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When Johnny Came Marching Home Again: A Critical Review of Contemporary Equal Protection Interpretation

JOHNNY PARKER*

To be a negro in America and to be relatively aware is to be in a constant state of rage.

Dr. Martin Luther King

An important tenet of early western political theory was the idea of equality among men.¹ This idea was not incorporated into the original Constitution; consequently, a large segment of American society was perceived as neither equal in society nor equal before the law. This conscious oversight was not theoretically corrected until the enactment of the Fourteenth Amendment. The rule of law created by this amendment, however, has not achieved the full measure envisioned by its drafters.²

* Associate Professor of Law, University of Tulsa College of Law; LL.M., Columbia University Law School, 1987; J.D., University of Mississippi, 1984; B.A., University of Mississippi, 1982.


2. This fact is so prominent that even the Supreme Court has noted it in its analysis of race-conscious remedial measures in education. In Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court noted:

Our Nation was founded on the principle that 'all Men are created equal.' Yet candor requires acknowledgement that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our 'American Dilemma.' Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

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The concept of equality is found in the last sentence of section one of the Fourteenth Amendment. Section one provides:
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.3

This particular amendment recognizes and seeks to protect four specific constitutional rights other than the equal protection of the laws.4 Prior to the enactment of the Civil Rights Act of 1964, however, the Equal Protection Clause was the primary weapon for challenging discriminatory race-based legislation. Otherwise, the civil rights arsenal was depleted.5

The primary object of the Equal Protection Clause was to create unconditional equality between the black and white races.6 Early federal courts, however, defined equality to mean political equality—to the exclusion of all other types of equality.7 The Court justified this approach to the Equal Protection Clause on the basis that the law could not provide or protect social equality. Consequently, in 1896, the United States Supreme Court, in Plessy v. Ferguson,8 observed: "[i]n determining the question of reasonableness [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."9

The fallacies inherent in this observation were that African Americans were not viewed, socially, as people and thus, could not share in the democratic traditions and customs afforded other citizens. Consequently, Justice Brown, writing for the majority, observed that “[t]he

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4. Section one of the Fourteenth Amendment also recognizes and protects the right of citizenship; privileges or immunities; and due process, substantive and procedural. U.S. CONST. amend XIV, § 1.
6. See infra note 31 and accompanying text.
7. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896)(holding that a statute that required white and "colored" persons to be furnished with separate accommodations on railway trains did not violate the Constitution; the Court noted that the object of the 13th Amendment was not to enforce social equality).
8. Id. at 544.
9. Id. at 550.
object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality . . . ." The social/political dichotomy served as the foundation of the "separate but equal doctrine" enunciated in Plessy. The creators of the "separate but equal" doctrine professed an ignorance of the interrelatedness of social and political mores. Thus, the conclusion that social equality was distinguishable from political equality and dependent solely upon individual choice was a logical progression of this otherwise obvious fallacy. Moreover, this dichotomy supported the view that law was an inadequate tool for achieving social equality—especially where the law conflicted with the sentiments of the community. Speaking on the inability of the legislature to overcome racial prejudice in the social setting, the Court noted:

this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is was organized and performed all of the functions respecting social advantages with which it is endowed.

The social/political dichotomy articulated in Plessy had a profound impact on constitutional interpretation from 1896 to 1964.

10. Id. at 544.
11. The Plessy "separate but equal" decision was inconsistent with the Court's earlier position in Strauder v. West Virginia, 100 U.S. 303 (1879). In Strauder, Justice Strong observed:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy . . . .

Strauder, 163 U.S. at 307-08.
12. Plessy, 163 U.S. at 551. The term "community" as used in the text evidences the sociological values of the justices participating in the majority. "Community" denotes the values and sentiments of the dominant white community. Its use in the singular tense further evidences the social reality in which the Plessy decision was rendered.

