be subjected to strict scrutiny unless there was proof of a discriminatory purpose. The Court

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104 426 U.S. 229, 242 (1976) (noting that an invidious discriminatory purpose may be inferred from examining the totality of relevant facts, and that while disproportionate impact is not irrelevant, “it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations” (internal citation omitted)). Prior to *Washington v. Davis*, in *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605 (1974), the Supreme Court rejected an equal protection challenge to the mayor’s appointment of members of the school board. *Educ. Equal. League*, 415 U.S. at 609, 621. Statistics showed a significant under-representation of African-Americans, but the Court reasoned that such statistical proof was insufficient to prove discrimination. *Id.* at 620–21.


106 *Id.* at 239.

107 *Id.*

108 *Id.* at 242 (internal citation omitted).

109 The complaint alleged that the municipal election process “unfairly diluted the voting strength” of African Americans. *Mobile v. Bolden*, 446 U.S. 55, 58 (1980). The Court explained, “legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities,” and that plaintiffs must prove discriminatory purpose. *Id.* at 66. The Court held that the evidence was insufficient to prove the electoral scheme represented purposeful discrimination against African-American voters. *Id.* at 73–74.
declared: "[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause . . . . [T]his principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination."110

Similarly, in McCleskey v. Kemp, the Supreme Court held that proof of discriminatory impact in the administration of the death penalty was insufficient to show an equal protection violation.111 In that case, statistics powerfully demonstrated racial inequality in the imposition of capital punishment.112 The Court, however, said that for the defendant to demonstrate an equal protection violation, he "must prove that the decisionmakers in his case acted with discriminatory purpose."113 Because the defendant relied solely on the statistical study for evidence and could not prove bias on the part of the prosecutor or jury in his case, no equal protection violation existed.114 Moreover, the Court said that to challenge the law authorizing capital punishment, the defendant "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect."115

The requirement for a discriminatory purpose is made all the more pernicious because the Supreme Court has made it very difficult to prove. The Court has held that showing such a purpose requires proof that the government desired to discriminate; it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences. In Personnel Administrator of Massachusetts v. Feeney, the Court declared: "Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."116 Moreover, the Court has recognized only very limited types of evidence that could be used to establish such discriminatory intent.117 As a result, a court will rarely find a discriminatory purpose for a facially race-neutral law. Thus, only rational basis review will be used and the law is sure to prevail.

Many laws with both a discriminatory purpose and effect may be upheld simply because of evidentiary problems inherent in requiring proof

110 Id. at 66–67 (internal citations omitted).
112 See id. at 286–87 (describing the study which tended to show "a disparity in the imposition of the death sentence . . . based on the race of the murder victim and, to a lesser extent, the race of the defendant").
113 Id. at 292.
114 Id. at 292–93, 297.
115 Id. at 297–98.
116 442 U.S. 256, 279 (1979) (internal citations omitted) (internal quotation marks omitted).
of such a purpose. Scholars such as Professor Charles Lawrence argue that this is especially true because racism is often unconscious and such "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy." In a society with such a long history of discrimination, one can presume that many laws with a discriminatory impact were likely to be motivated by a discriminatory purpose. Professor Larry Simon argues that

a showing of significant disproportionate disadvantage to a racial minority group, without more, gives rise to an inference that the action may have been taken or at least maintained or continued with knowledge that such groups would be relatively disadvantaged. . . . [I]t raises a possibility sufficient to oblige the government to come forward with a credible explanation showing that the action was (or would have been) taken quite apart from prejudice.

But the Supreme Court has not taken this approach and instead has required proof that the government desired the discriminatory consequences.

Equal protection should be concerned with the results of government actions and not just their underlying motivations. Professor Laurence Tribe explained:

The goal of the equal protection clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all. . . . [M]inorities can also be injured when the government is "only" indifferent to their suffering or "merely" blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.

