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Juridical Subordination

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INTRODUCTION

Brown v. Board of Education[1] is a landmark Supreme Court case, one of the most important cases the Court has ever decided.[2] While scholars have debated *Brown*'s meaning, we believe the case, at bottom, stands for racial advancement through the law. Explicitly going against its own history of juridical subordination—judicial decision-making that persistently suppresses the black equality interest in civil rights law[3]—the Court in *Brown*—by which we mean *Brown I*[4] and not *Brown II*[5]—became an unabashed supporter of racial advancement. For the first time in its history, the Supreme Court saw racial advancement as good social policy.[6] And it believed that a civil rights norm of equal rights, what scholars call *formal equal opportunity*, was the best strategy for pursuing racial advancement.[7]

But does formal equal opportunity remain good social policy today? Are African Americans, or blacks, who were the Court's primary concern,

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. The case revolutionized racial relations in our society and made our society more democratic than it otherwise would have been. *See infra* Part I.C.

3. *See infra* Part II.

4. *Brown*, 347 U.S. 483.

5. In *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955), the Court undercut the effectiveness of *Brown I* by ruling that the defendants need not implement its desegregation order immediately, but should proceed "with all deliberate speed." In making this ruling, the Court "sacrificed its integrity in a futile effort at appeasement. . . . Instead of easing desegregation, the Supreme Court's 1955 'all deliberate speed' ruling in *Brown II* emboldened southern congressmen and state officials to call for defiance." ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 132, 147 (2005). Judge Carter was one of the National Association for the Advancement of Colored People (NAACP) lawyers who argued *Brown* before the Supreme Court. *Brown*, 347 U.S. at 484.

6. *See infra* Part I.C.2.

7. *See infra* Part II.A.

better off today if the Court continues to vindicate formal equal opportunity in today's society? What choices are available to the Court?

These questions arise from the fact that the racial dynamics of American society have changed. They are significantly different today, in our post-civil rights society, than they were at the time of *Brown*, 1954. The separate–but–equal doctrine, also known as *Jim Crow*, which had governed race relations since the nineteenth century, ended with the passage of the Equal Employment Opportunity Act of 1972.[8] The Civil Rights Movement ended around that time as well.[9] Today, blacks have experienced unprecedented success individually, including the election and reelection of a black President of the United States. Yet, capital deficiencies continue to mark the lives of the vast majority of African Americans.[10] Although formal equal opportunity was seen as an effective and fair response to Jim Crow, many scholars today question its soundness in our current racial environment.[11] If *Brown* in spirit stands for racial advancement through the Supreme Court's vindication of the black equality interest in civil rights cases—in other words, the *avoidance* of juridical subordination—then formal equal opportunity may not be a sound post-civil rights theory on which the Court should rely. It may, in fact, be a racially subordinating norm.

That is, however, a difficult determination to make. There is more than one way to define the black equality interest in civil rights law. This was so even in 1954. *Brown*'s civil rights theory of formal equal opportunity tendered two potentially competing definitions of the black equality interest—racial omission and racial integration.[12] In this post-civil rights period, other constructions of the black equality interest have emerged—racial solidarity and social transformation—to present formidable challenges to formal equal opportunity.[13] Many, if not most, civil rights scholars today subscribe to either of these definitions.[14]

The purpose of this Article is to play out the various conceptualizations of the black equality interest in post-civil rights America. How is the

8. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1973) (codified as amended at 42 U.S.C. §§ 2000e-1 to -17 (2012)).

9. *See* ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA, at xii (2009).

10. *See id.* at 125–82.

11. *See infra* Part II.B.1.

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. This is our estimate based on casual discussions with other civil rights scholars, the many scholarly conferences critical theorists hold each year, and a perusal of the civil rights articles written each year.

claim of juridical subordination manifested in current Supreme Court cases, and what might civil rights law look like if the Court were to avoid juridical subordination? Our ambition is not to analyze every landmark Supreme Court civil rights case—page limitations prevent us from doing that—but to provide a framework for analysis, setting the table for the juridical subordination inquiry. Furthermore, we do not here attempt to reconcile the disparate ways in which the black equality norm is defined, because that might preempt important discussion that needs to take place before any such attempt is made.[15]

We begin with a discussion of the Supreme Court's inglorious racial history, which forms the backdrop for the *Brown* opinion, and then proceed to a discussion of the *Brown* opinion itself (Part I). The former discussion not only lays the foundation for our assessment of the motivation behind the Court's desegregation ruling in *Brown*, but also educates those who live with the misconception that the Supreme Court has been an unwavering champion of racial advancement. It has not; hence the strict scrutiny it receives to this day from civil rights scholars. Finally, we discuss the elements of juridical subordination—the black equality interest and implementing law—looking at both the civil rights and post-civil rights periods (Part II).

I. THE SPIRIT OF *BROWN*

A. The Supreme Court's Inglorious Racial History

The post-Civil War amendments to the Constitution—the Thirteenth Amendment,[16] Fourteenth Amendment,[17] and Fifteenth Amendment[18]—give evidence of the American people's—the Union's—commitment to

15. *See infra* Conclusion.

16. U.S. CONST. amend. XIII. Section One of the Thirteenth Amendment abolished slavery in the United States, and Section Two gives Congress the power to enforce Section One through legislation. *Id.*

17. U.S. CONST. amend. XIV. Section One of the Fourteenth Amendment declares that "[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. 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." *Id.* § 1. Section Five of the Fourteenth Amendment gives Congress the power to enforce the Fourteenth Amendment through legislation. *Id.* § 5.

18. U.S. CONST. amend. XV. Section One of the Fifteenth Amendment declares that a citizen may not be denied the right to vote based on race, color, or previous condition of servitude. *Id.* § 1. Section Two gives Congress the power to enact legislation to enforce Section One. *Id.* § 2.

racial equality during the postbelleum period.[19] So difficult and burdensome is the passage of a constitutional amendment, requiring a two-thirds majority in both the House and Senate plus ratification by three-quarters of the state legislatures,[20] that, more than the enactment of a statute,[21] it reflects the most serious attention and consideration the American people can give to law making. The national dedication to racial equality after the Civil War is futher indicated by the passage of a series of postamendment federal statutes designed to enforce the Reconstruction

19. By Lincoln's Second Inauguration, the purpose of the Civil War for the North had changed from a war to save the Union to one to end slavery. *See generally* JAMES M. MCPHERSON, FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR (1997) (noting that the soldier vote overwhelmingly supported abolition when Lincoln was reelected). Union soldiers returning from the South had reported the horrors of slavery to their fellow citizens, and many soldiers reenlisted. *See generally id.* The defeated South, which had rejected black rights, was forced to rejoin and to embrace the ideal of racial advancement; hence, the Reconstruction Amendments. For example, "Illinois, so notorious for antiblack racism before the war and anti-emancipation legislation during the war, repealed its 'Black Laws' in 1865 and was the first state to ratify the new Thirteenth Amendment." ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 232–33 (2004). At the time of his death, Lincoln believed in racial equality, and the nation through the enactment of the Reconstruction Amendments had followed him to that position. *See id.* at 250.

20. U.S. CONST. art. V.

21. Before being passed into law, statutes are bills. *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, http://www.house.gov/content/learn/legislative_process/ [http://perma.cc/KGF6-FHHK] (last visited Nov. 5, 2015). Bills may originate in either the House of Representatives or the Senate, and a representative or senator must sponsor the bill. *Id.* Next, a committee is assigned to review the bill. *Id.* If the committee releases the bill, it is voted on by members of the Congressional house in which it originated. *Id.* If the bill passes by a simple majority, the bill then moves to the other Congressional house where it is reviewed by another committee and voted upon if released by that committee. *Id.* If the bill passes by a simple majority in that house, members of both the Senate and House of Representatives work together to create the final bill by fixing differences in the versions of the bill passed by each house. *Id.* The final product is again voted on by members of the House of Representatives and the Senate. *Id.* If passed by a simple majority in both houses, the bill is sent to the President, who may sign the bill into law or veto it within ten days. *Id.*; *see also* CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 108–93 (2003) (outlining the steps of federal law making).

Amendments. These criminal[22] and civil[23] statutes empowered the federal courts to hold individuals and institutions accountable to the amended Constitution. Like the Reconstruction Amendments, these early civil rights statutes informed the civil rights statutes enacted during the 1960s

22. Congress enacted 18 U.S.C. § 241 (2012) to offer some protection to African Americans from intimidation and attack by white supremacist groups. Section 241 made it illegal for two or more people to "conspire to injure, oppress, threaten, or intimidate any person" for exercising a federal right. *Id.* The punishment for violating section 241 included monetary fines and up to ten years in prison or life imprisonment if the criminal act resulted in death. *See* Enforcement Act of 1870, ch. 114, §§ 4–6, 16 Stat. 140, 141 (codified as amended at 18 U.S.C. § 241 (2012)). Congress also enacted 18 U.S.C. § 242 (2012), which prohibited a person from willfully depriving any person in any state, territory, commonwealth, or district of any rights, privileges, or immunities secured or protected by the Constitution or federal laws. Those who violate section 242 face jail time or fines. 18 U.S.C. § 242 (2012); *see also* ROY L. BROOKS ET AL., THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES 744 (2011) (discussing sections 241 and 242).

23. Congress passed section one of the Civil Rights Act of 1866, which provided that every person born in the United States, regardless of race or color, has the same right within the United States to make and enforce contracts; to sue and be sued; to give evidence in court; to inherit, purchase, sell, lease, or convey real and personal property; and to receive full and equal benefit of all laws and proceedings as are enjoyed by white citizens. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (reenacted by the Enforcement Act of 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144 and codified as slightly amended at 42 U.S.C. § 1981 (2012)). The right to "inherit, purchase, lease, sell, hold, and convey real and personal property" was additionally protected by codification as 42 U.S.C. § 1982 (2012); *see also* BROOKS ET AL., *supra* note 22, at 289 (discussing section 1982).

Additionally, 42 U.S.C. § 1983 (2012), originally section one of the 1871 Civil Rights Act (passed three years after the enactment of the Fourteenth Amendment) provides a civil remedy for persons deprived of their rights. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13. The statute states that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983 (2012). Congress also enacted section 1985(3) as part of the 1871 Civil Rights Act. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, 13–14. Section 1985(3) allows the recovery of damages from persons who conspired to deprive "any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3) (2012); s*ee also* Roy L. Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 258–66 (1977) (discussing the history and implementation of 42 U.S.C. §§ 1983, 1985(3), and 1981). Further, Congress enacted the Civil Rights Act of 1875, which prohibited racial discrimination in juries, schools, transportation, and public accommodations. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336. For a discussion of the legislative history of the Civil Rights Act of 1875, see Aderson Bellegarde François, *The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy, and Affirmative Action*, 57 HOW. L.J. 573 (2014).

Civil Rights Movement.[24] None of this seemed to matter to the Supreme Court.

Rather than treating the Reconstruction civil rights laws as a bulwark of racial justice, the Supreme Court used these laws to shackle the recently emancipated enslaved to second-class citizenship. Indeed, the Court's civil rights jurisprudence had changed little from the antebellum period and would remain essentially the same until liberated by *Brown v. Board of Education* in 1954. Throughout the South and, to a lesser extent, in other regions of the country, blacks could not attend the best public schools, use the cleanest public restrooms or drinking fountains, occupy the best seats on streetcars or in theatres, vote in elections, or sit on juries.[25] Blacks were accorded neither due process nor equal protection of the laws. Segregation and racial discrimination were so widespread across the nation that they can hardly be called aberrations of the South. They were part of our national legal narrative, largely written by the Supreme Court.[26] As Lawrence Goldstone observes:

> The descent of the United States into enforced segregation, into a nation where human beings could be tortured and horribly murdered without trial, is a story profoundly tragic and profoundly American. And the Supreme Court was a central player in the tale.[27]

Was the Court's complicity in the subversion of racial equality the work of a few rogue justices, a judicial irregularity, or was it an ongoing pattern and practice of judicial decision-making at the highest reaches of our judiciary?[28] There were simply too many cases both predating and postdating the Reconstruction civil rights laws to call the Court's sabotage

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24. *See* United States v. Price, 383 U.S. 787, 790, 805–06 (1966) (holding that the defendants, a sheriff and his coconspirators, could be convicted under 18 U.S.C. § 241 for depriving three victims of their federal due process rights by the sheriff's releasing the victims from jail in the middle of the night, so that the coconspirators could intercept the victims as they attempted to leave the area, assault them, and shoot them to death); BROOKS ET AL., *supra* note 22, at 849–50 (explaining how the Supreme Court reinvigorated 42 U.S.C. § 1983 in 1961 in *Monroe v. Pape*, 365 U.S. 167, and reinvigorated 42 U.S.C. § 1985(3) in 1971 in *Griffin v. Breckinridge*, 403 U.S. 88).

25. *See* Leland Ware & Theodore J. Davis, *Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama*, 55 HOW. L.J. 533, 533–34 (2012).

26. *See, e.g.*, JASON SOKOL, ALL EYES ARE UPON US: RACE AND POLITICS FROM BOSTON TO BROOKLYN, at xxii–xxvi (2014) (showing that northerners supported high-achieving blacks individually but opposed civil rights for blacks collectively).

27. LAWRENCE GOLDSTONE, INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1903, at 12 (2011).

28. *See id*. at 13.

of racial equality a judical hiccup. The historical record leads to no other conclusion.

1. Dred Scott v. Sandford

Dred Scott v. Sandford,[29] a case that predates the post-Civil War laws, is without a doubt the most infamous of the Court's decisions. To understand *Dred Scott*, as well as the jurisprudence of racial justice the Supreme Court could have imbibed, one must first understand a famous English precedent, *Somerset v. Stewart*,[30] written by the distinguished English jurist Lord Mansfield.

James Somerset was an enslaved American brought to England by his master, Charles Stewart.[31] The slave escaped and was recaptured, setting off a long period of litigation regarding his status.[32] Lord Mansfield ruled that slavery was "[s]o high an act of dominion, . . . so odious, that nothing can be suffered to support it, but positive law."[33] Finding no positive law—no statutory law—in England authorizing slavery, the court set Somerset, the slave, free.[34] But the significance of the ruling extends beyond the facts of the case. The court established the precedent in Anglo-American law that a slave became free upon coming into a nonslaveholding jurisdiction because of the absence of positive law authorizing slavery therein.[35]

Fast forward to the *Dred Scott* case. In this 1856 case, a runaway slave took up residency in the "free" state of Illinois.[36] Once there, he invoked the *Somerset* precedent. Rather than deciding the substantive issue, Chief Justice Taney, writing for the Supreme Court, decided the case on procedural grounds, ruling that Dred Scott, even though he resided in Illinois for four years, was not a citizen of the state and, hence, could not

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29. 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

30. (1772) 98 Eng. Rep. 499; Lofft. 1.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 510, Lofft. At 19. For further discussion of Lord Mansfield's opinion, see, for example, STEVEN M. WISE, THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY 179–82 (2005).

35. *See, e.g.*, ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, SLAVE NATION: HOW SLAVERY UNITED THE COLONIES & SPARKED THE AMERICAN REVOLUTION 11–12 (2005) (explaining the lack of enthusiasm in England for slaveholding at the time of *Somerset*); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 313–68 (3d prtg. Aug. 1978) (describing *Somerset*'s holding that freedom is the default).

36. Dred Scott v. Sandford, 60 U.S. 393, 431 (1856).

invoke the federal court's diversity jurisdiction.[37] In other words, the federal courts lacked authority to decide the case. To cut off the prospect of Dred Scott suing in state court, the Supreme Court went on to rule *sua sponte* that blacks were "regarded as beings of an inferior order . . . unfit to associate with the white race" and, as such, "they had no rights which the white man was bound to respect."[38] The Court concluded, "the negro might justly and lawfully be reduced to slavery for his benefit."[39] These words come from the highest court in the land. The Court's ruling not only precluded an action from being filed in state court, but it also overturned the Missouri Compromise of 1820, which had divided new states between slave and free states, on the ground that it violated Fifth Amendment substantive due process rights by allowing a slave to shed his status as property upon stepping into a free state.[40] Taken together, *Somerset* and *Dred Scott* underscore an essential teaching about Anglo-American law—to wit, law is less a body of rules than a state of mind.

Starting in the late nineteenth century, the Supreme Court issued decision after decision crippling rights African Americans had just acquired under the Thirteenth, Fourteenth, and Fifteenth Amendments.[41] With few exceptions, the civil rights decisions issued prior to *Brown v. Board of Education* established and exposed the Supreme Court's inglorious racial history.[42]

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37. *Id.* at 427.
38. *Id.* at 407.
39. *Id.* at 408.
40. *Id.* at 452. For further discussion, see BLUMROSEN & BLUMROSEN, *supra* note 35, at 249–51. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (examining in depth "the most famous of all American judicial decisions").
41. *See, e.g.*, Giles v. Harris, 189 U.S. 475, 486, 488 (1903) (upholding the application of state law to bar African Americans from voting); Williams v. Mississippi, 170 U.S. 213, 225 (1898) (holding literacy tests and poll taxes constitutional); Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (finding separate–but–equal facilities constitutional), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954); The Civil Rights Cases, 109 U.S. 3, 25 (1883) (invalidating the Civil Rights Act of 1875); United States v. Cruikshank, 92 U.S. 542, 554 (1875) (overturning convictions of white supremacists); United States v. Reese, 92 U.S. 214, 221 (1875) (holding act penalizing denial of the right to vote unconstitutional).
42. Between 1875 and 1954—the year it decided *Brown v. Board of Education*—the Supreme Court issued a limited number of positive civil rights decisions. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71, 73 (1932) (reversing the criminal convictions and death sentences of nine African American males convicted of rape and holding that a trial court's failure to give defendants charged with capital offenses reasonable time to secure

2. United States v. Cruikshank

In *United States v. Cruikshank*, the Supreme Court undermined African Americans' ability to protect themselves against injustices committed by private citizens.[43] The Court was called upon to review the criminal convictions of three white defendants who had been found guilty of violating the Enforcement Act of 1870, also known as the First Ku Klux Klan (KKK) Act.[44] The defendants had participated in a brutal attack on African Americans in what became known as the "Colfax Massacre."[45] This massacre took place in Louisiana,[46] only three years after ratification of the last of the Reconstruction Amendments, the Fifteenth Amendment,[47] and was instigated by the events following Louisiana's widely contested 1872 gubernatorial election.[48] Both the Republican and Democratic candidates claimed to have won the election.[49] To the chagrin of white Democrats and the delight of African Americans, a Republican federal judge determined the Republican candidate, William P. Kellogg, was the victor.[50] In rebellion, a group of white Democrats, including many white supremacists, seized

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counsel or to appoint effective counsel violated the due process clause of the Fourteenth Amendment); Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (holding unconstitutional West Virginia's statute that categorically excluded African Americans from serving on juries purely based on their race), *abrogated by* Taylor v. Louisiana, 419 U.S. 522, 536 n.19 (1975).

43. *Cruikshank*, 92 U.S. 542.

44. *See infra* note 56 for the relevant portion of the Act.

45. *Cruikshank*, 92 U.S. at 544–45; GOLDSTONE, *supra* note 27, at 91 (citing United States v. Cruikshank, 25 F. Cas. 707, 708) (C.C.D. La. 1874) (No. 14,897)).

46. GOLDSTONE, *supra* note 27, at 88.

47. U.S. CONST. amend. XV, § 1 (stating that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). The Fifteenth Amendment was ratified on February 3, 1870.

48. GOLDSTONE, *supra* note 27, at 88; *see also* JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO *BROWN* 94 (1999) ("The apocalypse at Colfax had grown out of the ongoing struggle for political control of the South. Local white sentiment strongly supported the Democratic Party and a vision of the racial order[,] which subordinated blacks to white domination. In pursuit of this vision, white factions had resorted to violence.").