This reality is as true today as it was then—two Americas continue to exist; one black, one white, separate and unequal where the only relevant "community" continues to be that of the majority race. See generally, ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992)(describing the continued racial segregation in the 1980s in the areas of income, employment, and education).
13. Plessy, 163 U.S. at 551 (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).
For African Americans, it relegated the concepts of "equality of rights" and "equality of opportunity" to a virtually nonexistent status. More importantly, however, is the impact the dichotomy had on the concept of "citizenship" as defined in the first sentence of the Fourteenth Amendment.\textsuperscript{14}

The concept of citizenship is fundamental to constitutional interpretation. Citizenship is the adhesive which binds and establishes the contours of the Constitution.\textsuperscript{15} It is idealistically linked to the ideas of freedom and organization. The privilege of citizenship is a formal recognition of these ideas and a civic guarantee that the equilibrium between rights and duties will be maintained. When the relationship between equality, whether social or political, is ignored, either rights or duties are eroded; ultimately, freedom suffers, and the idea of citizenship is seriously weakened, and a caste system consisting of second-class citizens and aliens develops. The groups which share this status, whether second-class citizens or illegal aliens, are afforded the same social and legal treatment. This degenerative process leads to African Americans being viewed as second-class citizens, afforded no greater recognition or rights than illegal aliens.

The relatedness of social and political equality and the flaw of the \textit{Plessy} dichotomy are best illustrated by one of the most important incidents of citizenship—education.\textsuperscript{16} Education is broader than mere

\begin{itemize}
\item \textsuperscript{14} The Amendment defines citizens as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof. . . ." \textit{U.S. Const.} amend. XIV, § 1. Early federal court opinions regarding the 14th Amendment reflect that the status of women was not intended to be improved by the incorporation of the principles of citizenship and equality into the Constitution. These opinions reflect that social mores were utilized to restrict the political rights of women. \textit{See, e.g.} Bradwell v. Illinois, 83 U.S. (1 Wall) 130 (1873)(Illinois' refusal to grant a woman a license to practice law was not a violation of either the Fourteenth Amendment or the Privileges and Immunities Clause). \textit{See also} \textit{U.S. Const.} amend. XIX (giving women the franchise). This right should have belonged to women as citizens under the 14th and 15th Amendments, which were enacted long before the 19th Amendment.
\item \textsuperscript{15} \textit{See} Ambach v.Norwick, 441 U.S. 69 (1979)(holding a New York statute forbidding permanent certification of a public school teacher did not deny a non-citizen public school teacher equal protection, because the role of public education was so interrelated with the function of government that persons who had not become a part of the process of self-government could be permissibly excluded); \textit{Cf.} Nyquist v. Nauclet, 432 U.S. 1 (1977)(holding a New York statute barring certain resident aliens from state financial aid for higher education violated the Equal Protection Clause); Afroyim v. Rusk, 387 U.S. 253 (1967)(holding statute expatriating a citizen for voting in political elections of a foreign state was unconstitutional); Trop v. Dulles, 356 U.S. 86 (1958)(holding a federal statute divesting citizenship on the account of desertion from military service was unconstitutional because the deprivation of citizenship is not a weapon the government may wield to control individual behavior; citizenship is voluntary and with it are responsibilities and duties that cannot be divested unless by choice).
\item \textsuperscript{16} "Although education has yet to be recognized as a constitutionally protected right, its social value has elevated it to the level of a 'legitimate interest' and a right which must be made available to all on equal terms.'" \textit{Johnny C. Parker, Educational Malpractice: A Tort is Born, 39 Clev. St. L. Rev.} 301, 306-07 (1991)(quoting \textit{Brown v. Board of Educ.}, 347 U.S. 483, 493 (1954)).
\end{itemize}
schooling. Though schooling is an important factor in education, it is not sufficiently broad enough to define education. Rather, marriage, religious life, friendship, and entertainment are included in the concept of education. Any encounter with nature or society thus becomes education. Education, in this comprehensive sense, can be referred to as "acculturation," which was the dominant form of education at the time of the Plessy decision. This depiction of the social/political dichotomy reveals that most things social are important to the unfettered right to exercise political equality. Nevertheless, the dichotomy, from a historical perspective, legitimized the achievement of every social and political concern the Thirteenth, Fourteenth, and Fifteenth Amendments sought to prevent.

In Brown v. Board of Education the United States Supreme Court held that "the separate but equal" doctrine violated the Equal Protection Clause in the area of education. The Court failed, however, to renounce the doctrine in any other social area. This fact is especially revealing given the Court's reference to certain psychological and sociological studies which suggested that racial segregation was bad for negro children. Hence, the Court was careful not to disturb the social/political dichotomy articulated in Plessy.