But the structure of equal protection analysis—rigid tiers of scrutiny and only rational basis review without proof of a discriminatory purpose—ensures that the Constitution will have limited impact in remedying racial inequalities.

IV. THE KILLER QUESTION?

As Part III indicates, one of the most direct ways to reform equal protection jurisprudence to include a more substantive understanding of
equality would be to discard the current method of analyzing constitutional discrimination claims. Additionally, scholars and jurists have significantly criticized the current three-tiered approach to equal protection analysis. The pressing question of course would be: What do you replace the current antidiscrimination framework with? When giving content to the notion of equality and to reshaping the Court’s approach for deciding claims, a workable answer may be attainable. Others have previously proposed specific solutions, such as more unitary standards to replace the three-tiered approach to equal protection analysis. We do not offer a concrete substitute standard. Rather we suggest the ways in which an alternative approach to equal protection would need to deviate from the current standard. For one, to effectively construct a concept of equality that fully eradicates the impact of slavery and various forms of social identity discrimination that have followed in its wake, one would necessarily need to look at outcomes. In other words, it would be better if our analysis of claims of unlawful discrimination under the constitution started with the premise that persons—including governmental actors—actually intend the likely consequences of their actions. With this shift, the logical first step toward a reformed Equal Protection Doctrine would

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1. See supra note 101 and accompanying text (suggesting one alternative method to the tiered approach to equal protection analysis, would be to apply a “sliding scale”).
2. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 412–13 (Stevens, J., concurring) (indicating he always believed equal protection worked better as a continuum rather than three tiers of review, and reiterating criticism of the approach he first earlier articulated in Craig v. Boren, 429 U.S. 190, 212 (1976)); Trina Jones, Response: Antidiscrimination Law in Peril, 75 Mo. L. REV. 423, 438 (2010) (asserting that “[t]he more cynical among us might suggest that the [tiered] framework provides the Justices with cover. It gives the appearance of neutrality and consistency across cases and creates a sense of distance between judicial preferences and judicial decision making. In other words, it allows judges to appear even handed and to escape responsibility for making what are, in essence, value judgments.”); Jed Rubenfeld, Affirmative Action, 107 YALE L.J. 427, 435 (1997) (positing “[t]he Court’s classification-driven framework is illogical and untenable”).
4. In place of the tiers, Suzanne Goldberg suggests that the following three inquiries should shape the courts’ analysis of any classification: “(1) whether a plausible, nonarbitrary explanation exists for why the burdened group has been selected to bear the challenged burden in the context at issue; (2) whether the justification offered for the line drawing has a specific relationship to the classification’s context; and (3) whether the classification reflects disapproval, dislike, or stereotyping of the class of persons burdened by the legislation.” Suzanne Goldberg, Equality Without Tiers, 77 S. CAL. L. REV. 481, 533 (2004). Jennifer Hendricks, on the other hand proposes an approach she refers to as contingent equal protection analysis. Jennifer S. Hendricks, Contingent Equal Protection: Reaching for Equality After Ricci and Pits, 16 MICH. J. GENDER & L. 397, 399 (2010) (noting that contingent equal protection would use a single standard to adjudicate 3 different types of cases: “explicit race and sex classifications, facially neutral efforts to reduce inequality, and accommodation of sex differences to promote equality”).
5. This point was made by Justice Stevens in his opinion in Washington v. Davis. See Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (“Frequently the most probative evidence of intent will be objective evidence of what actually happened, rather than evidence describing the subjective state of mind of the actor. For, normally, the actor is presumed to have intended the natural consequences of his deeds.”).
involve overturning the opinion in *Washington v. Davis*. This step would also bring a measure of harmonization to antidiscrimination doctrine because it would mean that disparate impact claims, which are currently only statutorily authorized, would be constitutionally authorized as well.