49. GOLDSTONE, *supra* note 27, at 88. Immediately following the passage of the Reconstruction Amendments, Republican candidates committed to racial advancement were elected and took over the government in Louisiana. Kevin Boyle, *White Terrorists*, N.Y. TIMES (May 18, 2008), http://www.nytimes.com/2008/05/18/books/review/Boyle-t.html?pagewanted=all&_r=0 [http://perma.cc/LER6-VWQG]. White Democrats responded by threatening and brutally attacking black and white Republicans in order to keep them from voting in the 1872 gubernatorial election. *Id.*

50. GOLDSTONE, *supra* note 27, at 88. President Grant authorized federal troops to enforce the federal order that Kellogg be seated as Louisiana's governor and to protect the new Republican government. CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 13 (2008).

the Colfax courthouse in an attempt to set up their own government but were forced out by African Americans.[51] On April 13, 1873, a mob of whites armed themselves and marched on the Colfax courthouse, then occupied by black Republicans.[52] Outgunned, the African Americans surrendered to the white mob and turned over their weapons.[53] Nevertheless, the white mob set the courthouse on fire and began slaughtering African Americans.[54] Hours after the attack had begun, approximately 100 African Americans lay dead—burned alive in the courthouse, attacked outside its doors, and hunted down in the surrounding woods.[55]

In response to the Colfax Massacre, nearly 100 of the white attackers were indicted for violating section six of the Enforcement Act.[56] Of the nearly 100 people indicted, only three were convicted.[57] On appeal, the

51. GOLDSTONE, *supra* note 27, at 88–89.

52. *Id.* at 88. The number of white attackers varies by source. *See id.* (reporting that more than 250 armed white men attacked approximately 150 African Americans). *But see* LANE, *supra* note 50, at 91 (stating that approximately 140 white men provoked the Colfax Massacre).

53. GOLDSTONE, *supra* note 27, at 89.

54. *Id. But see id.* (reporting that white attackers claimed their killings were instigated when an African American shot and killed their captain).

55. *Id. But see* LANE, *supra* note 50, at 265 (estimating that between sixty-two and eighty-one African Americans were killed in the Colfax Massacre).

56. United States v. Cruikshank, 25 F. Cas. 707, 708 (C.C.D. La. 1874) (No. 14,897) (citing Enforcement Act of 1870, ch. 114, 16 Stat. 140 (codified as amended at 18 U.S.C. § 241 (2012))). The Enforcement Act was a bulwark for the Fourteenth and Fifteenth Amendments. It sought to ensure that Reconstruction laws were respected by criminally sanctioning persons who conspired to interfere with another citizen's federally guaranteed rights. GOLDSTONE, *supra* note 27, at 91. For further discussion on the purpose of the Enforcement Act, see Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 CHI.-KENT L. REV. 1013, 1013, 1022–32 (1995). Section six of the Enforcement Act stated "[t]hat if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.'" United States v. Cruikshank, 92 U.S. 542, 548 (1875) (quoting Enforcement Act of 1870, § 6). The defendants "were not charged with murder, [because] jurisdiction for that crime lay specifically with the states." GOLDSTONE, *supra* note 27, at 91.

57. *Cruikshank*, 25 F. Cas. at 708.

Supreme Court reversed the defendants' convictions, holding, in part, that the Fourteenth Amendment applied only to states, not to private actors.[58]

The Court began by explaining that, in order for a defendant to be found guilty of violating the Enforcement Act, he must have banded together or conspired to violate a right "granted or secured by the constitution or laws of the United States."[59] However, this prohibition did not apply to everyone. Because the Enforcement Act was predicated on the Fourteenth Amendment, it could not protect against a private citizen's violation of one's fundamental rights.[60] It only protected against state interference.[61] The Court thus articulated the state action doctrine.[62] Because the Fourteenth Amendment created no new rights between private individuals, states retained jurisdiction over actions between individuals. Thus, the Enforcement Act was inapplicable to the facts of this case.[63]

Similarly, the Court dismissed other charges in the indictment on the basis that the charges failed to allege that the defendants had violated rights secured by the Constitution or federal laws.[64] For example, the justices ruled the Fifteenth Amendment was inapplicable because it protected against discrimination in exercising the right to vote.[65] In contrast, affirmative voting rights are state-created. Because the indictment did not specifically state that, the defendants had intended to interfere with voting

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58. *Cruikshank*, 92 U.S. at 554, 559; *see also* HOWARD, *supra* note 48, at 100 ("The record does not indicate that William Cruikshank or his companions were men of means[,] yet the defense team numbered in its ranks John A. Campbell, architect of the butchers' *Slaughterhouse* argument and former member of the Supreme Court, and David Dudley Field, brother of then sitting Justice Stephen Field. Money raised from Klan sympathizers . . . probably also paid for the lawyers defending Cruikshank and his codefendants.").

59. *Cruikshank*, 92 U.S. at 549.

60. *Id.* at 554. *But see* Wilson R. Huhn, *The Legacy of* Slaughterhouse*,* Bradwell*, and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1074–78 (2009) (arguing that the Fourteenth Amendment was, in fact, intended to apply to acts of discrimination committed by private individuals).

61. *Cruikshank*, 92 U.S. at 554. Specifically, the Court stated "[t]he fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." *Id.*

62. *The Evolution of the State Action Doctrine and the Current Debate*, 123 HARV. L. REV. 1255, 1255 (2010); *see id.* at 1256–58, for a discussion of the state action doctrine's development.

63. *Cruikshank*, 92 U.S. at 554.

64. *See, e.g.*, *id.* at 551–52 (stating that the right to assemble was not created by the First Amendment and that the First Amendment only protects against congressional interference on that right); *id.* at 553 (stating that the right to bear arms was not created by the Second Amendment, which only protects citizens against federal encroachment).

65. *Id.* at 555–56.

rights *based on their race*, the defendants had not violated a federal right and, by extension, the Enforcement Act.[66]

The Court reversed the convictions of the white defendants based on flaws in the indictment in alleging a violation of federal law. Yet, the Court should have seen that the case implicated state action because the massacre was all about political power and, in addition, it could not have happened without the assistance of local authorities. The KKK always acts with local authority working behind the scenes. At the very least, the Court should have remanded the case to determine the extent to which local authorities had participated in or sanctioned the massacre. That would have brought the case within the state action doctrine. Failing to do so, the *Cruikshank* Court failed on both a case-specific and a global level. That is, it failed to secure justice for African Americans who had been slaughtered in Colfax, and it opened the door to the Jim Crow Era. The state action doctrine itself is quite problematic. It limits the Bill of Rights and Fourteenth Amendment, leaving the former slaves to the mercy of their former slaveholders and white supremacists. Withdrawing federal protection made it open season on blacks in the southern states at the hands of private citizens, who often acted under the closet authority of public officials.[67] Similarly, the massacre was, at bottom, about political power and the exercise of the franchise by blacks. It was about the integrity of the recently passed Fifteenth Amendment. Had there not been a gubernatorial election in which blacks voted for the first time, there would not have been a massacre of blacks. Federal rights were certainly implicated in *Cruikshank*, but the Court was too blind to see them.

3. United States v. Reese

In *United States v. Reese*, the Supreme Court further undermined African Americans' rights by invalidating sections of the Enforcement Act that criminalized unlawful interference with voting.[68] In *Reese,* the Supreme Court questioned whether two southern election officials could be punished under the Enforcement Act for refusing to allow William

66. *Id.*

67. *See Lynching Statistics by Year,* U. OF MO.-KAN. CITY, http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html [http://perma.cc/BK65-QERH] (last visited Nov. 5, 2015) (reporting the high volume of black lynchings that occurred, especially in the 1890s).

68. United States v. Reese, 92 U.S. 214, 221 (1875).

Garner, a qualified African American voter, to partake in a municipal election in Kentucky.[69] The election officials claimed they did not allow Garner to vote because he had failed to pay the required $1.50 poll tax.[70] Garner countered that he had attempted to pay the poll tax, but his payment had been refused.[71] The officials were indicted for violating the Enforcement Act, which provided federal punishment for interfering with a citizen's Fifteenth Amendment voting rights.[72]

On review, the Supreme Court examined whether the election officials could be indicted under the third and fourth sections of the Enforcement Act.[73] Section three prohibited an election official from wrongfully refusing to receive or count the vote of an eligible voter who presented an affidavit stating that a different state official had unreasonably failed to register that voter.[74] Essentially, section three protected the voting rights of eligible voters who had followed voting registration instructions but nonetheless had been wrongly turned away. Section four promised punishment to any person who used "force, bribery, threats, intimidation, or other unlawful means . . . to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote[]or from voting."[75]

The Court began by noting that Congress's power to create legislation governing state elections came from the Fifteenth Amendment.[76] Next, it explained that the Fifteenth Amendment prohibited interfering with an eligible citizen's voting rights *based on race, color, or previous condition*

69. *Reese*, 92 U.S. at 215. Kentucky was a slave state that remained loyal to the Union during the Civil War. HOWARD, *supra* note 48, at 105. About 60,000 Kentucky residents served in the Union army, whereas 30,000 joined the Confederate army. *Id.* Despite its loyalty to the North, "pro-Union white sentiment [in Kentucky] was neither opposed to slavery nor supportive of black rights." *Id.*

70. *Reese*, 92 U.S. at 224–25 (Clifford J., dissenting). In response to the North's Reconstruction efforts, many Southern states adopted poll taxes, which required eligible voters to pay a fee in order to vote. *See* David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 388–89 (2011). Poll taxes were used to prevent African Americans and poor whites from voting. *Id.* at 386–91.

71. *Reese*, 92 U.S. at 224–25 (Clifford, J., dissenting).

72. *Reese*, 92 U.S. at 216–17 (quoting Enforcement Act of 1870, ch. 114, 16 Stat. 140 (codified as amended at 18 U.S.C. § 241 (2012))).

73. *Id.* (quoting §§ 3–4, 16 Stat. at 140–41). "The importance of *Reese* was reflected in the fact that more than forty cases were being held in abeyance pending the Court's decision relative to William Garner's claim" in *Reese.* HOWARD, *supra* note 48, at 107.

74. *Reese*, 92 U.S. at 216–17 (quoting § 3, 16 Stat. at 140–41).

75. *Id.* at 217 (quoting § 4, 16 Stat. at 141).

76. *Id.* at 218.

of servitude.[77] If the Enforcement Act punished voting interference more broadly than the Fifteenth Amendment, the Court would find the act "unauthorized."[78] Finding that the third and fourth sections of the Enforcement Act were broader in scope than the Fifteenth Amendment, the Court declared those sections unconstitutional.[79] These sections of the Enforcement Act criminalized *any* unlawful interference with voting rights, whereas the Fifteenth Amendment only criminalized interference with voting rights that had been motivated by race.[80] Thus, the Court found that Congress, through the Enforcement Act, had penalized acts outside of its jurisdiction, rendering the entirety of each section invalid.[81] Because the sections of the Enforcement Act prohibiting voting interference were unconstitutional, the Court found there was no federal law under which the election officials could be charged. For that reason, it sustained the defendants' demurrers.[82]

With the stroke of the pen, the *Reese* Court wiped away federal voting protection for African Americans. The Court could have construed sections three and four in ways that brought them within the scope of the Fifteenth Amendment, such as by ruling that, as applied to the facts of *Reese*, these sections were limited to race. Race clearly motivated the election officials to deny the right to vote in this case. Moreover, when the Act is read in its entirety, there is little doubt that Congress intended to limit sections three and four to race-based voting violations. As the dissent pointed out:

> [T]he intention of Congress on this subject is too plain to be discussed. The Fifteenth Amendment had just been adopted, the object of which was to secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition. The act is entitled "An Act to

77. *Id.* at 217–18. The Court noted that if the interference was not motivated by race, color, or previous condition of servitude, Congress had no power to punish. *Id.* at 218.

78. *Id.*

79. *Id.* at 220–21 (discussing §§ 3, 4, 16 Stat. 140–41); *see also* HOWARD, *supra* note 48, at 108 (explaining the Court's rationale that the Fifteenth Amendment gave Congress power to legislate against racial discrimination, but sections three and four of the Enforcement Act punished wrongful acts not necessarily motivated by racial animus, thus rendering the sections defective).

80. *Reese*, 92 U.S. at 220.

81. *Id.* at 221. The Court also declined to enforce the parts of the Enforcement Act it found legitimate in favor of striking down the whole act. "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.*

82. *Id.* at 221–22.

> enforce the right of citizens of the United States to vote in the several states of the Union, and for other purposes." The first section contains a general announcement that such right is not to be embarrassed by the fact of race, color, or previous condition. The second section requires that equal opportunity shall be given to the races in providing every prerequisite for voting, and that any officer who violates this provision shall be subject to civil damages to the extent of $500, and to fine and imprisonment. To suppose that Congress, in making these provisions, intended to impose no duty upon, and subject to no penalty, the very officers who were to perfect the exercise of the right to vote,—to wit, the inspectors who receive or reject the votes,—would be quite absurd.[83]

By invalidating sections three and four of the Enforcement Act in their entirety, the Court eliminated the only legislation reinforcing and supporting the black Americans' newfound voting rights.[84] Again, the Court signaled it was open season for white supremacists to intimidate, threaten, and thwart racial advancement in this country.

4. The Civil Rights Cases

In the *Civil Rights Cases,* the Supreme Court declared that sections of the Civil Rights Act of 1875, securing equal treatment for African Americans in public accommodations, were unconstitutional.[85] Five similar lawsuits were consolidated in this case.[86] Essentially, five African American plaintiffs had all filed separate lawsuits alleging that certain hotels, theaters, and public transit companies had violated the Civil Rights Act of 1875 by denying them services or banning them from areas reserved for whites.[87] Section one of the Civil Rights Act of 1875 stated that:

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83. *Id.* at 241 (Hunt, J., dissenting) (discussing §§ 1–2, 16 Stat. 140).

84. "The impact of *Cruikshank* and *Reese* was immediate, practical, and devastating. The 1876 presidential election was months away." HOWARD, *supra* note 48, at 109. In 1874, almost one thousand cases were filed in the South alleging violations of the Enforcement Acts. *Id.* In 1875, after both *Reese* and *Cruikshank* were decided, that number fell to about two hundred suits. *Id.* (citing ALLEN W. TRELEASE, WHITE TERROR 385 n.2 (paperback ed. 1995)).

85. The Civil Rights Cases, 109 U.S. 3, 4, 25 (1883) (citing the Civil Rights Act of 1875, ch.114, 18 Stat. 335).

86. *Id.* at 4–5; *see also* HOWARD, *supra* note 48, at 124–25 ("The cluster of suits that became the *Civil Rights Cases* illuminated the meaning of racial caste distinctions in the everyday lives of blacks and whites . . . . It was a case [that] also went to the feeling and tone of everyday life for blacks.").

87. *The Civil Rights Cases*, 109 U.S. at 4–5. One of the five plaintiffs did not report his race. That plaintiff brought suit against the Grand Opera House in New York "for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater[.]" *Id.* at 4; *see also* HOWARD, *supra* note 48, at 126–27 (reporting that the plaintiff known as Mr. William R. Davis, a twenty-six-year-old African American man, had purchased tickets to the opera knowing he would not be admitted to test the opera house's discriminatory policy, much like Homer Plessy would later test Louisiana's public transportation laws).

> 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; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[88]

Section two of the Act imposed a punishment on any person who violated section one.[89] Under section two, a person who violated section one of the Civil Rights Act would have to pay $500 in damages to the person he had wronged, receive a misdemeanor conviction, and pay an additional fine or be given a minimum of thirty days of imprisonment.[90]

The Court had to determine whether sections one and two were constitutional under the Thirteenth and Fourteenth Amendments.[91] First, the Court held that sections one and two were not constitutional under the Fourteenth Amendment.[92] As it had in *Cruikshank*,[93] the Court stated that the Fourteenth Amendment only limited state action, not the actions of private citizens.[94] Because the Civil Rights Act regulated individual citizens' actions, the Court found the Act to be outside the scope of powers granted by the Fourteenth Amendment and thus unconstitutional.[95] As to the Thirteenth Amendment, the Court came to the same conclusion.[96] While "[C]ongress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents,"[97] refusing service to a person based on their skin color "ha[d] nothing to do with slavery or involuntary servitude" and was not akin to a badge of slavery, the Court ruled.[98] Thus, the ability to redress private citizens' refusal of service to African Americans was outside Congress's power and instead lay with the state.[99] Because the Court found that the Thirteenth and Fourteenth Amendments did not confer upon Congress the

88. *The Civil Rights Cases*, 109 U.S. at 9 (quoting § 1, 18 Stat. at 336).
89. *Id.* (quoting § 2, 18 Stat. at 336).
90. *Id.* (quoting § 2, 18 Stat. at 336).
91. *Id.*
92. *Id.* at 19.
93. *See supra* text accompanying notes 43–67.
94. *The Civil Rights Cases*, 109 U.S. at 11.
95. *Id.* at 19.
96. *Id.* at 24–25.
97. *Id.* at 21.
98. *Id.* at 24.
99. *Id.*

authority to create sections one and two of the Civil Rights Act of 1875, the Court declared those sections void.[100]

Justice Harlan filed a strong dissenting opinion in which he argued that the Civil Rights Act of 1875 was not unconstitutional under the Thirteenth and Fourteenth Amendments.[101] He criticized the majority's opinion as "narrow" and "artificial," and, like Justices Clifford and Hunt dissenting in *Reese*,[102] asserted that the majority had thwarted congressional intent, in this case the purpose behind the Thirteenth and Fourteenth Amendments.[103] Justice Harlan read the Thirteenth Amendment as prohibiting more than slavery. "[T]he Thirteenth Amendment[ ]may be exerted by legislation . . . for the eradication, not simply of the institution [of slavery], but of its badges and incidents[.]"[104] Public transportation, hotels, and places of public amusement were public or quasi-public functions, Justice Harlan continued, and "such discrimination [practiced by corporations and individuals in the exercise of their public or quasi-public functions] is a badge of servitude."[105] The Thirteenth Amendment afforded Congress the power to combat that badge of servitude through appropriate legislation, such as the Civil Rights Act of 1875.[106]

Moving to the Fourteenth Amendment, Justice Harlan argued that this Amendment afforded Congress the power to limit the actions of states *and* private citizens.[107] Justice Harlan argued that the Fourteenth Amendment affirmatively granted citizenship rights to African Americans, which brought African Americans within the purview of the Constitution's Privileges and Immunities Clause.[108] Additionally, Justice Harlan explained that Section Five of the Fourteenth Amendment extended to Congress the affirmative right to enforce the Fourteenth Amendment through legislation.[109] Justice Harlan argued that the protection of civil rights from racial discrimination was an essential feature of national and state citizenship, granted by the Fourteenth Amendment.[110] Because the Constitution granted

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100. *Id.* at 25 (discussing the Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335, 335–36).
101. *Id.* at 43, 58–59 (Harlan, J., dissenting).
102. *See supra* text accompanying note 83.
103. *The Civil Rights Cases*, 109 U.S. at 26 (majority opinion).
104. *Id.* at 35 (Harlan, J., dissenting).
105. *Id.* at 43 (discussing Munn v. Illinois, 94 U.S. 113 (1876)).
106. *Id.*
107. *Id.* at 46.
108. *Id.* Section Two of Article Four of the United States Constitution is known as the Privileges and Immunities Clause. It provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. 4, § 2.
109. *The Civil Rights Cases*, 109 U.S. at 45–47.
110. *Id.* at 49–50.

Congress the power to protect rights and privileges granted by the Fourteenth Amendment to citizens, so too must Congress have the power to affirmatively enact legislation applicable to all that protected African Americans' civil rights from racial discrimination.[111] Without that power, Congress would only be able to protect African Americans' civil rights against states and not against individuals and corporations, which Justice Harlan argued runs contrary to Congress's ability to "enforce one of its provisions."[112] Moreover, railroad corporations, innkeepers, and managers of places of public amusement were public agents because they provided services to the public.[113] Hence, "a denial by these instrumentalities of the state to the citizen, because of his race . . . is a denial by the state within the meaning of the [F]ourteenth [A]mendment," Justice Harlan insisted.[114]

The *Civil Rights Cases* painfully limited the federal government's ability to protect African Americans from discrimination that impeded racial advancement. Decrying the Court's decision, the African American press called it "a farce."[115] Other news sources found the Court's decision unsurprising.[116] Some even declared the decision "a triumph of law and sense," misunderstanding the decision to mean "special rights for none[,] but equal rights for all."[117]

It was Justice Harlan who intuitively summed up the truth in his dissent:

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws . . . . The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.[118]

As bad as the decision in the *Civil Right Cases* was, *Plessy v. Ferguson* was worse.