This article suggests that the social/political dichotomy, announced by the Supreme Court in Plessy, has resurfaced as an integral part of equal protection interpretation. It examines contemporary equal protection cases in employment, education, and law. This examination reveals a conservative judicial philosophy which has eroded the concept of equality, especially pertaining to race. The reader is reminded that this erosion, however, is not without precedent; the

19. Id. at 493.
20. Ten years after Brown, Congress enacted the Civil Rights Act of 1964, which outlawed the doctrine of separate but equal in many social areas including, accommodations, voting, employment, and housing.
21. Brown, 347 U.S. at 494 n.11. The Court, relying on these studies, understood "that chronic and remediable social injustices corrode and damage the human personality, thereby robbing it of its effectiveness, of its creativity, if not its actual humanity [and that] racial segregation debased all human beings—those who [were] its victims, those who victimized[d], and in quite subtle ways those who [were] merely accessories." KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 63 (1965).
precedent for the erosion is the social/political dichotomy articulated in *Plessy*.

This article explores the contours of race, society, and equal protection. It suggests that race is relevant and must always be treated as an important factor in equal protection interpretation and other decision making processes. The primary thesis is that the current conservative judicial philosophy is not well founded in law. Rather, this philosophy, like that in *Plessy*, mirrors and increasingly encourages the interest of the larger white and prejudiced society.

Moreover, this article suggests that: (1) most things social are closely related to the exercise of political freedoms; (2) the maxim of "colorblindness" is a euphemistic articulation of "separate but equal;" and (3) current economic and social conditions are much like those that served as the catalyst for the *Plessy* decision. These findings counsel against the Court's recent return to a conservative judicial philosophy. The assertion that *Plessy* is still good law, due to the fact that it has never been completely judicially disaffirmed, would subject the most noteworthy constitutional scholar to severe criticism; however, this article suggests that, unfortunately, such an assertion is indeed not far from the truth.

**I. FROM THE ANNALS OF EQUAL PROTECTION**

The Fourteenth Amendment was subjected to judicial review for the first time in the *Slaughter-House Cases*. The issue in *Slaughter-House*, however, did not involve the Equal Protection Clause or race, but rather, the Privileges and Immunities Clause. The case was useful in the equal protection context, however, because Justice Miller, writ-

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22. The Court's conservative philosophy is evident not only in contemporary equal protection review, but also is reflected in contemporary judicial interpretations of civil rights legislation. Congress, in 1989, determined that recent decisions of the Supreme Court drastically cut back on the scope and effectiveness of civil rights legislation. This finding served as the catalyst for the Civil Rights Bill of 1990 which, had it not been vetoed by President George Bush, would have effectively overturned numerous civil rights opinions rendered by the Supreme Court during the decade of the 1980s. See Civil Rights Act of 1991, 12 S. 2104, 101st Cong., 2d Sess. (1990). Supreme Court decisions that would have been affected by the passage of the 1990 Bill include: Patterson v. McLean Credit Union, 485 U.S. 617 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

23. Congress has legislatively overruled Supreme Court decisions involving race in only two instances. See Dred Scott v. Sanford, 60 U.S. (1 How.) 393 (1856)(effectively overruled by the 13th, 14th and 15th Amendments); and Plessy v. Ferguson, 163 U.S. 537 (1896)(effectively overruled by the Civil Rights Act of 1964). The Civil Rights Bill of 1990 was Congress' third attempt to override judicial opinions. The bill, after further congressional drafting, was subsequently signed into law by President Bush as the Civil Rights Act of 1991. This act did, in fact, overturn the cases the Civil Rights Bill of 1990 was designed to overturn.

ing for the court, included within his analysis a detailed account of the circumstances and conditions surrounding the drafting and eventual enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments. Justice Miller noted:

[N]otwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value...25

These circumstances caused Congress to pass the Fourteenth Amendment.