Overturning *Washington v. Davis* would also mean discarding the much criticized single-actor/intentional discrimination standard. It makes no sense that outcomes along group lines are largely imagined as irrelevant if we cannot locate a specific government actor engaging in the specific intentional act of discrimination that produces the disadvantage. Studies of the effects of unconscious bias have existed long enough for us to seek ways to operationalize their meaning within the law. The Court will, however, need to train itself in the assessment of increasingly novel forms of social scientific evidence. Its previous track record in the area of considering such evidence, at least in the context of assessing racial equality, is mixed. In *Brown*, the Court probably overstated the value of the Clark doll studies in the interest of bolstering their claim that separate could never be equal. In *McCleskey*, however, the Justices dismissed fairly robust evidence of racial animus in death penalty jury decisions as representing correlation and rather than causation. Recently, sociologists and sociolegal scholars have called on social scientific studies to engage in more careful empirical assessments of how race is operating in and outside

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127 The Civil Rights Act of 1964 already allows employment discrimination claims premised upon disparate impact evidence. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). In a recent decision, however, at least one Supreme Court Justice surmised that perhaps this practice was no longer warranted. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681-82 (2009) (Scalia, J., concurring) (questioning the wisdom of allowing disparate impact to be considered *per se* proof of discrimination).
128 As one scholar has noted, "[t]he *Washington v. Davis* intent requirement segments discrimination into a myriad of discrete, individualized occurrences. This approach preserves liberal individualism at the expense of eradicating racial subjugation in all facets of American life." Powell, *supra* note 17, at 842 (footnotes omitted).
129 See *supra* notes 105-08 and accompanying text.
of the legal realm, and for courts to use such evidence to reach more equitable outcomes. While these suggestions are helpful for potentially producing more robust data, some attention also needs to be paid to educating courts on precisely how this evidence should inform their decisionmaking processes.

Additionally, it may be time to revisit our method for identifying which types of discrimination claims should be actionable. Scholars have suggested, for instance, that over time and depending on the historical treatment of a social group within society, we may wish to alter the groups for whom heightened scrutiny is applied. Suspect classifications and accompanying tiers of analysis (for particular groups), however, may not be the most effective ways to manage discrimination claims. A number of scholars have suggested alternative methods for managing the effects of difference. For example, in his book Prejudicial Appearances, Yale Law Dean Robert Post argued that modern American antidiscrimination law should not be conceived of as protecting those inhabiting particular identities but instead should focus on transforming social practices that define and sustain potentially oppressive categories.

University of Michigan Women’s Studies and Political Science Professor Anna Kirkland has made a similar point in her recent provocative book, Fat Rights. She also believes the import of minority group identity should be minimized in favor of more pragmatic queries. For example, in the employment area, we should query who ought to

132 See Laura Gomez, A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory, in THE BLACKWELL COMPANION TO LAW AND SOCIETY. 453, 455 (Austin Sarat ed., 2004) (encouraging a more meaningful relationship between critical race theorists and social scientists, so that within empirical studies, race will not be studied as "an easily measured independent variable"); Richard Lempert, A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009, 44 LAW & SOC’Y REV. 431, 458 (2010) ("Our community should also be empirically analyzing and critically examining the modern jurisprudence on race. What exactly are the drivers of the cases that have changed the equal protection and due process clauses from powerful weapons in the fight against discrimination to actual or potential brakes on what the law can accomplish?"); Melvin Thomas, Anything but Race: The Social Science Retreat from Racism, 6 AFR.-AM. RES. PERSP. (2000) (examining prominent theories and perspectives that illustrate the social science’s retreat from racism as the primary cause of black disadvantage), available at www.rcgd.isr.umich.edu/prba/perspectives/winter2000/mthomas.pdf.

133 See, e.g., Lempert, supra note 132, at 455–57.

134 See ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 42–47 (2001) (arguing that courts considering questions of antidiscrimination law should rely on sociological as well as doctrinal accounts in reaching their decisions).

135 In some ways this is the argument we made for reconciling the disparate constitutional treatment of race and class. See Barnes & Chemerinsky, supra note 3, at 129–33.