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111. *Id.* at 52.
112. *Id.*
113. *Id.* at 58–59.
114. *Id.* at 59.
115. GOLDSTONE, *supra* note 27, at 129 (source quoted in Valeria W. Weaver, *The Failure of Civil Rights 1875–1883 and Its Repercussions*, 54 J. OF NEGRO HIST. 368, 371–72 (1969)). Following the *Civil Rights Cases* decision, over 2,000 whites and blacks gathered in Washington D.C. at a protest where Frederick Douglass spoke. HOWARD, *supra* note 48, at 131.
116. *See* GOLDSTONE, *supra* note 27, at 128.
117. *Id.* (quoting ATLANTA J. CONST., Oct. 16, 1883).
118. *The Civil Rights Cases*, 109 U.S. at 61.

5. Plessy v. Ferguson

In *Plessy v. Ferguson*, the Supreme Court notoriously upheld segregation in public transportation under the doctrine of "separate–but–equal."[119] The plaintiff, Homer Plessy, was charged with violating Louisiana's statute that prohibited whites and African Americans from riding in the same railway car after he boarded the white railway car and refused to switch to the "colored" car.[120] To the naked eye, Plessy looked like a white man.[121] By blood, Plessy was seven-eighths white and one-eighth African American.[122] After refusing to sit in the colored car, Plessy was removed by police, taken to local jail, and criminally charged.[123] Plessy challenged Louisiana's railcar statute, arguing that it violated the Thirteenth and Fourteenth Amendments.[124]

In an 8–1 decision, the Supreme Court upheld Louisiana's statute, finding that it violated neither the Thirteenth nor the Fourteenth Amendment.[125] In first finding no Thirteenth Amendment violation, the Court reasoned that the statute did not "reestablish a state of involuntary servitude" by simply making a legal separation between whites and blacks.[126] Second, the Court held that the statute did not violate the Fourteenth Amendment.[127] The Court explained that the purpose of the Fourteenth Amendment was

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119. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954); *see also* BROOKS ET AL., *supra* note 22, at 34–35 (providing a synopsis of *Plessy v. Ferguson*).

120. *Plessy*, 163 U.S. at 541. Specifically, the statute stated "[T]hat all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; *provided* that this section shall not be construed to apply to street railroads. No person or persons, shall be permitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to." Separate Car Act, § 1, 1890 La. Acts 153, 153. Violators would be charged $25 or imprisoned for up to twenty days. § 2, 1890 La. Acts at 153.

121. *Plessy*, 163 U.S. at 541. Although he appeared white and likely could have ridden in the white railway car without issue, Plessy announced to the conductor that he was one-eighth black—shades of Rosa Parks. *See* GOLDSTONE, *supra* note 27, at 159; ROSA PARKS WITH JIM HASKINS, ROSA PARKS: MY STORY 115–18 (1992) (recalling the famous civil rights instance in 1955 when Rosa Parks, an African American woman, was arrested after refusing to give her seat to a white bus rider).

122. *Plessy*, 163 U.S. at 541. Plessy's actions were designed ahead of time to test the validity of southern segregation policies on public transportation. GOLDSTONE, *supra* note 27, at 159. The railway conductor and police deputy involved had agreed to take part in the incident, and Plessy was removed peacefully from the railway car. *Id.*

123. *Plessy*, 163 U.S. at 541–42.

124. *Id.* at 542.

125. *Id.* at 537, 542, 551–52, 558.

126. *Id.* at 542–43.

127. *Id.* at 550–51.

to treat races equally before the law, *not* to abolish racial distinctions or create social equality.[128] To support its pro-segregation stance, the Court pointed to school segregation policies, "which ha[ve] been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."[129] The Court dismissed Plessy's argument that the statute was unreasonable because it stamped nonwhites with "a badge of inferiority" by responding that nonwhites were responsible for their own feelings of inferiority.[130]

In a powerful dissent, Justice Harlan famously declared that the Constitution is colorblind.[131] The true purpose behind the Thirteenth, Fourteenth, and Fifteenth Amendments, Justice Harlan believed, was to "remov[e] the race line from our government[t]" and to secure equal civil rights for all Americans regardless of race.[132] Louisiana's statute interfered with African Americans' right to travel about freely.[133] Justice Harlan rejected the argument that the statute was not discriminatory because it equally limited both whites and nonwhites in their railway seat options by explaining the statute was meant to keep African Americans out of the white railway cars, not the other way around.[134] He concluded that Louisiana's segregation law was invalid because it was facially inconsistent with the colorblind Constitution.[135] A harbinger of modern thought, Harlan predicted the majority's opinion would come to be seen as equally atrocious as *Dred Scott v. Sandford*.[136]

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128. *Id.* at 544; *see also* HOWARD, *supra* note 48, at 148–49 (detailing how the majority opinion followed sociologist William Graham Sumner's proposition that law-ways cannot alter folkways, and thus the Fourteenth Amendment must not be construed as doing so).

129. *Plessy*, 163 U.S. at 544.

130. *Id.* at 551.

131. *Id.* at 559, 563 (Harlan, J., dissenting) ("Our Constitution is color[b]lind, and neither knows nor tolerates classes among citizens.").

132. *Id.* at 555–56.

133. *Id.* at 557.

134. *Id.* at 556–57.

135. *Id.* at 562.

136. *Id.* at 559, 563; *see, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (referring to *Plessy v. Ferguson* and *Dred Scott v. Sandford* as stock answers to the question of what is the worst Supreme Court decision); Michael Stokes Paulsen, *The Worst Constitutional Decisions of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003) (declaring that *Plessy v. Ferguson* and *Dred Scott v. Sandford* are "among the many obvious rivals for the title of worst constitutional decision of all time"); *see also* HOWARD,

6. Williams v. Mississippi

In *Williams v. Mississippi*, the Supreme Court upheld southern voting laws that blatantly operated to prevent African Americans from voting.[137] The plaintiff, Henry Williams, was indicted on a murder charged by an all-white grand jury in Mississippi.[138] Williams moved to quash the indictment alleging that Mississippi's voter registration laws violated the Fourteenth Amendment.[139]

Mississippi's voter registration laws required eligible voters to pay a poll tax and pass a literacy test.[140] The laws also gave election administration officials complete discretion in administering the literacy test and determining whether an eligible voter had passed.[141] Moreover, citizens of Mississippi were only eligible to serve on juries if they were registered voters.[142] Thus, the purpose of Mississippi's voting requirements was two-fold. First, they meant to prevent African Americans from voting. Second, they prevented African Americans from serving on juries. The Mississippi circuit court denied Williams's motion to quash.[143] Williams's subsequent motion to remove the case to federal court was also denied.[144] An all-white jury then convicted Williams and sentenced him to be hanged.[145]

William appealed, arguing that Mississippi's voter registration laws violated the Fourteenth Amendment because, despite their facial neutrality, the laws gave administrative officers absolute discretion to determine voting eligibility, which in turn determined ability to sit on a jury.[146] The Supreme Court recognized that Mississippi's law afforded the election administrative officials enormous discretion:

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supra note 48, at 158 ("Laws mandating black zones and white zones were a logical extrapolation of the premise of *Plessy* . . . .").

137. Williams v. Mississippi, 170 U.S. 213, 225 (1898); *see also* CHARLES L. ZELDEN, THE BATTLE FOR THE BLACK BALLOT 18 (2004) (describing how many Southern states enacted literacy tests, poll taxes, and grandfather clauses in the early 1900s in an effort to prevent blacks from voting).

138. *Williams*, 170 U.S. at 213.

139. *Id.* at 219.

140. *Id.* at 220–21 (citing MISS. CONST. art XII, § 241 (repealed 1965), § 244 (repealed 1975)). The voter registration law also included residency requirements and prohibited citizens who had been convicted of certain crimes from registering. *Id.* at 220–21 (citing MISS. CONST. art XII, §§ 241–42). After Mississippi enacted its new voting requirements, less than 9,000 of the 147,000 voting-age blacks voted in elections. ZELDEN, *supra* note 137, at 18.

141. *Williams*, 170 U.S. at 221 (discussing MISS. CONST. art XII, §§ 242, 244).

142. *Id.* at 214.

143. *Id.* at 217.

144. *Id.*

145. *Id.*

146. *Id.* at 220.

> [T]his officer can reject whomsoever he chooses, and register whomsoever he chooses, for he is vested by the [Mississippi] constitution with that power . . . . The officer is the sole judge of the [literacy] examination of the applicant, and, even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration.[147]

However, the Court determined there was insufficient evidence to prove that the voter registration laws had *actually* been administered in a discriminatory fashion.[148] To bolster this contention, the Court pointed out that the plaintiff had brought suit against the law, not against any election officials.[149] Ultimately, the Supreme Court upheld Mississippi's voter registration laws because they were facially neutral and evidence had shown only the likelihood—not certainty—that the laws had been administered in a racially discriminatory manner.[150]

The *Williams* decision effectively removed African Americans' right to vote. The decision supported election officials' desire to prevent African Americans from voting in contravention of the Fifteen Amendment. It impeded racial progress by placing a heavy evidentiary burden on African Americans seeking to challenge the administration of state voting laws.

7. Giles v. Harris

In *Giles v. Harris*, the Supreme Court declined to strike down Alabama's voter registration laws, even though these laws were clearly intended to prevent African Americans from voting.[151] In *Giles,* the African American plaintiff brought suit against the Board of Registrars of Montgomery, Alabama, on behalf of himself and 5000 other African Americans.[152] The plaintiff alleged that the Board of Registrars had unfairly refused to register him and other eligible African Americans to vote before August 1, 1902,[153] and that portions of Alabama's state constitution dealing

147. *Id.* at 221.
148. *Id.* at 223; *see also* Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 569 (2003) (quoting *Williams*, 170 U.S. at 222) (explaining how the Court was aware disenfranchisement laws were aimed to inhibit blacks from voting by targeting "'the alleged characteristics of the negro race' while allowing laws to target both 'weak and vicious white men as well as weak and vicious black men.'").
149. *See Williams*, 170 U.S. at 224–25.
150. *Id.* at 225.
151. Giles v. Harris, 189 U.S. 475, 486, 488 (1903).
152. *Id.* at 482.
153. *Id.*

with voter eligibility violated the Fourteenth and Fifteenth Amendments.[154] Alabama's voting registration laws were split into two categories depending on whether a person had registered to vote before or after January 1, 1903.[155] For those who registered to vote before January 1, 1903, the eligibility criteria were more relaxed, and voters received lifelong voting rights.[156] Alabama residents who registered to vote on or after January 1, 1903, faced stricter voting eligibility criteria, including literacy or wealth requirements.[157]

The federal district court dismissed the suit for lack of jurisdiction.[158] On appeal, the Supreme Court affirmed the district court's dismissal on different grounds.[159] The Court found it "impossible to grant the equitable relief which is asked,"[160] because the plaintiff was asking that his name and the names of eligible African American voters be placed on the pre-1903 voter registration list while asserting that Alabama's voting registration scheme was unconstitutional.[161] The Court refused to register the plaintiff under a potentially fraudulent voting registration scheme, while "express[ing] no opinion as to the alleged fact of [the laws'] unconstitutionality[.]"[162] The Court noted that the plaintiff could not sue the state of Alabama and that a federal court could not issue an order requiring a state to act.[163] Thus, there was no relief a federal court could award the plaintiff.[164] The Court declared that if the state of Alabama had violated the plaintiff's

154. *Id.* (citing ALA. CONST. art. VIII, §§ 180–81, 183–88).

155. *Id.* (citing ALA. CONST. art. VIII, § 187).

156. *Id.* at 482–83 (citing ALA. CONST. art. VIII, §§ 180, 187). The pre-1903 voting registration criteria included residency requirements and poll taxes. ALA. CONST. art. VIII, § 178. It excluded from eligibility "insane persons" and people who had been convicted of certain crimes. *Id.* at § 182. Finally, it allowed men who were veterans, descendants of veterans, or "of good character and who understand the duties and obligations of citizenship under a republican form of government" to register to vote. *Id.* at §§ 182, 187. Unsurprisingly, the pre-1903 voter registration laws were "practically administered . . . [to] let in all whites and [keep] out a large part, if not all, of the blacks," so African Americans would not be assured lifelong voting rights. *Giles*, 189 U.S. at 483.

157. *Giles*, 189 U.S. at 483–84 (citing ALA. CONST. art. VIII, § 181). Under the post-1903 scheme, a person seeking to register to vote either had to pass a literacy test, own 40 acres of land, or have substantial real and personal property upon which they had paid $300 in state taxes the previous year. *Id.* (citing ALA. CONST. art. VIII, § 181).

158. *Id.* at 485 (dismissing the case because the plaintiff's suit had not alleged that the amount–in–controversy was $2,000 or more).

159. *Id.* at 488.

160. *Id.* at 486.

161. *Id.* at 486–87.

162. *Id.*; *see also* HOWARD, *supra* note 48, at 164 (explaining how the Court's opinion "gratuitously ridicule[d] the plaintiffs and their claims. . . . If the law was a fraud how could they ask to be its beneficiary, but if it were not a fraud, as implied by a demand to be put on the rolls it created, why would they complain about being excluded by its operation.").

163. *Giles*, 189 U.S. at 487–88 (citing Hans v. Louisiana, 134 U.S. 1 (1890)).

164. *Id.* at 488.

political rights, only that state, Congress, or the Executive Branch could grant relief.[165] But the Court does have the power of moral leadership, as it exhibited in *Brown v. Board of Education.* In affirming the district court's dismissal, the *Giles* Court held that it was unable to grant the plaintiff relief by putting his name on the pre-1903 voter registration list or declaring Alabama's entire voting scheme fraudulent and ordering a new, valid system.[166] The Court, once again, did all that it could to impede racial advancement—what an inglorious racial history.

B. Moving Toward Redemption

Responding to pressure exerted by a relentless litigation campaign waged by the NAACP, the Supreme Court began to chip away at the regime of second-class citizenship it had helped erect since the Court's inception. There were many NAACP victories, each laying the foundation for the *Brown* decision. Three are especially important: *Missouri ex rel. Gaines v. Canada*,[167] *McLaurin v. Oklahoma State Regents for Higher Education*,[168] and *Sweatt v. Painter*.[169]

1. Missouri ex rel. Gaines v. Canada

In *Missouri ex rel. Gaines v. Canada*, petitioner Lloyd Gaines, an African American, was refused admission to the state's all-white law school at the University of Missouri.[170] There were no Missouri law schools for blacks.[171] Respondent admitted at trial that petitioner's "work and credits at the Lincoln University [his undergraduate school] would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible."[172] Petitioner was refused admission upon the ground that it was "contrary to the constitution, laws[,] and public policy of the State to admit a negro as a student in the University of Missouri."[173] Respondent advised petitioner to apply for aid under a

165. *Id.*
166. *Id.* at 486–88.
167. 305 U.S. 337 (1938).
168. 339 U.S. 637 (1950).
169. 339 U.S. 629 (1950).
170. 305 U.S. at 342.
171. *Id.* at 345.
172. *Id.* at 343.
173. *Id.*

state statute that allowed the State Superintendent of Schools to arrange for the admittance of blacks to law schools in other states, including adjacent states, where non-resident blacks are admitted.[174] The statute also allowed the Superintendent to pay the tuition of these law schools.[175]

Siding with the petitioner, the Supreme Court held that the state violated constitutional equal protection when it failed to provide an in-state law school for blacks.[176] The Court pushed aside respondent's arguments that there is "a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical"; and that, "pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State."[177] The Court rejected the promise of a black law school as nothing more than words—"a mere declaration of purpose, still unfulfilled"[178]—certainly not a "mandatory duty."[179] Similarly, the Court found the state's "generous" offer to arrange for and pay the tuition of petitioner to attend an out–of–state law school to be constitutionally insufficient:

> Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, —each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do.[180]

Under this rationale, there would be a constitutional violation if Missouri "arrange[d] for the attendance" and paid the "reasonable tuition fees"[181] of blacks to attend Harvard Law School.

The fact that the petitioner was the first African American to demand a law school at Lincoln University was no excuse for not providing one beforehand. As the Court ruled, the constitutional right at issue was a "personal" one.[182] The petitioner was therefore entitled to equal protection of the laws as an individual, regardless of whether other members of his

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174. *Id.* at 342–43 (quoting MO. REV. STAT. § 9622 (1929)).
175. *Id.* (quoting § 9622).
176. *Id.* at 345.
177. *Id.* at 346 (quoting State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 791 (1937), *rev'd*, 305 U.S. 337 (1938)).
178. *Id.*
179. *Id.*
180. *Id.* at 350.
181. *Id.* at 342–43 (quoting MO. REV. STAT. § 9622 (1929)).
182. *Id.* at 351.

class sought the same opportunity.[183] Of course, a personal right in the discrimination context is only comprehensible by reference to characteristics that form the basis for the animus, which, in turn, are common to other members who might suffer the same discrimination. Group rights and personal rights are not mutually exclusive in civil rights cases. Perhaps the Court invoked the idea of "personal rights" because it thought that admitting Mr. Gaines to the law school as a matter of personal right might seem less threatening to the status quo than declaring the rights of African Americans as a group.

Indeed, although *Gaines* was a major victory for all African Americans, because it was the first Supreme Court case that expressly held that separate education must actually be equal, the case still very much maintained the status quo. It did not require desegregation or integration. Blacks remained separate but equal, which is to say they continued to be regarded as second-class citizens under the Court's civil rights jurisprudence. The Court, in short, was not prepared to overrule *Plessy*.[184]

Yet, the Court's attitude toward black advancement was clearly changing, and *Gaines* was an unmistakable manifestation of that change not only in the Court's holding and reasoning on the substantive issues, but also on the procedural issues. Whereas in earlier cases the Court's anti-black rulings had turned on minor procedural errors by the petitioners,[185] the Court was quite willing to push aside arguably more serious pleading errors, such as the failure to exhaust all remedies in *Gaines*. The Court seemed to ignore or play down pleading problems in support of racial equality.[186]

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183. *Id.* at 350–51.

184. For further discussion, see Sherman P. Willis, *Bridging the Gap: A Look at the Higher Public Education Cases Between* Plessy *and* Brown, 30 T. MARSHALL L. REV. 1, 5–12 (2004).

185. *See* Gong Lum v. Rice, 275 U.S. 78, 84 (1927) (finding a failure to allege Chinese petitioner was denied the right to attend a "colored school"); Cumming v. Richmond Cty. Bd. of Educ., 175 U.S. 528, 545 (1899) (petitioner did not allege that school district failed to establish and maintain a high school for "colored children" out of existing funds).

186. All things being equal, if the Court ignored pleading problems when it wanted to and used them when it so desired, it could be argued that the Court denied equal protection of the laws in violation of the Fifth Amendment. Because all things are not equal, there is no clash between subordination discourse and discrimination discourse. Also, because the Court is the final arbiter of what the law is, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), a Fifth Amendment challenge under discrimination law would be unavailing.

2. McLaurin *and* Sweatt

In two cases handed down on the same day in 1950, the Supreme Court continued to move toward rectifying its shameful past. The first case was *McLaurin v. Oklahoma State Regents for Higher Education*.[187] As a condition for enrolling in a graduate program at an all-white university under the *Gaines* precedent, appellant G.W. McLaurin, an African American Ph.D. candidate, had to comply with a state statute that required the following:

> [him] to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.[188]

Not unlike it did in *Gaines*, the Court pushed by the state's main argument, that the conditions it imposed were "merely nominal,"[189] to rule in favor of black advancement on equal protection grounds. The educational conditions imposed on the appellant were so humiliating and segregating that he was "handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[190] The Court not only found that the appellant had an equality interest in integrated education, which interest, as the interest in *Gaines*, was "personal and present"[191]—not dependent upon similar requests made by other blacks and ripened with the establishment of similar educational opportunities for whites[192]—but, for the very first time, linked the black equality interest to good social policy:

> Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training

187. 339 U.S. 637 (1950).
188. *Id.* at 640.
189. *Id.*
190. *Id.* at 641.
191. *Id.* at 642.
192. "It is fundamental that these cases concern rights [that] are personal and present. This Court has stated unanimously that 'The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.'" Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Sipuel v. Bd. of Regents, 332 U.S. 631, 633 (1948)).

> is unequal to that of his classmates. State-imposed restrictions [that] produce such inequalities cannot be sustained.[193]

In the next case, *Sweatt v. Painter*,[194] the Court continued the process of historical reversal. However, unlike *McLaurin*, the Court did not place the black equality interest in the larger context of good social policy. Instead, the Court packaged the asserted interest as only a "personal and present" constitutional right.[195]

The Court in *Sweatt* came very close to overturning *Plessy v. Ferguson*.[196] The issue was whether a new law school built for African Americans in Texas offered the petitioner, Heman Marion Sweat, "'privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas,'" from which Sweatt had been denied admission because of the color of his skin[197] The Court answered this question in the affirmative.[198] It held that the petitioner must be admitted to Texas Law School because the state's black law school was unequal in physical facilities and "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close."[199] While reiterating that the equality interest petitioner sought to assert—an integrated or quality education (same difference in this case)—was "personal and present,"[200] the Court did not link the vindication of this interest to good social policy. The Court kept the interest "personal."

McLaurin and *Sweatt* have important differences that make the former the more important case. *McLaurin* links black advancement to good social policy; *Sweatt* does not. The black interest asserted in *Sweatt* has no significance beyond the individual who asserts it. Neither case, however, changed the legal status of blacks, who remained second-class citizens.

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193. *McLaurin*, 339 U.S. at 641.
194. 339 U.S. 629, 635–36 (1950).
195. *See id.* at 635.
196. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).
197. *Sweatt,* 339 U.S. at 632 (quoting Sweatt v. Painter, 210 S.W.2d 442, 446 (Tex. Civ. App. 1948), *rev'd*, 339 U.S. 629 (1950)).
198. *Id.* at 632–33.
199. *Id.* at 634.
200. *Id.* at 635.

Separate–but–equal was still the law of the land. In fact, *Sweatt* explicitly refused to "reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."[201] That task was left to *Brown*.

C. Juridical Redemption: Brown v. Board of Education

1. The Opinion

With the momentum of cases that chipped away at the separate–but–equal doctrine, *Gaines*, *McLaurin*, and *Sweatt* in particular, a unanimous Supreme Court in *Brown v. Board of Education* raised and answered the dispositive issue: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."[202]

The Court then went on to sign the execution warrant for Jim Crow. It ruled, "in the field of public education the doctrine of 'separate but equal' has no place. . . . [S]uch segregation is a denial of the equal protection of

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201. *Id.* at 636.

202. 347 U.S. 483, 493 (1954). The attack on separate–but–equal was first lodged at the district court level in one of the four cases consolidated in *Brown*, *Briggs v. Elliott,* 342 U.S. 350 (1952), when the NAACP, with some prodding from a sympathetic trial judge, Judge Julius Waties Waring, changed its litigation strategy against separate–but–equal from an attack on the equality part of the equation—equalized facilities—to an attack on the separation part— segregation is immoral and inherently unequal. *See Brown*, 347 U.S. at 486 n.1; RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 304 (2004). There is a bit of a controversy regarding how the NAACP's litigation strategy changed. In his memoir, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS, Robert L. Carter claims that the original complaint in *Briggs* stated a frontal attack on the separate–but–equal doctrine and that the group's litigation strategy had changed from tangible to intangible inequality. CARTER, *supra* note 5, at 96. Based on our review of the original filing papers, we must side with Richard Kluger's account. The complaint in *Briggs* focuses on tangible inequality, such as "failing to or refusing to provide such bus transportation to Negro children" and "maintaining public schools for Negro children . . . which are in every respect inferior to [as opposed to separate from] those maintained for white children." Complaint at 9–10, Briggs v. Bd. of Trs. for Sch. Dist. No. 22, (E.D.S.C. May 17, 1950) (No. 2505). Although the amended complaint continues to make reference to the "facilities," it also avers that "the policy, custom, practice and usage of defendants . . . in refusing to allow infant plaintiffs, and other Negro children, to attend elementary and secondary public schools in Clarendon County, South Carolina which are maintained and operated exclusively for white children is a violation of the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution[.]" Complaint at 12, Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. Dec. 22, 1950) (No. 2657).

the laws."[203] *Brown* changed the sociopolitical environment for racial relations in our country. From that point forward, the law would regard blacks as people whose lives mattered. Equal opportunity before the law—*formal equal opportunity*—was now the law of the land, first in the field of education, then spreading to other segments of society.

Looking back at the decision a decade later, Judge Robert Carter, one of the NAACP lawyers who argued the case before the Supreme Court, wrote that *Brown*'s decision engendered "a social upheaval the extent and consequences of which cannot even now be measured with certainty" and changed the legal status of black Americans from mere supplicants "seeking, pleading, begging to be treated as full-fledged members of the human race" to persons entitled to equal treatment under the law.[204] Effectively ending racial segregation, a relic of slavery, the decision was, in the view of Judge Louis Pollak, who had for most of his professional life been an advisor to the NAACP lawyers, "probably the most important American government act of any kind since the Emancipation Proclamation."[205] Hence, Judge Pollak saw the decision in the same light as did Judge Carter. In a 2004 interview on NPR, he observed that, "even though it was a decision about schools, [*Brown*] became a precedent for, in the next half-dozen years, a series of Supreme Court decisions where they didn't even have to write opinions, where they knocked out segregation in buses, in parks, in swimming pools and the whole array of public institutions that had been blanketed with Jim Crow for half a century."[206]

2. The Motivation

Many contemporary legal scholars view *Brown* in materialistic terms. They argue that the Supreme Court's decision to upset settled law was motivated less by a racial awakening or fulfillment of the American Creed—

203. *Brown*, 347 U.S. at 495.

204. Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246–47 (1968).

205. *About the Book*, RICHARDKLUGER.COM, http://www.richardkluger.com/AboutSimpleJustice.htm [http://perma.cc/MSU5-V4YF] (last visited Nov. 5, 2015). Judge Pollak had served as the dean of Yale Law School and the University of Pennsylvania Law School prior to becoming a judge. Dennis Hevesi, *Louis H. Pollak, Civil Rights Advocate and Federal Judge, Dies at 89*, N.Y. TIMES (May 12, 2012), http://www.nytimes.com/2012/05/13/us/louis-pollak-judge-and-civil-rights-advocate-dies-at-89.html?_r=0 [http://perma.cc/MFP9-97D8].

206. Hevesi, *supra* note 205.

the Court's response to the American Dilemma made plain by Gunnar Myrdal[207]—than by material considerations.[208] Not only had we just fought a war to save democracy for the world, but also black soldiers returned home with a new militancy. They were unwilling to accept second-class citizenship.[209]

There were also geopolitical considerations. At the time of *Brown*, the United States was in the throes of the Cold War, in which a major objective was to win the hearts and minds of the black, brown, and yellow people of the Third World. Foreign press reports, letters from United States ambassadors abroad, and other communiqués clearly and persistently indicated that the United States could not win the Cold War if world news organizations continued to carry stories of lynchings, murders of young blacks like that of 14-year-old Emmett Till, racial discrimination against African delegates to the United Nations in places of public accommodation, and other domestic incidents of racial oppression.[210] So serious were these concerns that the United States Department of State filed amicus curiae brief in *Brown* that sided with the NAACP.[211] This was the first time in American history that the government sided with the NAACP in a

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207. Gunnar Myrdal was a Swedish Nobel laureate economist and sociologist who headed a large scale study of racial relations in the United States funded by the Carnegie Institution and documented in his seminal book, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944). That book described the problem of race in the United States as "an America Dilemma" because of the obvious conflict between the high ideals of freedom and equality embedded in our founding documents and continuously espoused by our leaders, which Myrdal called the "American Creed," and the regime of cruelty and humiliation visited upon blacks under the separate–but–equal doctrine, or Jim Crow. *Id.* at xlvii. The materialists play down the impact Myrdal's book had on the *Brown* Court.

208. For a more detailed discussion of this perspective, see sources cited *infra*, n.210; DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 59–68 (2004) (explaining how the Court in *Brown* reacted to geopolitical concerns).

209. For a discussion, see, for example, ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 28 (1992) (describing the role of the war in encouraging the issuance of presidential executive orders).

210. *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 48–79 (2002) (discussing international impressions of American racism); 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, 369–76 (2002) (book review) (describing the American response to international censure of various racist acts in the United States). Emmett Till's murder for allegedly whistling at a white woman was so monstrous that it helped inspire Rosa Park's civil rights defiance. Allan Jalon, *1955 Killing Sparked Civil Rights Revolution: Emmett Till: South's Legend and Legacy*, L.A. TIMES, (Oct. 7, 1985), http://articles.latimes.com/1985-10-07/news/mn-16511_1_emmett-till-s-name [http://perma.cc/274J-4XTX].

211. Brief for the United States as Amicus Curiae, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5), 1952 WL 82045.

segregation case. The government's amicus curiae brief referred to Secretary of State Dean Acheson's report stating that "racial discrimination in the United States remains a source of constant embarrassment to this Government in the day[–]to[–]day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."[212] American racism made it difficult for the United States to market democracy as a protector of personal freedoms.

We see another motivation for the Court's decision in *Brown*; namely, the Supreme Court's own history in racial relations—its inglorious racial past.[213] When viewed within that context, *Brown* stands for something quite different, and what it stands for is not inconsistent with the materialist take on the case.[214]

Well aware of its sordid precedents, the *Brown* Court arguably sought to end the harm that prior Supreme Courts had visited upon generations of blacks. At its most basic level, *Brown* should be understood as a case of juridical redemption, a case in which the Court seeks to atone for its inglorious racial history enshrined in cases like *Dred Scott* and *Plessy*. *Brown* sought to reverse course, to support racial advancement rather than to continue to impede it. And it sought to do so less because it felt sorry for blacks or wanted to accord them special treatment than because it saw racial advancement as good social policy.

Ending school segregation in 1954 was good social policy. The *Brown* Court, in fact, explicitly noted "the importance of education to our democratic society."[215] School segregation was fundamentally inconsistent with

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212. Derrick Bell, *Brown v. Board of Education*: *Forty-Five Years After the Fact*, 26 OHIO N. U. L. REV. 171, 179–80 (2000) (quoting Brief for the United States as Amicus Curiae, *supra* note 211, at 8); *see* DUDZIAK, *supra* note 210; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 111–12 (1988).

213. *See supra* Part 1.A.

214. Nor is the materialistic view inconsistent with the Mydralian view. Clearly, the justices could have been motivated by both materialistic (bringing the country into a new, post-War order) and idealistic (living up to the American Creed) considerations, the latter of which could include atonement for a shameful judicial course of conduct in racial relations. For other views regarding the meaning of *Brown*, see, for example, MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010) (describing the challenges of post-*Brown* integration and treating various interpretations of *Brown*); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin, ed., paperback ed., 2002) (collecting a group of constitutional law scholars' rewritten *Brown* opinions).

215. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

democracy's internal morality—human dignity. To reach that conclusion, the Court had to reject *Plessy*'s "finding" that the segregation statutes did not stamp blacks with a "badge of inferiority" and that any suggestion of black inferiority arising from racial segregation came from a twisted black perspective.[216] Heeding the voices of black children spoken through the doll test, the work of black psychologists Kenneth and Mamie Clark,[217] *Brown* went in the opposite direction of *Plessy*, finding that "'[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children.' . . . Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[218] Brown thus embraced racial advancement as a matter of good social policy.

II. ELEMENTS OF JURIDICAL SUBORDINATION

The phase "juridical subordination" is used to describe judicial decision-making in civil rights cases, especially at the Supreme Court level, that inhibits racial advancement by suppressing the black equality interest.[219] Such decision-making is bad social policy, we argue, because it reverses the civil rights course set in *Brown* and undercuts *Brown*'s noble attempt to reverse the Supreme Court's inglorious racial history. Juridical subordination, then, occurs when the Supreme Court, without racist intent, suppresses the black equality interest necessary for racial advancement. The Court itself becomes an object of civil rights scrutiny.

Unearthing juridical subordination is a complex process that necessarily begins with an understanding of the black equality interest in civil rights law.[220] In overturning the separate–but–equal doctrine, the *Brown* Court embraced a rather ambiguous concept of racial equality, or black equality, that scholars call "formal equal opportunity."[221] FEO, as it is sometimes called, guarantees equal rights under the law. In the decades following *Brown*, Congress and the Supreme Court have fashioned two potentially conflicting tenets to give meaning to formal equal opportunity: "racial

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216. Plessy v. Ferguson, 163 U.S. 537, 550 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

217. *Brown,* 347 U.S. at 494 n.11 (citing studies including Kenneth Bancroft Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950)).

218. *Id*. at 494–95 (quoting finding VIII of the district court in *Brown*, filed with the opinion but not printed in 98 F. Supp. 797 (D. Kan. 1951)).

219. *See generally,* Roy L. Brooks, Racial Inequality Beyond Racial Discrimination (unpublished manuscript) (on file with author) (describing the ancillary problem not solved by *Brown*: the post-civil rights race problem).

220. *See infra* Part II.B.1.

221. *See, e.g.*, BROOKS, *supra* note 209, at 29 (discussing *Brown*'s role as the first governmental act to make formal equal opportunity a constitutional imperative).

omission"—or color blind—and "racial integration"—or racial mixing.[222] These operating tenets effectively defined the black equality interest during the civil rights period and guided both the creation and application of civil rights law during the time as well as today.

Governing both the civil rights and post-civil rights periods, our civil rights law can be divided into antidiscrimination law and racial preference law. Antidiscrimination law mainly implements the racial omission tenet of formal equal opportunity through the intent or effects test, while racial preference law primarily enforces the racial integration tenet through application of the strict scrutiny test.[223] The primary sources of civil rights law, whether antidiscrimination law or racial preference law, are the Constitution, most particularly the Equal Protection Clause, and myriad federal statutes proscribing discrimination.[224]

As we shall see, the black equality interests and implementing law crafted during the civil rights era are not the only ways to promote racial advancement in today's post-civil rights society. Indeed, they may not be the best or even sound approaches in today's society. One of the questions staring us in the face is whether the civil rights-era equality interests—racial omission and racial integration—continue to have currency in post-civil rights America. Are they themselves elements of juridical subordination?[225] To answer that question, we begin with a discussion of the black equality interests and implementing law in the civil rights era.

A. Civil Rights Period

1. Black Equality Interest

Racial omission and racial integration are operating tenets for formal equal opportunity, the civil rights policy that replaced separate–but–equal. Taken together, they define "equal rights" or, for present purposes, the black equality interest under a regime of equal rights. Racial omission defines equal rights, or the black equality interest, as racial neutrality. The government's stance on matters of race should be neutral, or color blind. Race must be omitted from governmental rules and policies regarding

222. *Id.* at 29–30.
223. *See* discussion *infra* Parts II.A.2, II.B.3.
224. *See* discussion *infra* Parts II.A.2, II.B.3.
225. *See infra* Part II.B.1.

education, employment, housing, and other areas of American life.[226] Racial groups are entitled to equal treatment, or racial neutrality, from the government in all aspects of life. White Americans should not be given any government-sanctioned freedoms or privileges not also available to African Americans and vice versa.[227]

Racial integration is racial omission's sibling tenet. It defines formal equal opportunity, or the black equality interest thereunder, as racial mixing.[228] All aspects of the government and government-supported segments of American society—whether educational, economic, or social—should be racially mixed. Racially integrated settings create opportunities for blacks and, at the same time, remove from the public arena all vestiges of prior systems of racial oppression. However, beneficial racial integration might be for blacks and the nation as a whole, the racial integration tenet, unlike the racial omission tenet, is permissive rather than mandatory, at least in the Supreme Court's deployment of the tenet. Governmental entities need not take affirmative steps to promote racial mixing, and, in fact, can only do so under very limited circumstances.[229] They, however, must take affirmative measures to ensure that their policies and practices are race-neutral.[230]

Clearly, the racial omission and racial integration tenets presuppose racial desegregation. No government could logically or successfully operate a public policy that mandates the omission of race from legal considerations or calls for racial mixing without first, or at least simultaneously, removing legal designations that exclude and stigmatize a racial group. The failure to do so would be disingenuous and certainly would create governmental dysfunction, if not cognitive dissonance among Americans, on racial matters.

The racial integration and racial omission tenets sometimes collide with each other. This happens most famously in the case of affirmative action, which typically promotes racial integration in a race-conscious manner.[231]

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226. *See* BROOKS, *supra* note 209, at 29.

227. *Id.*

228. *Id.* at 30.

229. *See, e.g.*, BROOKS ET AL., *supra* note 22, at 1323–1401 (discussing that voluntary affirmative action must have a remedial or educational diversity purpose).

230. *See, e.g.*, 42 U.S.C. § 2000e-2 (2012) (prohibiting employment discrimination on the basis of race).

231. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (remanding Caucasian student's suit against a university for discrimination against her on the basis of race because the Fifth Circuit did not apply strict scrutiny to her claims); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (school districts' use of racial classifications as a "tiebreaker" to promote diversity was unconstitutional because districts failed to meet high bar for justifying racial discrimination); Gratz v. Bollinger, 539 U.S. 244 (2003) (selection method favoring "underrepresented" groups violated Equal Protection clause); Grutter v. Bollinger, 539 U.S. 306 (2003) (narrowly tailored admissions

Yet, the tenets need not collide. Colorblind decision-making can support the racial integration tenet on the theory that it allows racial mixing to unfold naturally—by the removal of the artificial barrier of racial segregation rather than by affirmative measures taken by an institution. When the tenets collide, one of them must yield. Usually civil rights law requires the racial integration tenet to give ground.[232]

2. Implementing Law

There are two basic mechanisms in American law for the enforcement of formal equal opportunity, or the racial omission and racial integration tenets. The first is through antidiscrimination law, and the second is through racial preference, or affirmative action, law. Both sets of law comprise modern civil rights law. Each is provided for in federal statutes as well as the U.S. Constitution.

On the statutory side, there are myriad federal statutes that both proscribe racial discrimination and permit racial preferences. The Civil Rights Act of 1964,[233] the Voting Rights Act of 1965,[234] the Fair Housing Act of 1968,[235] and the 1972 amendments to Title VII of the 1964 Civil Rights Act[236] are the most significant federal antidiscrimination and racial preference laws implementing the racial omission and racial integration

program, although race-conscious, served a compelling interest and was therefore constitutional); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications in awarding government contracts); City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) (holding city failed to show a compelling government interest justifying plan requiring contractors to award subcontracts to minorities); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing measured use of race as an admissions criterion). *See generally* BROOKS, ET AL., *supra* note 22, at 1323–1401 (discussing the remedial purpose and diversity rationales, the discriminatory purpose requirement, and alternatives to affirmative action); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 501–86 (17th ed. 2010) (discussing Supreme Court jurisprudence on equal protection in the racial discrimination context).

232. *See* BROOKS ET AL., *supra* note 22, at 1323–1401; SULLIVAN & GUNTHER, *supra* note 231.