136 See William N. Eskridge, A Pluralist Theory of the Equal Protection Clause, 11 U. PA. J. CONST. L. 1239, 1249–51 (2009) (providing that due to the value of pluralism in our democracy and the Fourteenth Amendment’s anti-class (categorization) principle, social groups have an ability move from derided to protected status).

137 POST, supra note 134, at 10–22, 41–53.

possess workplace rights and how these rights should operate. In comparing the call for rights for obese citizens to the civil rights movement and the movement for women’s and disability rights, Kirkland deftly attempts to articulate those claims that antidiscrimination law appears capable of including and those that are discarded. She cautions that our laws have been too focused on protecting traits. Instead, we should use what she terms the “logic of personhood” to decide which bases for discrimination should be protected and to what extent. For her, difference is really the issue. At a minimum, those differences that are unduly stigmatized should at least be considered for protection by the Court.

These suggestions on how to define equality and remake equal protection analysis are not exhaustive. For example another approach might resurrect the Supreme Court’s discarded benign discrimination arguments. As we have argued previously, if we are not able to contextualize the formalist understanding of equality, it would be fairer to move to a framework reorganized around principles of distributive justice—where the government seeks to remedy real disparities across race, gender, and class, without attempting to assess whether it was membership within the minority category that necessarily caused the disadvantage.

V. CONCLUSION

How one interprets the concept of equality, both as a function of reading it across the Constitution or in relation to history, counts. For example, germane to this Essay, it matters what preexisting constitutional pronouncements the language of the Reconstruction Amendments was designed to alter. It also matters that we look to history to measure the
changed life circumstances the Amendments were designed to achieve—whether, in fact, the Framers were willing to give full effect to this goal or not. Further, one would imagine the Court would employ an analytical framework that would place these concerns at the fore, rather than obscure their relevance by relying on dubious neutrality principles. Failing to contextualize the substance and structure of equal protection analysis in this way, can be a problem. Not only do we struggle with assigning meaning, we end up with jurisprudential frameworks that produce painful results, in and outside of Fourteenth Amendment jurisprudence.¹⁴⁴

To the extent it can be effectively argued that it was unclear precisely what type of equality the drafters of the Reconstruction Amendments were attempting to create, the title of this Essay is a bit misleading. To refer to the “Once and Future Equal Protection Doctrine,” is after all to suggest that the Amendment will be restored to its original understanding or former glory. We are loath to stand firmly behind this claim because to do so would be to endorse an interpretation that espouses the values of equal treatment while absolutely maintaining a system of spoils managed through race. The return or restoration of which we speak is, however, giving effect to the idea that equality, however the concept is understood, must involve some attempt to take account of the prolonged, systematic mistreatment and disenfranchisement of particular social groups. To do so will almost always require a court to address the real-life circumstances of that group’s members and to assess the state’s role in creating or facilitating systemic and structural disadvantage, whether or not it was intended. This is the fading legacy of the Brown decision, but it also comports with what one would have expected the Framers to endorse in the late 1800s, if they were free of political (and social) constraints. The “return” then is actually a return to an idea of what the Reconstruction Amendments could have achieved shortly after ratification, and could still achieve now if we are willing to consider the enormous scope of what remains to be done in the name of equality—in terms of ensuring political, civil, and social rights. Current Supreme Court jurisprudence seems uninterested in these questions, but perhaps in the future the Court will pay greater attention to the debilitating effects of difference and spend less effort on reifying transcendence narratives.

¹⁴⁴ See Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (per curiam) (overruling a three-judge panel). This recent voting rights case involved a challenge that a disenfranchisement law was violative of the Voting Rights Act, where it resulted in the loss of voting rights—due to criminal convictions—for twenty-four percent of Washington state’s African American men. In an analysis eerily similar to the opinions in Washington v. Davis and McCleskey, the Ninth Circuit Court of Appeals ruled that while the criminal justice system included racial discrimination, it could only act upon intentional discrimination. Id. at 993–94.