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

234. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

235. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

236. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V. 1975)).

tenets. Vindicating the racial omission tenet, the 1964 Civil Rights Act has eleven titles, each of which prohibits discrimination "on the basis of race or color" in a major sector of American life, such as voting,[237] public accommodations,[238] public education,[239] and employment[240]—to mention just a few. Similarly, the 1965 Voting Rights Act, which vastly improves the voting protections provided in Title I of the 1964 Civil Rights Act, which mainly established standards applicable to voter registration,[241] bans all forms of discrimination in voting from literacy tests to complex schemes of vote dilution "on account of race or color."[242] The 1968 Fair

237. Tit. 1, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241–42 (codified as amended at 52 U.S.C. § 10101 (2012)).

238. *Id.*, tit. 2, Pub. L. No. 88-352, §§ 201–07, 78 Stat. at 243–46 (codified at 42 U.S.C. §§ 2000a to a-6 (2012)).

239. *Id.*, tit. 4, Pub. L. No. 88-352, §§ 401–10, 78 Stat. at 246–49 (codified at 42 U.S.C. §§ 2000c to c-9 (2012)).

240. *Id.*, tit. 7, Pub. L. No. 88-352, §§ 701–16, 78 Stat. at 253–66 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

241. *Id.*, tit. 1, Pub. L. No. 88-352, § 101, 78 Stat. at 241–42 (codified as amended at 52 U.S.C. § 10101 (2012)).

242. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.). Many restrictions on voting enacted by several states prior to the 2012 presidential election were eerily similar to forms of discrimination used during Jim Crow to prevent blacks from voting. In a 2012 report, the NAACP detailed the numerous efforts by state governments across the nation, particularly in the south, to disfranchise African Americans. *See* NAACP LEGAL DEF. & EDUC. FUND, INC. & NAACP, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA (2011), http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf [http://perma.cc/ZG3V-VDK2]. Although these efforts are executed in the name of politics and are facially neutral, they have a significant disparate impact on blacks. *See id.* at 11–38. Some are clearly targeted toward African Americans, Hispanics, and the poor. *See id.* at 37–38. For a sample of the disfranchisement measures detailed in the NAACP report, see *id.* at 11–13

Florida and Texas have enacted laws that substantially restrict voter registration drives that work to the detriment of black voters many of whom rely heavily on these drives to register. In Florida, nearly twenty percent of blacks, more than any other group, register through voter registration drives. *Id.* at 11 (citing Letter from League of Women Voters of Fla. et al. to Chris Herren, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice 12 (July 15, 2011), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Florida%20Section%205%20comment%20letter%20-%20FINAL.pdf [https://perma.cc/ZZT4-89LV]). Also, many poor blacks register to vote at public assistance agencies—three times more often than poor white voters. *Id.* at 16 (citing *Voting and Registration in the Election of November 2008—Detailed Tables*, U.S. CENSUS BUREAU, https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html [https://perma.cc/EP3T-JUJ2]). States are required by federal law to provide voter registration services at state public assistance agencies. National Voter Registration Act (NVRA), Pub. L. 103-31, § 7, 107 Stat. 77, 80 (codified at as amended at 50 U.S.C. § 20506 (2012)). Yet, Louisiana, Georgia, Texas, and other states have failed to comply with the NVRA. NAACP LEGAL DEF. & EDUC. FUND, INC. & NAACP, *supra*, at 12.

Some states have limited the time and place individuals can register to vote, all to the detriment of blacks. Florida, Ohio, Wisconsin, and Maine have enacted such laws. *Id.* at

12. Ohio, for example, repealed a law that provided a one-week period in which individuals could both register and vote at the same time. *Id.* The elimination of this law falls disproportionately on black voters who have used it more than other groups in the past. *Id.*

Several states have enhanced their eligibility requirements for voting. Alabama, Kansas, and Tennessee have enacted laws that require documentary proof of citizenship before one can register to vote. *Id.* This facially neutral requirement will fall more harshly on older African Americans because many were born in the Jim Crow Era, when most blacks were born at home without birth certificates, as they were denied access to hospitals or did not have enough money to pay for a hospital delivery. *Id.* (citing *New State Voting Laws: Barriers to the Ballot?: Hearings Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 9 (Sept. 8, 2011) (statement of Ryan P. Haygood, Director, Political Participation Group, NAACP LDF), http://www.naacpldf.org/files/case_issue/Final%20Voting%20Barriers%20Testimony2C%20September%2012C%202011%20_400__2.pdf [http://perma.cc/5XD2-QFZJ]). The same result occurs with laws in states like Wisconsin that lengthen the period of time one must be a resident of the state before becoming eligible to vote. *Id.* These durational residency requirements disproportionately affect blacks, who tend to move more frequently than whites. *Id.* (citing PAUL TAYLOR ET AL., PEW RESEARCH CTR., AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE'S HOME? 22 (2008), http://www.pewsocialtrends.org/files/2010/10/Movers-and-Stayers.pdf [http://perma.cc/C4Z3-34E9]).

The Florida and Iowa legislatures have passed laws that deny the franchise to convicted felons. *Id.* at 26–27. Ex-felons who have served their sentences are permanently denied the right to vote. *Id.* at 12. As African Americans have disproportionately high rates of felony convictions and incarcerations, these laws will disfranchise thousands of black citizens. *Id.*

Florida, Mississippi, and several other states have taken steps to purge voters from the registration rolls. *Id.* While the stated purpose of voter purges is to maintain the purity of the lists of eligible voters by removing the names of ineligible individuals, eligible voters are often purged from the lists. *Id.* A ninety-one year-old war hero, for instance, was stricken from the rolls in Florida. Greg Allen, *World War II Vet Caught Up in Florida's Voter Purge Controversy*, NPR.ORG (May 31, 2013, 1:56 PM), http://www.npr.org/sections/itsallpolitics/2012/05/31/154020289/world-war-ii-vet-caught-up-in-floridas-voter-purge-controversy [http://perma.cc/RHV2-GTTM]. That state's purging program has been so flawed that 12,000 voters have been erroneously flagged or purged. NAACP LEGAL DEF. & EDUC. FUND, INC. & NAACP, *supra*, at 12. Over seventy percent of these voters have been black or Latino. *Id.* (citing WENDY WEISER & MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, RECENT VOTER SUPPRESSION INCIDENTS 2 (2008), http://brennan.3cdn.net/e827230204c5668706_p0m6b54jk.pdf [http://perma.cc/YC6A-HBGJ]).

Florida, Georgia, Ohio, Tennessee, and West Virginia passed legislation that substantially reduced the opportunities for early voting. *Id.* The period for early voting was cut almost in half, from fourteen to eight days, in Florida. *Id.* Again, this facially neutral move falls more heavily on blacks than whites as they are more likely than whites to use the early voting process. *Id.* Although only thirteen percent of the Florida electorate, blacks accounted for twenty-two percent of the early voters therein during the 2008 general election. *Id.* (citing Letter from NAACP LDF to Chris Herren, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice 4 (June 17, 2011), http://naacpldf.org/files/case_issue/2011-06-17%20

Housing Act makes it illegal for certain property owners, real estate agencies, and lenders to discriminate "because of race, [or] color" in the sale or rental of housing.[243] Finally, the 1972 amendments to Title VII of the 1964 Civil Rights Act, *inter alia*, strengthened the Equal Employment Opportunities Commission, the government agency charged with enforcing Title VII, by giving it the power to investigate and prosecute charges of employment discrimination, making Title VII more than just a toothless tiger, and by extending the prohibition against employment discrimination to states and local governmental entities.[244] The latter revision made employment discrimination unlawful in states that had not already enacted employment discrimination laws. As the Supreme Court has noted, "Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972."[245] The 1972 amendments brought an official end to the Jim Crow era and began the post-civil rights era.[246]

Vindicating the racial integration tenet, many federal statutes also permit the use of racial preferences as a remedy for past discrimination. Title VII, for example, permits employers to establish race-conscious affirmative action policies under such circumstances.[247] The 1965 Voting

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LDF%20joint%20statement%20to%20AG%20regarding%20Florida%20election%20laws%20.PDF [http://perma.cc/Q3D2-87Z3]).

Finally, several states have passed laws requiring voters to present a government-issued photo ID at the polls on election day. Among these states are Alabama, Texas, Mississippi, South Carolina, Kansas, Rhode Island, Tennessee, and Wisconsin. *Id.* at 12–13. These laws have a tremendous disfranchisement effect on the American people, as eleven percent of voting-age citizens, approximately 22.9 million people, do not have a government-issued photo ID. *Id.* at 13 (citing BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf [http://perma.cc/AAS6-7QEE]). They are especially devastating for blacks, as 25 percent of black voting age citizens (over six million people) do not possess a valid government-issued photo ID. *Id.*

The NAACP report also highlights federal and state attempts to weaken the Voting Rights Act of 1965. *Id.* at 39–40. Sections 2 and 5 are the most important provisions of the Act. Many of these facially neutral voting measures smack of voting techniques used throughout the south during Jim Crow to deny the right to vote or to reduce the voting power of blacks.

243. Pub. L. No. 90-284, § 804(a), 82 Stat. 81, 83 (1968) (codified as amended at 42 U.S.C. § 3604 (2012)).

244. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V. 1975)); *see* Brooks, *supra* note 23, at 259 (discussing the 1972 Amendments).

245. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309 (1977).

246. *See* 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975); BROOKS, *supra* note 9, at xii.

247. *See, e.g.*, Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616 (1987) (voluntary); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (involuntary). *See generally*, ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION:

Rights Act authorizes the creation of "majority-minority voting districts," a form of affirmative action, to remedy historic patterns of voting discrimination.[248] The 1968 Fair Housing Act has in the past permitted affirmative action housing policy on a limited basis.[249]

Statutory antidiscrimination and racial preference laws are triggered by the "intent test" and, sometimes, the "effects test." The former test requires the plaintiff to show that the defendant, whether it be a private party or governmental entity, purposefully made a race-conscious decision that disadvantages the plaintiff.[250] The effects test requires the plaintiff to show that the defendant used a racially neutral policy or practice that "fall[s] more harshly" on the plaintiff's civil-rights class than on one or

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CASES AND PERSPECTIVES 1203–34 (3d ed. 2005) (discussing Supreme Court cases regarding voluntary and involuntary affirmative action under statutory law).

248. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 905–06 (1995) (discussing the purpose of the Voting Rights Act); Shaw v. Reno, 509 U.S. 630, 640–41 (1993) (same). Although jurisdictions may continue to take race into account when drawing election districts, the Supreme Court requires a strong justification if racial considerations predominate over traditional districting principles. *See* Ala. Legis. Black Caucus v. Alabama, No. 13-895, 135 S. Ct. 1257, 1270–73 (Mar. 25, 2015) (holding, *inter alia*, that the district court failed to properly calculate "predominance" in its alternative holding that race was not the predominant motivating factor in the creation of any of the challenged districts, that the district court's other alternative holding—that the challenged districts would satisfy strict scrutiny—rests on a misperception of the law; specifically, Section 5 of the Voting Rights Act does not require a covered jurisdiction to maintain a particular numerical minority percentage. Instead, it requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice); Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (holding that § 4(b) of the Voting Rights Act was unconstitutional as it applied an outdated formula to determine which states and counties were covered entities under § 5 of the Act). *See generally*, BROOKS ET AL., *supra* note 247, at 557–678 (discussing the development of the right to vote).

249. These are "access" quotas designed to increase minority participation in housing as opposed to "ceiling" quotas used to regulate the racial composition of a housing complex. The latter is typically referred to as "racial occupancy controls" or "managed integration." *See, e.g.*, South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 871, 882–83, 899 (7th Cir. 1991) (special outreach marketing did not necessarily limit access); United States v. Starrett City Assocs., 840 F.2d 1096, 1101–02 (2d Cir. 1988) (noting that access quotas are generally upheld, while ceiling quotas are "of doubtful validity"). *See generally*, BROOKS ET AL., *supra* note 247, at 282–336, 318–20 (discussing the Fair Housing Act in general, and specifically affirmative action in the context of housing).

250. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003) (disparate treatment claims require proof of discriminatory intent).

more of the other civil-rights classes.[251] Because whites constitute a civil-rights class (a "protected class"), these laws also protect them.[252]

Like statutory law, constitutional law enforces formal equal opportunity through the creation of antidiscrimination and racial preference laws. In constitutional law, the "strict scrutiny test" has become the Supreme Court's chief means of enforcing the racial omission and racial integration tenets. A two-prong equal-protection test, the strict scrutiny test prohibits a governmental entity from intentionally—the intent test—using a racial classification unless the classification is narrowly tailored—commonly called the "means prong" or "means test"—to serve a compelling state or governmental purpose—commonly called the "ends prong" or "ends test".[253] Imbued with the constitutional authority of the Equal Protection Clause, the strict scrutiny test is intended to severely limit the use of race in the formulation of public law or policy.[254] To that extent, the strict scrutiny test promotes the racial omission tenet.[255]

Implicit in the strict scrutiny test is the constitutional authorization for the use of racial preferences by governmental entities. These institutions have constitutional permission to intentionally use a racial classification that would otherwise be discriminatory only if the classification meets the strict scrutiny's means and ends tests—it must be as narrowly tailored to

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251. *Id.* (quoting Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

252. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976) (reasoning Title VII terms are not limited to any particular race and that the EEOC consistently interprets that title to apply to discrimination against whites, as well as against nonwhites); *see generally*, BROOKS ET AL., *supra* note 247, at 261–81, 375–556 (discussing discrimination in public accommodation and employment).

253. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (remanding Caucasian student's suit against a university for discrimination against her on the basis of race because the Fifth Circuit did not apply strict scrutiny to her claims); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (school districts' use of racial classifications as a "tiebreaker" to promote diversity was unconstitutional because districts failed to meet high bar for justifying racial discrimination); Johnson v. California, 543 U.S. 499 (2005) (strict scrutiny governed inmate's racial discrimination claim against prison); Gratz v. Bollinger, 539 U.S. 244 (2003) (selection method favoring "underrepresented" groups violated Equal Protection clause); Grutter v. Bollinger, 539 U.S. 306 (2003) (narrowly tailored admissions program, although race-conscious, served a compelling interest and was therefore constitutional).

254. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 802–05 (2006). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (expressing the majority's "wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'").

255. *See, e.g.*, BROOKS ET AL., *supra* note 247, at 1235–1312 (providing background on the use of strict scrutiny by the courts); SULLIVAN & GUNTHER, *supra* note 231, at 531–76.

serve a compelling governmental purpose.[256] Few racial classifications pass the strict scrutiny test. Basically, the Supreme Court recognizes only two compelling state interests regarding race-conscious programs designed to assist blacks: the desire to remedy an institution's own past discrimination and the desire to maintain a diverse student body. In sanctioning affirmative action, the strict scrutiny test, to that extent, promotes the racial integration tenet.[257] Mediating the tension between the racial omission tenet and the racial integration tenet, the strict scrutiny test typically favors the former tenet. The racial omission tenet trumps the racial integration tenet in most constitutional, as well as most statutory cases.

In sum, statutory and constitutional civil rights law can be divided into antidiscrimination law, prohibiting racial discrimination, and racial preference law, permitting racial preferences as an exception to said prohibition. Antidiscrimination law, whether statutory or constitutional, primarily seeks to enforce the racial omission side of formal equal opportunity. Statutory antidiscrimination law is invoked by the intent test and sometimes by the effects test. Constitutional antidiscrimination law operates through the

256. *See Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring) (internal citation omitted) ("Under strict scrutiny, all racial classifications are categorically prohibited unless they are 'necessary to further a compelling governmental interest' and 'narrowly tailored to that end.'" (quoting *Johnson*, 543 U.S. at 514)); *Grutter*, 539 U.S. at 326 ("[Strict scrutiny] means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."); *Adarand Constructors, Inc*., 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

257. *See, e.g*., *Fisher*, 133 S. Ct. 2411 (remanding Caucasian student's suit against a university for discrimination against her on the basis of race because the Fifth Circuit did not apply strict scrutiny to her claims); *Parents Involved in Cmty. Schs.*, 551 U.S. 701 (school districts' use of racial classifications as a "tiebreaker" to promote diversity was unconstitutional because districts failed to meet high bar for justifying racial discrimination); *Gratz*, 539 U.S. 244 (selection method favoring "underrepresented" groups violated Equal Protection clause); *Grutter*, 539 U.S. 306 (narrowly tailored admissions program, although race-conscious, served a compelling interest and was therefore constitutional); *Adarand Constructors, Inc.*, 515 U.S. 200 (applying strict scrutiny to racial classifications in awarding government contracts); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding city failed to show a compelling government interest justifying plan requiring contractors to award subcontracts to minorities); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing measured use of race as an admissions criterion); *see also* BROOKS ET AL., *supra* note 247, at 1197–1318 (providing an overview of the historical development of and current law regarding affirmative action); SULLIVAN & GUNTHER, *supra* note 231.

strict scrutiny test, which incorporates the intent test. Racial preference law, whether statutory or constitutional, primarily seeks to enforce the racial integration tenet. It operates as an exception to the intent test statutorily and the strict scrutiny test constitutionally.

These laws have governed the Supreme Court's decision-making in both the civil rights and post-civil rights periods. Here's the rub: racial dynamics have changed since the civil rights era, not a little but a lot.[258] New black equality interests challenge the old interests. Dialogue about the American race problem needs to keep up with the times. It must become more sophisticated, shifting from discrimination discourse to subordination discourse.

B. Post-Civil Rights Period

1. The Problem: Changing Racial Dynamics

Racial conditions in contemporary American society are quite different from what they were at the time of *Brown* and during the civil rights era. The Supreme Court in 1954 was dealing with a system of American Apartheid. The South had Jim Crow laws and the North, for the most part, had Jim Crow practices. For example, blacks in the South were prohibited not only from going to the same schools as whites, but also from eating in the same restaurants, drinking out of the same public water fountains, entering the same restrooms, or watching movies seated next to whites in theaters.[259] Common signage at the time warned: "Whites Only"; "Restrooms for Colored"; "No Dogs or Niggers"; "Colored Waiting Room"; and "Staff and Negroes Use Back Entrance."[260] Blacks could be lynched for such infractions as attempting to register to vote, filing a lawsuit against a white person or a black man making eye contact with a white woman—"eyeball rape."[261] Lynching was more than hanging. It typically had a prelude and finale, the former consisting of torture, burning, maiming, and dismemberment,

258. For a detailed discussion of these changes see, for example, BROOKS, *supra* note 9, at x–xiii (contrasting the discrimination experienced by black Americans in the past with current instances of racial discrimination, including capital deficiencies and disparity in opportunities).

259. *Id.* at xi.

260. *See, e.g.*, REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH 5, 6, 10, 39, 110, 131, 166, 181, 232, 236 (William H. Chafe, Raymond Gavins, & Robert Korstad eds., 2001) (illustrating various forms of segregation and discrimination in the Jim Crow South).

261. *Id.* at xii.

and the latter consisting of such "souvenirs" as ears, nose, lips, genitals, and other body parts.[262]

In 1972, the racial dynamics of American society changed significantly and for the better. Jim Crow died with the passage of the Equal Employment Opportunity Act of 1972,[263] the Civil Rights Movement as well as the civil rights period ended, and what scholars call the post-civil rights period began. Some four decades into the post-civil rights period, blacks have experienced unprecedented success individually, including the election and reelection of a black President of the United States. Yet capital deficiencies—financial, human, and social—continue to overwhelm the vast majority of African Americans.[264] While formal equal opportunity—the racial omission and racial integration tenets—was seen as an effective and fair response to Jim Crow, many scholars today question its soundness in our current racial environment. Indeed, at least four distinct post-civil rights theories speak to the question of formal equal opportunity's utility in civil rights cases and, more broadly, our post-civil rights society: *traditionalism*; *reformism*; *limited separation*; *and critical race theory*.

Each theory proceeds from a very distinct belief, orientation, or norm regarding the best strategy for racial advancement in contemporary American society. Traditionalists believe that race no longer matters in our post-civil rights society; ergo, FEO is conceptually sound, provided that the racial omission tenet trumps the racial integration tenet in civil rights cases, as is traditionally the case. Reformists proceed from the opposite posture. They believe race still matters in post-civil rights America; ergo FEO is conceptually sound but operationally flawed, precisely because the racial integration tenet does not routinely prevail over the racial omission tenet. Limited separatists start from the normative position that racial solidarity

262. *See, e.g.*, PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002) (describing how lynching was used by whites to institute a reign of terror over black Americans); CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO (The Lawbook Exchange, Ltd. 2008) (1940) (reviewing statutes and cases concerning post-Civil War race relations); NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889–1918 (Negro Universities Press 1969) (1919) (discussing the shameful presence of lynchings in American history); REMEMBERING JIM CROW, *supra* note 260 (collecting interviews of firsthand accounts of the atrocities perpetuated against black southerners); Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 282–86 (2003) (presenting the horrific details of lynchings).

263. BROOKS, *supra* note 9, at xii; Roy L. Brooks, *The Crisis of the Black Politician in the Age of Obama*, 53 HOW. L.J. 699, 727–31 (2010).

264. BROOKS, *supra* note 9, at 125–83.

matters most; ergo, FEO is conceptually unsound because it leaves no room for racial separation. Finally, critical race theorists' core post-civil rights belief is that white hegemony matters most; ergo, FEO is conceptually unsound as it protects and perpetuates white privilege and it offers no social transformation.

From these very different post-civil rights theories, we get very different articulations of the black equality interest, from which determinations of juridical subordination can be made. Traditionalists define the black equality interest as racial omission—colorblind judicial decision-making is the best path for racial advancement in today's society—and would, accordingly, find juridical subordination whenever the Supreme Court suppresses the racial omission tenet. Reformists define the black equality interest as racial integration—diversity-driven judicial decision-making is the best strategy for racial advancement—and would, as a result, find juridical subordination whenever the Supreme Court suppresses the racial integration tenet. Limited separatists define the black equality interest as racial solidarity—judicial decision-making that supports black institutions is the best prescription for racial advancement—and would, consequently, find juridical subordination whenever the Supreme Court suppressed or perhaps failed to support benign racial identity. Finally, critical race theorists define the black equality interest as social transformation—judicial decision-making that strikes a blow against white hegemony—and would, accordingly, find juridical subordination whenever the Supreme Court suppressed efforts to bring about social transformation.

Determining juridical subordination is a complex process of analysis in post-civil rights America because the black equality interest today is subject to multiple conceptualizations. Notwithstanding such complexity, the Supreme Court and lower federal courts must make this calculation. They must engage subordination discourse to further racial advancement and, hence, good social policy, in our post-civil rights society. What follows is a more detailed explanation of the calculations that go into the multifarious determinations of juridical subordination.

2. Black Equality Interest and Subordination

a. Traditionalism

Traditionalism's basic orientation toward the American race problem, its core belief about racial relations and black progress, is quite simple: *race no longer matters*.[265] Adherents of this post-civil rights theory are clearly not saying that racism does not exist; they are saying that the

265. *See id.* at 14–34.

racism that does exist does not prevent African Americans or any other ethnic group from achieving worldly success and personal happiness in our post-civil rights society. Similarly, they are clearly not saying that African Americans face no problems today; they are saying that the problems African Americans face in today's society are self-inflicted. These problems are internal, not external; they are cultural, not racial.[266]

Given this core belief about black equality in post-civil rights America, one can easily imagine that traditionalists are largely in sync with the civil rights-era conceptualization of the black equality interest. They would seem to have an overall favorable regard for formal equal opportunity's design for racial advancement. Formal equal opportunity still makes good sense to them. It is a civil rights policy, or strategy for racial advancement, that it is both conceptually and operationally sound. The only caveat is that each tenet must be strictly applied; in other words, the racial integration tenet must always be enforced in a racially neutral fashion. It must never cross paths with the racial omission tenet in application. If, however, their paths do cross through an ill-advised attempt to bring about racial integration in a race-conscious manner, then the racial omission tenet must trump. Blacks and society as a whole are better off when we do not pollute the social environment by making too much fuss about race when, in fact, race no longer matters. Race-conscious policies are racially divisive, pure and simple.

This thinking, indeed, provides the subtext for most of the Supreme Court's decision-making in civil rights cases since the end of the civil rights period. The Court simply does not want to make too much of the problem of race in our society.[267] Our judgment that traditionalists have a strong preference for the racial omission tenet comes not only by implication

266. *See id.* at 1–13.

267. *See, e.g.*, Schuette v. Coal. to Defend Affirmative Action, Integration, & Immigration Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623 (2014) (no federal authority could bar state constitutional amendment prohibiting affirmative action); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (remanding Caucasian student's suit against a university for discrimination against her on the basis of race because the Fifth Circuit did not apply strict scrutiny to her claims); Grutter v. Bollinger, 539 U.S. 306 (2003) (narrowly tailored admissions program, although race-conscious, served a compelling interest and was therefore constitutional); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (holding city failed to show a compelling government interest justifying plan requiring contractors to award subcontracts to minorities); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications in awarding government contracts); *see also* Larry Alexander & Maimon Schwarzchild, *Race Matters,* 29 CONST. COMMENT. 31 (2013) (arguing that too much attention is given to the race issue).

from their core post-civil rights belief, but also directly from the lips of some well-known traditionalists. Chief Justice Roberts is a steadfast traditionalist. He writes: "Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[268] George Will, another traditionalist, strongly believes not only that race no longer matters, but also that race only matters when the government uses it in policymaking. Whether invidious or benign, "negative" or "positive," race-conscious governmental policies are discriminatory and, hence "racist."[269]

Based upon the traditionalists' view about formal equal opportunity, especially the emphasis they give to the racial omission tenet in furthering the black equality interest, it is reasonable to conclude that traditionalists would find juridical subordination whenever courts suppress the racial omission tenet, even in favor of blacks. Giving blacks special treatment is not only racially divisive, but it also signals to society that blacks are hapless victims in need of special treatment. Such treatment undercuts the black equality interest by depicting blacks as a people less than equal to whites. Blacks are akin to wards of the state. Racial charity undermines racial equality.

b. Reformism

Reformists operate from a different post-civil rights perspective than traditionalists. Glenn Loury, a one-time traditionalist, argues that the traditionalist belief that "[i]t's time to move on" is "simplistic social ethics and sophomoric social psychology."[270] When reformists look at the American race problem, they see a problem of race, rather than a narrower problem that inheres in the culture of the lowest socio-economic class in black America.

For reformists, race still matters, just the opposite of what traditionalists believe, because, *inter alia*, even though we have a black president, the most powerful person in the world lacks the power to raise racial issues with a strong voice in his own administration.[271] General Mills reports a

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268. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U. S. 701, 743, 748 (2007).

269. *See* George F. Will, *Why Civil Rights No Longer Are Rights*, SAN DIEGO UNION-TRIB., Mar. 10, 2005, at B12.

270. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 144 (2002).

271. For instance, President Barack Obama was severely rebuked by the media when he saw racism in the arrest of a renowned black Harvard professor and friend of the president, Henry Louis Gates, by a white police officer, Sgt. James Crowley of the Cambridge, Mass., Police Department. Helene Cooper, *Obama Criticizes Arrest of a*

strong racist response to its 2013 commercial showing an interracial family eating its iconic cereal, Cheerios.[272] Backstage racism, such as that revealed by former NBA owner Donald Sterling in a private conservation, seems more prevalent than front-stage racism—racism expressed in public places.[273] Smoking-gun evidence of African American claims of racist cops can be found not only in the Department of Justice (DOJ) report on Ferguson,[274] but also in Federal Bureau of Investigation (FBI) Director James Comey's acknowledgment of the "hard truth" that racial bias is a fact of life among police officers policing black communities.[275] Yes, there is black–on–black crime, but traditionalists fail to point out that FBI statistics show that the rate of white on white crime is virtually identical to the rate of black–on–black crime, reformists argue.[276] Reformists want

Harvard Professor, N.Y. TIMES (July 23, 2009), http://www.nytimes.com/2009/07/23/us/politics/23gates.html?_r=0 [http://perma.cc/ALX9-FRLS]; Toby Harnden, *Barack Obama's Support Falls Among White Votes*, TELEGRAPH (Aug. 2, 2009), http://www.telegraph.co.uk/news/worldnews/barackobama/5961624/Barack-Obamas-support-falls-among-white-voters.html [http://perma.cc/LL7M-4N5K]; Michael A. Fletcher & Michael D. Shear, *Obama Voices Regret to Policeman*, WASH. POST (July 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072400451.html [http://perma.cc/BJ4Q-HRA2]; Krissah Thompson & Cheryl W. Thompson, *Officer Tells His Side of the Story in Arrest of Harvard Scholar*, WASH. POST (July 24, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/23/AR2009072301073.html [http://perma.cc/NYN9-NDGA].

272. Stuart Elliott, *Vitriol Online for Cheerios Ad with Interracial Family*, N.Y. TIMES (May 31, 2013), http://www.nytimes.com/2013/06/01/business/media/cheerios-ad-with-interracial-family-brings-out-internet-hate.html [http://perma.cc/8M84-P2UR].

273. *See, e.g.*, LESLIE HOUTS PICA & JOE R. FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONTSTAGE (2007) (positing that most actual expression of racism is done in private settings, particularly among social groups).

274. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5, 18, 62, 65 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/LH8B-RDSL].

275. James B. Comey, Director, Fed. Bureau of Investigation, Address at Georgetown University (Feb. 12, 2015), http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race [http://perma.cc/6UJB-HKD8].

276. *See* BROOKS, *supra* note 9, at 32–33 ("In 2002, for example, 74.5% of violent crimes perpetrated against African Americans were committed by other African Americans. In that same year, however, 72.6% of violent crimes perpetrated against whites were committed by other whites." (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2002 STATISTICAL TABLES, at tbl. 42, http://www.bjs.gov/content/pub/pdf/cvus02.pdf [http://perma.cc/2R6G-LEJK])).

the Supreme Court to be more sensitive to the racially disadvantaging effects of these and other racialized conditions.[277]

But reformists are not revolutionaries. "With due humility," reformist Glenn Loury insists, "I am a reformer, not an 'abolitionist[.]'"[278] Hence, reformists, like traditionalists, would seem to embrace formal equal opportunity in concept. Racial omission and racial integration are fine in concept in our post-civil rights, post-Jim Crow society. The difference lies in their views as to the way in which the Supreme Court typically applies these tenets. Traditionalists believe formal equal opportunity, although conceptually sound, is operationally flawed. It is flawed in that way because the Court does not place enough emphasis on the racial integration tenet in its administration of both racial preference and antidiscrimination law. Reformists want more, rather than less, racial integration, even if that means more race-conscious, less colorblind decision-making. Black equality is most enhanced through racial integration, as the mainstream is where the best of everything is—the best schools, jobs, and so on.[279] The difference between reformists and traditionalists, in short, lies in the relative emphasis given to the racial omission and racial integration tenets. For traditionalists, the racial omission tenet trumps the racial integration tenet. For reformists, the racial integration tenet trumps the racial omission tenet.

Given the strong belief that race still matters—Justice Sotomayer begins one of her dissenting opinions by borrowing from the title of reformist Cornel West's book, *Race Matters*[280]—juridical subordination under reformism can be defined as the suppression of the racial integration tenet. Such racial subordination is manifested most frequently when the Supreme Court curtails racial preference law. Race-conscious affirmative action is

277. For further discussion of how race still matters, see *id.* at 37–53.

278. LOURY, *supra* note 270, at 121.

279. For example, on average, segregated schools are "inferior in terms of the quality of their teachers, the character of the curriculum, the level of competition, average test scores, and graduation rates." Brenna Lermon Hill, Comment, *A Call to Congress: Amend Education Legislation and Ensure That President Obama's "Race to the Top" Leaves No Child Behind*, 51 HOUS. L. REV. 1177, 1184 (2014) (quoting GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HISTORICAL REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 5 (2007), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf [http://perma.cc/4X36-FLKF]).

280. *See* Schuette v. Coal. to Defend Affirmative Action, Integration, & Immigration Rights & Fight for Equal by Any Means Necessary, 134 S. Ct. 1623, 1651, 1676 (2014) (Sotomayor, J., dissenting)*; see also* CORNEL WEST, RACE MATTERS (2d ed. 2001) (calling on both races to recognize that racism and race are woven into American history and must be acknowledged).

the strongest implementation of the racial integration tenet.[281] Similarly, juridical subordination occurs in antidiscrimination law when the Court makes it difficult for plaintiffs to bring or win cases that would bolster racial integration. Antidiscrimination law—the prohibition against discrimination on the basis of race or color[282]—is the gateway to integrating American institutions.

c. Limited Separation

Limited separatists have a clear post-civil rights orientation, a clear understanding of what matters most in the quest for black equality in today's society: racial solidarity. Racial self-sufficiency is the *sine qua non* of racial advancement for African Americans. Yet, blacks, limited separatists believe, suffer from a dearth of racial unity—a paucity of racial pride. Blacks are too preoccupied with gaining acceptance from whites or making their fame and fortune in white institutions. Hence, there is not enough black pride, black heritage, black solidarity, and self-reliance.[283]

Given this post-civil rights perspective, one can safely surmise that limited separatists have an unfavorable opinion of formal equal opportunity. Both tenets—racial omission and racial integration—are conceptually incompatible with limited separatists' core message of racial solidarity, a message that is both race-conscious and out of sync with racial integration. Thus, unlike traditionalists and reformists, limited separatists reject formal equal opportunity at the conceptual level. Formal equal opportunity, in the view of limited separatists, is at best an inchoate post-civil rights policy and at worst a dangerous post-civil rights policy in the context of today's post-civil rights society.

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281. *See* MINOW, *supra* note 214; Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L.J. 1, 5–6 (2006); Leslie Yalof Garfield, *Back to* Bakke*: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 684 (2005); David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 812 (2005); *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (narrowly tailored admissions program, although race-conscious, served a compelling interest and was therefore constitutional); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications in awarding government contracts); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing measured use of race as an admissions criterion).

282. *See supra* text accompanying notes 220–24.

283. *See* BROOKS, *supra* note 9, at 73–74.

Even during the civil rights era, many African Americans viewed the concepts of racial omission and racial integration with suspicion. While African Americans in general initially greeted the Supreme Court's decision in *Brown* with exuberance, a fair amount of apprehension set in among many blacks, especially in the South, upon sober reflection. The fear was that formal equal opportunity might mean the closure of black institutions or the end to public funding of such institutions.[284] The NAACP lawyers who argued *Brown* were aware of these concerns, but dismissed them as unfounded.[285] However, the fears have, by and large, proven to be true.[286] Indeed, the Supreme Court simply does not place much value in maintaining or creating black institutions. For most of the post-civil rights period, it has waged a sustained war against publicly funded black institutions on the ground that they make a mockery of *Brown*. For example, the Court placed Historically Black Colleges and Universities (HBCUs), which are quintessential black institutions, under a constitutional duty to dismantle their racial identity in deference to the color-blind tenet. In *United States*

284. *See* discussion *infra*, note 286.

285. *See* CARTER, *supra* note 5, at 156–57, 172. In addition, some civil rights scholars see implicit racism in *Brown*'s assertion that separate is inherently unequal. *See infra* note 293 and accompanying text.

286. Testimony before the United States Senate indicated that perhaps a majority of African American principals and teachers did lose their jobs. *See* Kevin D. Brown, *Review: Robert L. Carter, A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*, 31 VT. L. REV. 925, 939 (2007) (citing *Displacement and Present Status of Black School Principals in Desegregated School Districts: Hearings Before the Select Comm. on Equal Educ. Opportunity of the U.S. S.*, 92d Cong. 4906–07 (1971) (statement of Dr. Benjamin Epstein, Assistant Superintendent in Charge of Secondary Education, Newark, New Jersey)); *see also* ALVIS V. ADAIR, DESEGREGATION: THE ILLUSION OF BLACK PROGRESS (1984) (discussing the impact of desegregation on African Americans); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102, 109 (1987) (citing Brief for Nat'l Educ. Assoc. as Amicus Curiae, United States v. Georgia, 445 F.2d 303 (5th Cir. 1971) (No. 30-338) (providing empirical data on burden borne by black teachers, administrators, and students because of school integration)); JAMES E. BLACKWELL, THE BLACK COMMUNITY: DIVERSITY AND UNITY, 158–60 (2d ed. 1985); HAROLD CRUSE, PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY 22 (1987) (describing the "disservice" done to blacks by the NAACP's rejection of compromise gestures—belated equalization of segregated school systems); ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 285, n.13 (2d ed. 2005) (sources cited therein); HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES 94–97 (1972) (stating desegregation often resulted in merely superficial changes and placed the burden on those it was intended to aid); David G. Carter, *Second-Generation School Integration Problems for Blacks*, 13 J. BLACK STUD. 175, 175–88 (1982) (examining the phenomenon of post-*Brown* resegregation). In addition to school closings, many of the integrated schools experienced "second-generation resegregation"—segregation within these schools—with the over placement of black students in slow-learner, such as "educable mentally retarded," classes and white students in advanced classes. *See* BROOKS, *supra* note 209, at 77.

v. Fordice, the Supreme Court held that current policies traceable to de jure segregation that have a discriminatory effect "must be reformed to the extent practicable and consistent with sound educational practices."[287] Understanding the threat this standard—"racial identifiability" attributable to de jure segregation—poses to the existence of HBCUs, Justice Clarence Thomas, the lone black justice on the Court who, if nothing else, is proudly black, attempted to spin the majority's opinion in such a way as to save HBCUs. The Court, he opined in a concurring opinion, "do[es] not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*."[288]

Despite Justice Thomas' attempt to spin the holding in *Fordice*, subsequent attempts have been made to "desegregate" HBCUs. Indeed, on remand in *Fordice*, the lower court mandated colorblind admission standards at HBCUs and white colleges in the state of Mississippi.[289] This ruling was made over the vehement objection of blacks who argued that the new standards would cut black enrollment in half at Mississippi's three HBCUs. The Supreme Court denied an appeal in the case and, hence, refused to block the lower court's ruling.[290]

For limited separatists, Justice Harlan's famous defense of the racial omission tenet in his dissenting opinion in *Plessy v. Ferguson* illustrates the inadequacy of racial equality under formal equal opportunity.[291] As he set about defending the idea of a colorblind Constitution, Justice Harlan assured the nation that America's racial hierarchy would *not* change. The very same paragraph in which he embraced the colorblind Constitution opens with Justice Harlan avowing:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for *all time*, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.[292]

287. 505 U.S. 717, 729 (1992).
288. *Id.* at 748 (Thomas, J., concurring).
289. Ayers v. Fordice, 879 F. Supp. 2d 1419, 1494 (N.D. Miss. 1995).
290. Ayers v. Fordice, 522 U.S. 1084 (1998) (mem.). The Court's decision denying certiorari in the case is reported in an article written by Peter Applebone. *Equal Entry Standards May Hurt Black Students in Mississippi*, SAN DIEGO UNION-TRIB., Apr. 24, 1996, at A10.
291. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).
292. *Id.* at 559 (emphasis added).

Limited separatists ask, rhetorically, how could anyone who truly cares about racial equality limit the black equality interest to formal equal opportunity?

Given the importance of racial identity and solidarity to limited separatists, it is not difficult to glean a responsive definition of juridical subordination. The Supreme Court engages in juridical subordination when it suppresses racial identity or solidarity. Justice Thomas seems to indicate that this form of juridical subordination is quite typical: "*It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior*."[293] Although a core traditionalist, Justice Thomas has a clear understanding of and appreciation for the limited separatist concept of juridical subordination.[294]

d. Critical Race Theory

Critical race theory's central post-civil rights message is that white hegemony matters most in the struggle for racial advancement. Not unlike that of limited separation, this core belief translates into a condemnation of formal equal opportunity. From the perspective of critical race theory, formal equal opportunity is conceptually unsound, dead on arrival, so never mind about its application. Thus, unlike limited separatists or reformists for that matter, critical race theorists do not believe formal equal opportunity's defects can be fixed by artful reconceptualization or clever application. The "animal" cannot be "tamed"; it must be "killed."

Critical race theory's core message of white hegemony comes from an analytical framework that goes to the very structure of our society. As Richard Delgado and Jean Stefancic assert, "critical race theory questions the very foundations of the liberal order, including equality theory, legal

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293. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (emphasis added). Some civil rights scholars see implicit racism in *Brown*'s assertion that separate is inherently unequal. *See, e.g.*, Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 4–6 (1992) (discussing de jure segregated public schools' inconsistency with constitutional values). In a subsequent article, Professor Brown states:

> I am one who firmly believes that what allowed Chief Justice Earl Warren to produce an opinion that all the justices of the Supreme Court could agree upon was the notion that segregation damaged only black people. Thus, I think the social science evidence was necessary because it allowed Warren to garner unanimous support for his opinion striking down segregation. As insulting to blacks as I find Warren's opinion in *Brown* fifty years later, my deep and long reflections of twenty years as a law professor assures me that striking down segregation, even at this cost, was a tremendous bargain for black people.

Id. at 947.

294. For an attempt to reconcile Justice Thomas's traditionalism with his limited separatism, see *infra* text accompanying notes 349–49.

reasoning, Enlightenment rationalism, and neutral principles of constitutional law."[295] Reminiscent of the *Wizard of Oz*, critical race theorists believe that appearance can be deceiving and, hence, seek to "understand what is going on behind the curtain."[296] Looking behind the curtain, critical race theorists see a post-civil rights social order that is racially corrupt and has been from the very beginning. Look around and what does one see: whites on top, people of color on the bottom. Everything important in our society slants in favor of insiders who are overwhelmingly straight white males. This racialized social order means that our society is "racist," a term critical race theorists use quite often. "Racism" means that our society is not organically neutral or objective when it comes to matters of race. Instead, it is "non-neutral" or "anti-objective," all of which is socially constructive. When people think colorblind, they do not see monochrome; they see white.[297]

Some whites, "critical white theorists," acknowledge the privilege they have in the social order.

> [W]hen I . . . apply for a job[ ]or hunt for an apartment, I don't look threatening. Almost all of the people evaluating me for those things look like me—they are white. They see in me a reflection of themselves—and in a racist world that is an advantage. I smile. I am white. I am one of them. I am not dangerous. Even when I voice critical opinions, I am cut some slack. After all, I'm white.[298]

In response to Justice Holmes's aphorism, "[t]he life of the law has not been logic: it has been experience," or values,[299] critical race theorists can be understood to pose the following question: whose values does the law tend to vindicate?

Because it is part of a racially corrupt society, formal equal opportunity is necessarily "racist," critical race theorists insist. More than just a cog or mantelpiece, formal equal opportunity is an integral part of the social order, as it protects and perpetuates it. That, indeed, is the purpose of law:

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295. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (2d ed. 2012).

296. Jerry L. Anderson, *Law School Enters the Matrix: Teaching Critical Legal Studies*, 54 J. LEGAL EDUC. 201, 210 (2004).

297. *See* BROOKS, *supra* note 9, at 89–108; TIM WISE, DEAR WHITE AMERICA: LETTER TO A NEW MINORITY (2012).

298. Robert Jensen, *White Privilege Shapes the U.S.: Affirmative Action for Whites is a Fact of Life*, BALT. SUN (July 19, 1998), http://articles.baltimoresun.com/1998-07-19/news/1998200115_1_white-privilege-unearned-white-action-for-whites [http://perma.cc/6C6Z-JMFA].

299. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed. 1963).

to maintain the existing social order. Consequently, formal equal opportunity does nothing to unstack the deck—to disassemble the constructed racial hierarchy that inheres in our society—but does everything to legitimize it. "Formal equal opportunity is thus calculated to remedy at most the more extreme and shocking forms of racial treatment; it can do little about the business–as–usual types of [racialized conditions] that people of color confront every day and that account for much of our subordination, poverty, and despair."[300] The criticalist critique of formal equal opportunity, then, is part of a more general critique of our socio-legal order.[301]

Precisely how does formal equal opportunity do its job? How does it protect and perpetuate the socio-legal order? It does so, critical race theorists contend, primarily by privileging the perspective of the people on top: straight white males, the "insiders." Created by insiders, formal equal opportunity, and, hence, civil rights law, is largely informed by their perspective, rather than by the victim's perspective. The insider's ultimate aim is to remain on the inside: to stay in power. This goal is camouflaged by the use of lofty language like "justice," "equal protection," and "due process" in legal reasoning. Such language endows the socio-legal order with noble rhetoric, which, in turn, is used to mollify outsiders. Opium for the masses.

Based upon their critique of formal equal opportunity, critical race theorists would find juridical subordination when courts write opinions or render decisions that protect or preserve white hegemony. Juridical subordination, in other words, is judicial decision-making that effectively privileges insiders. Hence, from the critical race theory perspective, any judicial opinion that sustains the existing racial order—the historical relationship between race and power, or white hegemony—constitutes juridical subordination.

To demonstrate how juridical subordination is manifested, critical race theorists might cite an example involving the government's treatment of a nonblack "outsider" group, Native Americans. The government has used law to rationalize and justify the reduction and eradication of Native American land rights. As Robert Williams notes:

> Since its invasion of America, white society has sought to *justify*, through law and legal discourse, its . . . aggression against Indian people by stressing tribalism's incompatibility with the superior values and norms of white civilization. For half a millennium, the white man's Rule of Law has most often served as the

300. Richard Delgado, *Recasting the American Race Problem*, 79 CALIF. L. REV. 1389, 1394 (1991) (reviewing ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990)).

301. *See* BROOKS, *supra* note 9, at 89–108.

> fundamental mechanism by which white society has absolved itself [of] . . . any injustices arising from its assumed right of domination over Indian people.[302]

Juridical subordination is manifested by the fact that, in this case, law protects and perpetuates white hegemony over Native Americans—an "assumed right of domination over Indian peoples." Williams finds other examples of white hegemony "in the discourses of seventeenth[-]century Puritan divines, nineteenth[-]century Georgia legislators, and twentieth[-]century members of Congress, the federal judiciary[,] and the federal executive branch."[303]

Critical race theorists would also point to numerous legal doctrines in racial preference law and antidiscrimination law that protect or preserve white hegemony. These doctrines are conceived or implemented by the Supreme Court from the insider's perspective—the perpetrator's perspective—rather than from the outsider's perspective—the victim's perspective.[304] For example, the diversity rationale is one of the permissible governmental purposes that sustains race-based affirmative action under the strict scrutiny test. Insiders seized upon that rationale as the basis for their support of affirmative action in *Grutter*.[305] From the outsider's perspective, however, the diversity rationale is a negative because, critical race theorists argue, it sustains white hegemony by diverting the nation's attention from the real reason we need affirmative action—to redress white control and power in our mainstream institutions.[306] Similarly, in antidiscrimination law, the plaintiff is typically required to trace discriminatory acts to a here–and–now perpetrator, an existing person or institution, which can be held directly responsible for the discrimination. Critical race theorists maintain that this requirement makes it impossible for antidiscrimination law to redress societal discrimination, which from the outsider's point of view is a far more debilitating form of discrimination than individual

302. Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 277 (1989), *reprinted in* CRITICAL RACE THEORY: THE CUTTING EDGE 94, 103 (Richard Delgado & Jean Stefancic eds., 2d. ed. 2000).

303. *Id.*, *reprinted in* CRITICAL RACE THEORY at 103.

304. The classic scholarship on this point remains Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

305. Grutter v. Bollinger, 539 U.S. 306, 317 (2003).

306. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 906 (1995).

discrimination. Redressing societal discrimination offers a more direct hit against white hegemony than going after individual acts of discrimination.[307]

3. Implementing Law

What would civil rights law look like if the Supreme Court attempted to avoid juridical subordination in the ways suggested by the post-civil rights norms? If the Court showed absolute devotion to each of the post-civil rights norms individually—racial omission, racial integration, racial solidarity, and social transformation—what might civil rights law begin to look like? We think it might look something like the following.

a. Traditionalism

Traditionalists would make certain changes to current racial preference and antidiscrimination law so as to guard against the juridical subordination they identify—suppression of the racial omission tenet. As to the former, traditionalists would, at the very least, eliminate race-based affirmative action—repeal racial preference law—and, thus, obviate the need for the strict scrutiny test, at least for racial classifications. Indeed, Justice Scalia, a core traditionalist, argues that race-conscious laws are dangerously divisive in a society like ours. Quoting Professor Bickel's influential book, *The Morality of Consent*, Justice Scalia writes:

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. . . . "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[308]

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307. *See, e.g.*, Freeman, *supra* note 304, at 1053 (remedying racial discrimination, from the victim's perspective, requires affirmative efforts to change the conditions, rather than individual actions); Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (2d ed. 1980)).

308. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520–21 (1989) (Scalia, J., concurring) (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975)). Chief Justice Roberts takes a similar position. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007); *see also* Schuette v. Coal. to Defend Affirmative Action, Integration, & Immigration Rights & Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623 (2014) (no federal authority could bar state constitutional amendment prohibiting affirmative action); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (remanding Caucasian student's suit against a university for discrimination

Traditionalists have a more complex view of antidiscrimination law. Antidiscrimination law effectuates the racial omission tenet by prohibiting governmental entities and certain private institutions from using race-conscious policies or practices. A violation of antidiscrimination law is triggered when it can be shown that the defendant intentionally used race in its decision-making process—intent test—or used an identified facially neutral policy or practice that, unknown to the defendant, had a racially disparate impact on a protected class—effects test. The intentional use of race means that race was a motivating factor—or under some laws "the substantial factor"—in the decision-making process.

To avoid juridical subordination, traditionalists would make any number of changes to antidiscrimination law. High on the list is jettisoning the effects test while retaining the intent test. The latter is acceptable because it is narrowly focused on the accused's racial animus, indicating that race really did matter in the action taken. For that reason, traditionalist judges, including Justices Scalia and Thomas, have not hesitated to permit litigation to go forward under the intent test in a variety of settings. In *Thompson v. North American Stainless, LP*, Justice Scalia wrote a unanimous opinion that upheld the right of a plaintiff to bring a third-party retaliation claim under Title VII.[309] The plaintiff alleged that he was fired by his employer three weeks after the plaintiff's fiancée, who also worked for the defendant, filed an EEOC sex discrimination charge against the employer.[310] Similarly, in *Robinson v. Shell Oil Co*., Justice Thomas wrote a unanimous opinion that permitted a former employee to bring an action for post-employment retaliation under Title VII against an employer who wrote a bad reference letter even though the statute explicitly applies only to "an employee or applicant."[311]

Traditionalists, on the other hand, reject the effects test. They find this test to be too broad—too much of a hunting expedition searching for racism. Far from being colorblind, the effects test, they believe, is color-

against her on the basis of race because the Fifth Circuit did not apply strict scrutiny to her claims); *Grutter*, 539 U.S. 306 (narrowly tailored admissions program, although race-conscious, served a compelling interest and was therefore constitutional); *J.A. Croson, Co.*, 488 U.S. 469 (1989) (holding city failed to show a compelling government interest justifying plan requiring contractors to award subcontracts to minorities); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications in awarding government contracts).

309. 562 U.S. 170, 178 (2011).

310. *Id.* at 172.

311. 519 U.S. 337, 339–46 (1997).

conscious in that it brings too much attention to the question of race in the administration of our antidiscrimination law. As far as traditionalists are concerned, racial animus, unless explicitly shown otherwise, is not responsible for the plight of blacks. The problem facing blacks is class-based, not race-based. Hence, giving race so much attention makes race matter when it really does not, and should not, in our post-civil rights society. The government, especially the courts, ought not to encourage plaintiffs in employment discrimination, housing discrimination, voting rights, and other antidiscrimination lawsuits to think of ingenious ways to imagine the existence of racism or racial discrimination where none exist—or at least not enough to matter. Actions that raise the ghost of racism can only take the nation down a dangerously divisive path. Hence, the traditionalists on the Supreme Court have not allowed plaintiffs to initiate effects-based litigation under Title VI of the 1964 Civil Rights Act[312] and have otherwise sought to clip the wings of the effects test whenever possible. Two examples follow.

In *Wal-Mart Stores, Inc. v. Dukes*, the traditionalist justices, over a strongly worded dissent by the reformists justices, rejected the female employees' claim that the employer's policy of allowing local supervisors to exercise discretionary and subjective decision-making over employment matters explained the widespread disparate pay and promotions accorded to female employees across the nation.[313] The traditionalists could not find discrimination because, *inter alia*, Wal-Mart had adopted a written policy of nondiscrimination, and plaintiffs failed to identify a specific employment practice that produces the gender disparity.[314] Similarly, in *Ricci v. DeStefano*, the traditionalist justices favored the intent test over the effects test.[315] Plaintiffs were seventeen white firefighters and one Hispanic firefighter who argued that they were the victims of disparate treatment discrimination—intent test—in violation of Title VII when the city of New Haven discarded the results of a promotional exam that had an adverse impact on the black firefighters who took it—effects test.[316] Fearing a disparate-impact lawsuit, the city threw out the exam results.[317] Over a sharp dissent written by the reformists justices, the traditionalists justices ruled that the fear of a lawsuit was not enough to excuse what

312. *See* Alexander v. Sandoval, 532 U.S. 275, 291–93 (2001).
313. 131 S. Ct. 2541, 2547–48, 2557 (2011).
314. *Id.* at 2553–55.
315. 557 U.S. 557, 585 (2009).
316. *Id.* at 562.
317. *Id.*

these justices saw as the city's intentional discrimination.[318] The Court held the city liable under the intent test.[319]

b. Reformism

To avoid the juridical subordination they identify—suppression of the racial integration tenet—reformists would make certain changes to current racial preference and antidiscrimination law. With respect to the former, race-conscious affirmative action would be made a general rule of law. Affirmative action, thereby, becomes as legitimate under reformism as it is illegitimate under traditionalism. To accomplish that goal, the strict scrutiny test, against which all voluntary affirmative action plans are constitutionally tested, would have to be changed. Currently, an affirmative action plan passes constitutional muster under the strict scrutiny test if it is narrowly tailored—means test—to serve a compelling governmental interest—ends test.[320] One way to accommodate more affirmative action is to expand the ends prong. In addition to a public institution's desire to redress its own discrimination, which is extant law, reformists would certainly include the desire to eradicate societal discrimination among the acceptable compelling governmental interests.[321]

Another candidate for the ends prong that might resonate with reformists is the simple desire for racial integration. An affirmative action program could satisfy the ends prong—would constitute a compelling governmental interest—if the program was established for the purpose of increasing racial integration within the institution. This effectively extends the diversity rationale beyond current law, which limits that rationale to the educational context.[322] If, for example, a school district wanted to implement an affirmative action plan not for its student body, but for its work force, it could do so without violating the strict scrutiny's ends prong by demonstrating a need to bring more racial diversity to its work force. Thus, for reformists, diversity would probably be regarded as a compelling governmental interest for purposes of satisfying strict scrutiny's ends prong in any context. They

318. *Id.* at 579–80.
319. *Id.* at 593.
320. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V. 1975)).
321. *See* BROOKS, *supra* note 9, at 44–45.
322. Grutter v. Bollinger, 539 U. S. 306, 328 (2003).

might reason that racial democracy is not achieved when blacks experience their greatest social mobility in sports and music.

From the reformist perspective, the Supreme Court commits juridical subordination in antidiscrimination law when it fails to deploy this important body of civil rights law in ways that foster racial integration in a given case. To avoid such juridical subordination in antidiscrimination law, reformists would create or modify any and all legal doctrines that supported racial integration. Four examples readily come to mind. The first is the creation of a new litigation model, called the "individual effects test." This test provides an easier way of probing institutional discrimination than the current effects standard, which is group-based. Second, societal discrimination should be made actionable under antidiscrimination law. Third, the burden of proof as to the defendant's state of mind in intentional discrimination should be shifted from the plaintiff to the defendant as the latter is in control of this evidence and, hence, is in the best position to know the truth regarding it. Finally, institutions should be allowed to use good-faith efforts to open opportunities for blacks within their organizations without at the same time subjecting themselves to litigation or at least liability under the intent test.

The individual effects test is a way to probe institutional discrimination effectively. It allows the plaintiff to establish a prima facie violation of antidiscrimination law by proving that he or she, as a member of a protected class, was adversely affected by an institution's facially neutral policy or practice, for instance by a college's heavy reliance on the SAT or an employer's written test requirement. The plaintiff would *not* have to show, as he or she must under the extant effects standard, that the facially neutral practice or policy adversely impacts his or her protected class as a whole. Such a showing requires complex statistical analysis and expert witnesses. Under the reformists' model, first proposed by Professor Richard Zimmer,[323] a black job applicant who receives a low score on an employment test establishes adverse impact, but not necessarily employment discrimination. The plaintiff must then show that a less discriminatory alternative policy or practice was available to the institution and that the institution failed to use it. The alternative, less discriminatory policy or practice must serve the institution's legitimate interests. Thus, on-the-job experience may be a less discriminatory, but equally effective alternative to assess the applicant's qualifications as the employer's written test. An applicant might say, "I did not do well on the test, but I have twenty years of excellent on–the–job experience." The use of AP grades in lieu of SAT scores may be a less discriminatory alternative for a particular black

323. BROOKS ET AL., *supra* note 247, at 510 (quoting Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473, 497–98, 500–01, 503 (1999)).

college applicant seeking admissions to Harvard. This approach is somewhat consistent with current law. An employer sued under Title VII of the 1964 Civil Rights Act is entitled to rebut the prima facie case based on adversity to the group by proving that the test was job-related and consistent with business necessity.[324] If the employer carries this burden, it can still be held liable if the plaintiff can show the availability of a less-discriminatory alternative.[325] Professor Zimmer's proposal leaves out the job-related or business-necessity defense for the individual effects test.[326] He summarizes this litigation model in the context of employment discrimination:

> [T]his model "requires that the plaintiff prove that she was adversely affected by an 'employment practice,' that an alternative practice exists, and that this alternative both would not adversely affect the plaintiff and would serve the employer's legitimate interests.". . . Plaintiff establishes an employment practice that adversely affects her by bringing forth "evidence that the action is consistent with the way the defendant usually operates and is not ad hoc [a first-time action] or idiosyncratic.". . . The term "employment practice" is to be construed liberally, and, as such, includes subjective judgments of supervisors. . . Plaintiff proves an alternative employment practice by showing that "other employers either did or could act regularly on the basis of this proposed practice. It is not enough to show that an employer could act on it in some exceptional situations."[327]

The Supreme Court may have difficulty accepting an effects test that disassociates itself from the idea of systemic discrimination, which is how the effects test has always been understood.[328] Unlike claims of intentional discrimination, which invoke the intent test, claims of disparate impact discrimination are deemed to be cognizable only because they impact the entire group of, say, black workers or black college applicants. Disparate impact does not apply to single-plaintiff lawsuits. The effects test is for groups; the intent test is for individuals or groups. Hence, the individual effects test takes what has traditionally been viewed as a group-oriented

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324. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659–60 (1989).

325. *See id.* at 660–61.

326. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U. S. 299 (1977) (statistics provided to make prima facie case of discrimination must not rely on practices that were not, at the time, illegal).

327. BROOKS ET AL., *supra* note 247, at 510 (quoting Zimmer, *supra* note 323, at 497–98, 500–01, 503).

328. *See, e.g.*, *Wards Cove Packing Co.*, 490 U.S. 642 (nonwhite workers could not prevail because they had only statistics, rather than evidence of particular hiring practices linked to demonstrated adverse impact); *Hazelwood Sch. Dist.*, 433 U.S. 299 (statistics provided to make prima facie case of discrimination must not rely on practices that were not, at the time, illegal).

lawsuit and makes it accessible to individual claims of discrimination. Reformists might argue that this critical change in law should make the effects test more successful in doing what it was supposed to have done from the beginning—"eliminat[e] the cumulative effects of historical racial discrimination."[329] Given the fact that the conventional deployment of the effects test has had limited success,[330] should the Supreme Courts fail to adopt the individual effects test where applicable, a reformist would say, the Court will have engaged in juridical subordination.

Allowing for the prosecution of societal discrimination is the second reformist measure.

Societal discrimination, according to the Supreme Court, is "discrimination not traceable to its own actions."[331] Michael Selmi defines it as "discrimination in the air" or as:

> . . . discrimination for which there is no identifiable responsible party, public or private. It might alternatively be defined as discrimination that occurred some time in the past with an identifiable party that is no longer legally culpable because the statute of limitations has run or the effects of the discrimination are now too attenuated to trace. . . . [S]ocietal discrimination. . . [might include] the lingering effects of past discrimination. The term may also serve as a surrogate for identifiable discrimination in the circumstance where a governmental entity is reluctant to admit or prove its own discrimination. Finally, . . . societal discrimination might best be seen as the cumulative effects of multiple acts and actors—a combination of all the factors identified above[.][332]

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329. Smith v. City of Jackson, 544 U.S. 228, 247, 262 (2005) (O'Connor, J.,). In discussing the history of disparate impact liability, Justice O'Connor remarked that "the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination." *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

330. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006). In this article, Professor Selmi argues that the disparate impact theory arose not as a general theory of equality, but more modestly as a device to deal with specific instances of prior discrimination. *Id.* at 705, 708–16. After reviewing the cases, Professor Selmi concludes that the disparate impact theory has had limited success outside of written employment tests and that disparate impact is extremely difficult to prove in court. *Id.* at 725, 755–57. Professor Selmi's most striking conclusion is that the disparate impact theory may have had the unintentional effect of undercutting the disparate treatment theory by limiting our understanding of what constitutes intentional discrimination. *Id.* at 767–82. Our concept of intentional discrimination continues to turn on motivation and animus. *Id.* at 701, 782. The major social mistake of pushing so hard for disparate impact theory, Professor Selmi argues, was the belief that law could do the work that politics itself could not—to wit, bring about substantive racial equality. *Id.* at 707. Professor Selmi argues for a greater commitment by society to remedying inequalities. *Id.* at 770–71.

331. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (1986) (O'Connor, J., concurring); *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

332. Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1603–04 (2002) (citations omitted).

The last definition—the cumulative effects of all forms of prior or current discrimination, including the lingering effects of slavery and Jim Crow—is the most coherent. It focuses on current discriminatory effects, realizing that such effects may have begun with an act of past intentional discrimination. This definition also recognizes that societal discrimination, unlike individual or institutional discrimination, is not likely to have an identifiable perpetrator—it is not tied to any particular person or institutional practice or policy—although it can certainly affect an individual's behavior or what goes on in an institution. As the cumulative effects of all discrimination in a society, past or present, societal discrimination effectively identifies society as the perpetrator. For that reason, according to the Supreme Court, societal discrimination is not subject to legal redress. The problem, from the Supreme Court's perspective, is not that societal discrimination does not exist, but that it is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future."[333] It is too big to prosecute.

This, then, means that racial integration is impeded by a form of discrimination that the Court lacks the imagination to remedy. That is yet another instance of juridical subordination. Perhaps this form of juridical subordination is justified, perhaps not. The point, however, is that it exists, and should, at the very least, be acknowledged as such.

Reformists would certainly make societal discrimination actionable. They strongly believe that we should not be hung up on identifying a perpetrator when all of society is the perpetrator. "*If the past disparities are morally illegitimate*," Loury argues, "*the propriety of the contemporary order must also be called into question.*"[334] One way to make societal discrimination actionable is to require institutions to take societal discrimination into account as best as they can when formulating institutional policies or practices. Failure to do so would make them liable to blacks disadvantaged by the institution's policy or practice. Thus, to avoid liability, the institution would have to consider the ways in which its policies or practices are likely to disadvantage blacks affected by such policies or practices. For example, prior to administering a promotional exam, the employer should run it by blacks within or outside the company to get their input as to its racial impact. Bringing in more people to review the exam can bring to light unanticipated problems and avoid charges of

333. *Wygant*, 476 U.S. at 276 (plurality opinion).

334. LOURY, *supra* note 270, at 103; *see* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 137–38 (2004).

racial unfairness after the exam is given. Similarly, a state would not institute a new Voter ID law requiring a birth certificate when it discovers, upon consulting with black community leaders, that a large segment of blacks who had been voting for years have no birth certificate simply because they were born at home at a time when Jim Crow denied them access to hospitals.

Requiring institutions to take societal discrimination into account also seems fair, reformists might argue, because public and private institutions have historically played major roles in creating societal discrimination. Accordingly, institutions are much better positioned than individuals to do something about societal discrimination. Take, for example, the fact that "[t]he typical white family enjoys a net worth that is more than eight times that of its black counterpart."[335] This racial disparity, reformists could argue, is one of the effects of societal discrimination. It is the cumulative effect of historical discrimination against blacks in employment markets, housing markets, and educational institutions going back intergenerationally as far as Jim Crow and even slavery. Because of the inertia of these discriminatory traditions, the typical black family has not been able to accumulate an estate to pass down to future generations. When poor white immigrants were starting out in this country from the 1890s to the 1940s, scores of young black men were falsely imprisoned for long terms under local vagrancy laws in the South. This was "slavery by another name," to borrow from Douglas A. Blackmon's wonderful book on the subject.[336] Then there were the Jim Crow laws and practices that targeted blacks in both the North and South. Thus, unlike white immigrants, generations of blacks had no ability to acquire or accumulate an estate that could be passed down to children, grandchildren, and future generations. "Some economists estimate that up to [eighty] percent of lifetime wealth accumulation results from gifts from earlier generations, ranging from the down payment on a home to a bequest by a parent."[337] If a college, for example, did not take this demonstration of societal discrimination into account when creating a financial aid package for a black student, who is likely the first in his family to go to college, that action would be the basis for a lawsuit under antidiscrimination law governing educational institutions, such as Title VI of the 1964 Civil Rights Act.

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335. Dalton Conley, Opinion, *The Cost of Slavery*, N.Y. TIMES (Feb. 15, 2003), http://www.nytimes.com/2003/02/15/opinion/the-cost-of-slavery.html [http://perma.cc/6M3V-D3QJ].

336. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (First Anchor Books 2009) (2008).

337. Conley, *supra* note 335; *see* Grutter v. Bollinger, 539 U.S. 306, 344–46 (2003) (Ginsburg, J., concurring) (discussing slavery's educational legacy).

Although the institution is not directly responsible for societal discrimination, it has a civil rights duty not only to be knowledgeable about the force and effect of such discrimination, but also to do something about it.

The reformist attempt to make societal discrimination actionable will place an unprecedented major burden on institutions. Each institution would have to be aware of the country's racial history, not a bad idea, and the impact that history has had on each applicant or person with whom it deals. Is this an instance where the cure—making societal discrimination actionable—is worse than the disease—juridical subordination? We think not. One of the duties of living in a diverse society is to know something about how one's fellow citizens live.[338]

The next reformist proposal focuses on the intent test. It places the burden of proof regarding the defendant's intent on the defendant itself, rather than on the plaintiff. Under current law, the burden of proof is on the plaintiff.[339] Reformists would have the plaintiff carry the initial burden of bringing forth credible evidence of discrimination, direct or circumstantial. But once this burden is satisfied, the burdens of production and persuasion would then shift to the defendant to disprove the inference of discrimination that arises from the plaintiff's prima facie case. As the critical question raised in the plaintiff's prima facie case concerns the defendant's state of mind, and given the fact that the defendant is in the best position to know its own state of mind, shifting the burden of persuasion with respect to that element of proof on the defendant seems fair and reasonable.[340]

A good faith efforts standard is the final reformist proposal we have identified here. This reform would give institutions a safe harbor in creating policies and practices that promote racial integration. Civil rights law is very complex and shifts from time to time and judge to judge. Institutions are not always sure that they are in compliance. What they fear most is being sued for violating the law and the expense and bad publicity that accompany such lawsuits. A good faith efforts standard would give institutions legal assurance that they will not be sued, or at least held liable, for their good faith efforts in creating opportunities for integrating their organizations. If there is no invidious intent associated with the formulation

338. *See supra* note 242 and accompanying text (discussing Voter ID laws).

339. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

340. *See, e.g.*, BROOKS, *supra* note 209, at 55–57 (discussing the difficulty of prosecuting a disparate treatment claim).

or execution of their policies and practices, and if their intent was to open doors for racial minorities, then institutions would be immune from liability under either the intent or effects test.

In sum, a belief in the potency of racism and the ubiquity of racial discrimination in today's society—race still matters—is at the core of the reformist post-civil rights perspective. This suggests that reformists would view racial preference and antidiscrimination law vastly different not only from traditionalists, but also from current civil rights law, which, in most respects, correlates with traditionalism in its application. Reformists would want more affirmative action and more expansive ways of probing structural and individual discrimination. Such changes to racial preference law underscore the importance that reformists attach to the racial integration tenet. They place more emphasis on the racial integration tenet than on the racial omission tenet. Conceptually, both tenets are sound; but operationally, the racial integration tenet should trump the racial omission tenet. To borrow from Justice Holmes again, reformists believe that formal equal opportunity need not be "killed" as it can be "tamed" and made a "useful animal."[341]

c. Limited Separation

To avoid juridical subordination, which limited separatists define as the suppression of racial identity or solidarity, the Supreme Court will have to move beyond the racial omission and racial integration tenets. Indeed, limited separatists would want the Supreme Court to do something it has steadfastly refused to do—distinguish between involuntary racial isolation that subordinates and stigmatizes—racial *segregation*—and voluntary racial isolation that supports and empowers—racial *separation*.[342] In *Brown*, the Supreme Court in one broad sweep ruled that, "[s]eparate educational facilities are inherently unequal."[343] More recently, Chief Justice Roberts elides the distinction between racial segregation and racial separation because he believes that judges should not be too confident in their "ability to distinguish good from harmful governmental uses of racial criteria."[344] To that claim, a limited separatist would respond: even a dog knows the difference between being kicked and stumbled over.

Scholars such as Robert Smith suggest that it is quite possible to "delink" racial separation "from the justificatory ideology of white

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341. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

342. *See, e.g.*, ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 12, 117 (1996) (discussing the "warts" of *Brown*, including its overly broad holding).

343. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

344. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U. S. 701, 742 (2007).

supremacy."[345] Racial separation is "theoretically, empirically, and politically relevant."[346] Even Chief Justice Roberts' African American brethren, Justice Clarence Thomas, understands the limited separatist take on racial isolation:

> "Racial isolation" itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, . . . [separation] injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.[347]

As it has been said, a black child does not have to sit next to a white child to get a quality education.

At first glance, it may appear that Justice Thomas is contradicting his strong embrace of the racial omission tenet put forth principally in *Adarand Constructors, Inc. v. Pena*[348] and *Grutter v. Bollinger.*[349] But it may be possible to hold both positions—racial omission and limited racial separation —if the latter is viewed as an *exception* to the former. Indeed, this is probably how limited separatists would do a doctrinal end-around formal equal opportunity.

Thus, to avoid juridical subordination unearthed through the limited separatist perspective, the standards for determining liability under racial preference law would have to at least be supplemented to permit blacks and other similarly situated groups to create positive, racially identifiable institutions with governmental assistance if need be. There is no way to accommodate racial solidarity, or limited separation, within the terms of the strict scrutiny test, which is designed to support the racial omission tenet. Racial solidarity has both the intent and the effect of sanctioning race-conscious decision-making, undermining the racial omission tenet, as well as legitimizing racial isolation, undermining the racial integration tenet. Hence, at the very least a new constitutional test would have to be developed as an exception to extant civil rights law. The racial omission and racial integration tenets would have to coexist with this new test.

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345. ROBERT C. SMITH, RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T 2 (1995).
346. *Id.*
347. Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).
348. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
349. Grutter v. Bollinger, 539 U.S. 306 (2003).

Limited separatists have, in fact, set forth a three-prong test that establishes conditions for determining the legality of racial classifications specifically created for the purpose of achieving racial solidarity:

> First, the group seeking [the racial classification] . . . must be able to demonstrate the need for a supportive environment free of debilitating racism or, in the case of gender, sexism. If our mainstream institutions practice the type of racial [control over] other groups that they do [over] African Americans, if other groups can point to educational, socioeconomic, or political disadvantage due to race or gender, then they satisfy the first condition. White males will have a difficult time meeting this condition because even the "angry" ones are not disadvantaged on account of their race or gender[.]
>
> Second, [the racial classification] . . . must not unnecessarily trammel the interests of other individuals or groups. This means that gratuitous discrimination is prohibited. [Racially identifiable institutions] . . . must grant access to individuals from outside the group, so long as these individuals are willing to support the institution's primary objectives. For example, a white student should be allowed to attend an Historically Black College or University . . . so long as he understands that the institution's primary objective is to attend to the special educational needs of African American students. Likewise, an African American lawyer should be allowed to practice law in a small Korean law firm so long as she understands that the law firm's primary objective is to service the surrounding Korean community, and a Latino graduate of Harvard Business School should not be denied employment with a Wall Street investment banking firm so long as it is understood that the primary objective of the firm is to service large, multinational corporations.
>
> Third, the only time an individual can be denied an opportunity on account of his or her race (or gender)—the only time a restrictive classification can be used—is when race (or gender) is a bona fide selection qualification "reasonably necessary to the normal operation of the particular [institution]," to borrow from analogous civil rights law. Race, for example, would constitute a bona fide selection qualification . . . if an African American institution were in danger of losing its identity or focus by the admission or hiring of an additional white applicant[.][350]

Governed by the three-prong test, limited separation does not reintroduce the separate–but–equal civil rights policy into racial relations. Not only is racial integration treated as a legitimate alternative to limited separation, allowing African Americans and other racial groups to pursue both racial strategies depending on individual-needs racial circumstances, but limited separatist organizations can themselves be racially integrated. True, a black organization or community could bar *further* integration so as to maintain its racial character. But neither the organization nor the community could ban *all* integration. Limited separation is not total separation, the latter of which would be a violation of constitutional and statutory law under the three-prong test.

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350. BROOKS, *supra* note 342, at 191–92.

In the end, then, limited separatists would give African Americans three equally valid strategies for racial advancement—*racial omission*, *racial integration*, and *limited separation*. The Supreme Court, thereby, treats limited separation *pari passu* with the racial omission and racial integration tenets. *Formal equal opportunity is the general rule and limited separation is the exception*. The strict scrutiny test governs racial preference law except when beneficial forms of racial isolation are at issue, in which case the three-prong test applies.[351] As a comprehensive formula for judicial support of the black equality interest, formal equal opportunity is conceptually unsound. But working in conjunction with limited separation, it makes sense, limited separatists would argue.

d. Critical Race Theory

What changes in civil rights law should the Supreme Court make in order to avoid juridical subordination as defined by critical race theorists—suppression of social transformation? Derrick Bell suggests that the Court must undergo "a change of perspective."[352] The Supreme Court, must begin to view "racial problems . . . from the perspective of minority groups, rather than [from] a white perspective."[353] The most direct way for the justices to acquire this mindset is to replace the strict scrutiny test in racial preference law and the intent or effects in antidiscrimination law with what can be called the "white-hegemony test." In other words, rather than banning racial classifications that do not satisfy the strict scrutiny test or prohibiting discrimination "because of race or color," the Court should strike down private or public policies or practices under our civil rights laws only if they protect or preserve white hegemony. In parallel fashion, the Court should issue rulings calculated toward dismantling white hegemony. These socially transformative rulings effectuate a fundamental restructuring of a society that is heavily slanted in favor of insiders, critical race theorists would argue. This complex argument hangs on a simple proposition: *given our anti-objective society, justice requires overcompensation in the opposite direction to balance*

351. This is similar to the application of a different level of scrutiny that the Supreme Court applies to gender classifications. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

352. Bell, *supra* note 306, at 906 (quoting Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CALIF. L. REV. 893, 904 (1994)).

353. *Id.* at 906–07 (quoting Farber, *supra* note 352, at 904).

things out. This proposition is similar to the sentiment offered by Supreme Court Justice Harry Blackmun years ago: "In order to get beyond racism, we must first take account of race. There is no other way."[354]

The most direct way to determine whether a Supreme Court ruling protects or preserves white hegemony is to ask whether the court's opinion or decision enhances white, or insider, privilege. Peggy McIntosh defines white privilege in a famous passage:

> I have come to see white privilege as an *invisible package of unearned assets* that I can count on cashing in each day, but about which I was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.[355]

The "cultural meaning" test is another way to detect white hegemony in an opinion. This test is also a way to privilege the outsider's perspective. It asks, for example, what does it mean in the African American culture "to construct a barrier between all-white and all-black sections of Memphis."[356] The meaning African Americans would attach to this wall is very different from what they would assign to, say, an employer's requirement that its truck drivers carry a valid driver's license. Even if the latter disadvantaged African American applicants because many of them did not have a valid driver's license, it would not necessarily indicate an assumed right of white domination over African Americans. Protecting hate speech would fail the cultural meaning test as well, because speech is a form of domination. Hate speech says that whites can say whatever they want to blacks. Hate speech reinforces white hegemony.[357]

Critical race theorists, in short, would want the Supreme Court to use its institutional authority to chip away at white hegemony. Each civil rights decision should aim to dismantle the white power structure in our

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354. DELGADO & STEFANCIC, *supra* note 295, at dedication (quoting Justice Harry Blackmun).

355. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women's Studies*, *in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 23 (Leslie Bender & Dan Braveman eds., 1995) (emphasis added); *see supra*, text accompanying note 298.

356. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355, 357, 365 (1987).

357. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 471 (1990); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 178 (1982); *see also* CATHARINE A. MACKINNON, ONLY WORDS (1993) (arguing the use of the First Amendment to protect intimidation, subordination, terrorism, and discrimination). *See generally*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (examining assaultive speech).

society as much as possible. Just as a good doctor would treat the problem rather than just the symptoms, the Supreme Court, critical race theorists believe, should treat the problem rather than the symptom. The Court does this through social transformation; in other words, by attempting to change the relationship between race and power in the social order.

CONCLUSION

Juridical subordination—the suppression of the black equality interest in civil rights cases[358]—makes the Supreme Court an object of civil rights inquiry. This is how it should be, given the Court's long history of racial harm prior to *Brown* as well as the racially impeding decisions made after *Brown*, starting with *Brown II*.[359] Plain and simple, Supreme Court decisions affect the wellbeing of African Americans. As Justice Thurgood Marshall has said: "What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes."[360] In *Brown*, the Court reversed course but has not always stayed on course since. Avoiding juridical subordination is, in our view, the best way for the Court to remain on course.

But, as we have shown, the determination of juridical subordination is rather indeterminate. There is more than one legitimate way to define the black equality interest in civil rights law in civil rights cases.[361] This does not surprise us; for, as Holmes has observed, behind every decision "lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[362] We have identified the post-civil rights norms—racial omission, racial integration, racial solidarity, and social transformation—as "competing legislative grounds" in the discourse on juridical subordination.[363]

Several questions arise from that application. How much difference is there between civil rights decisions that attempt to avoid juridical subordination —decisions that give maximum attention to racial advancement based on

358. *See supra* Part II.
359. *See supra* Introduction, Part I.A.
360. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).
361. *See supra* Part II.B.
362. Holmes, *supra* note 341, at 466.
363. *See* Brooks, *supra* note 219.

any one of the post-civil rights norms—and conventional civil rights decisions—decisions that take account of federalism, comity, and other competing referents? Is there a way to reconcile the competing post-civil rights norms to produce a single standard? What are the social costs—institutional and in terms of racial relations—associated with judicial efforts that give top priority to black advancement? Are we asking the Court to engage in a dangerously progressive enterprise, similar to what it did in *Brown*, albeit obviously less revolutionary? Is there a limit to what the law can do for racial advancement? If juridical subordination is unavoidable, we may be faced with the sense, if not the reality, that uneven individual success is all that African Americans can hope for in our post-civil rights society; that, with the death of Jim Crow, we have reached a permanent glass ceiling on racial advancement for black Americans as a whole.