Seven years later in Strauder v. West Virginia26 the Equal Protection Clause was used to challenge the constitutionality of a racially discriminatory state statute. In Strauder, the plaintiff, a former slave, was indicted for and convicted of murder. Plaintiff prayed for removal to federal court, assigning as grounds for the removal that under the laws of West Virginia no "colored" man was eligible to serve on a petit or grand jury and that by virtue of being a "colored" man, he could not enjoy the full and equal benefits of all the laws of the State of West Virginia.27

Justice Strong, author of the decision, reaffirmed the Slaughter-House Court's observations about the purpose of the Fourteenth Amendment.28 Justice Strong, however, went one step further and

25. Id. at 70.
27. Id. at 304.
28. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the Slaughter-House Cases, 'No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested,—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.'
observed that the words of the Fourteenth Amendment carried a “necessary implication” of a positive immunity or right to be exempt from unfriendly legislation solely because of one’s race or color. The implication also exempted “colored” persons from legislation which implied inferiority in civil society and lessened the security of their enjoyment of the rights others enjoyed.

The “necessary implications” of the Fourteenth Amendment meant that the provision should be construed in a manner that would diminish the gulf between the treatment of the black and white races. Concerned with the failure of the government and the people to communicate and trust one another, the breakdown of alliances among the states, and the hostility of southern whites towards blacks, Justices Miller and Strong seemingly viewed social equalitarianism as the solace that would trigger a return to national patriotism, loyalty, kinsmanship and, ultimately, restoration of authority to the people.

The theory of social equalitarianism was short lived, however. The continued decline in popular trust of the reconstructionist federal government, loss of respect for the law, and the decline in all spheres of social and political life, magnified by a depressed southern economy, led to the Compromise of 1876, which officially ended reconstruction. Consequently, by 1896 the responsibility for finding a balance between freedom and order, between the safety of the state and the individual, and between public and private interests had been completely returned to state legislatures. Thus, Plessy signified judicial disenchantment with law as a remedy for social change. The

Id. at 306-07.
29. Id. at 307-08.
30. Strader, 100 U.S. at 308.
31. Justice Miller noted that in any fair and just construction of the Civil War Amendments, it was necessary to look to the purpose for which they were enacted, their pervading spirit, and the evil which they were designed to remedy. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872). Compare, however, the difference in scope and coverage of the 14th Amendment noted by the Slaughter-House Court and the Strader v. West Virginia Court. The Slaughter-House Court believed that the protection extended to other racial minorities. Slaughter-House, 83 U.S. (16 Wall) at 71-72. The Strader Court, on the other hand, believed the protection referred only to the protection of the negro. Strader, 100 U.S. at 310.
32. In the Hayes-Tilden Compromise of the 1876 presidential election, the Democratic and Republican parties reached an understanding that the presidential republican candidate, Hayes, would: (1) be allowed to take office, on the condition that he would withdraw federal troops from the South; and (2) do nothing to prevent the election of several Democratic candidates in Republican controlled states. Derrick A. Bell, Jr., Race, Racism and American Law 33 (3d ed. 1992). Bell characterizes this as a “final example of black rights becoming grist in the mill of white interest.” Id. at 33.
34. “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.” Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
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decision strongly suggested that the Constitution’s role in protecting racial minorities should consist only in removing barriers to minority participation in the political process. The reality that the Court did not recognize, however, is that full participation in a democratic society requires more than a voice and a vote.\textsuperscript{35} As one author has noted, “[o]ne person, one vote,” under these circumstances, makes a travesty of the equality principle.\textsuperscript{36}

Separate but equal was firmly entrenched in our legal system for nearly sixty years. Not until 1945 did the Supreme Court begin to understand that political equality was meaningless without social equality. Between 1945 and 1972\textsuperscript{37} the Supreme Court departed from its conservative approach toward African Americans, and began enforcing civil rights laws and developing uniform standards of review for equal protection challenges.\textsuperscript{38} This departure was short lived, however, and the liberal judicial philosophy that the Equal Protection Clause during the civil rights movement began to come to a halt.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{35} The Voting Rights Act of 1965 symbolizes congressional recognition that a voice and a vote did not provide blacks with the opportunity to fully participate in the political process. Judicial construction of the Voting Rights Act, however, has fallen under recent criticism. A leading critic of the courts’ interpretation of the act observed:
    
    within contemporary voting rights jurisprudence, mere electoral control by black voters over their representatives has come to satisfy the Act’s conception of representation. In search of a statutory core value and judicially manageable standards, the courts have cobbled from the statute a right to minority electoral success. The courts have ignored statutory language providing for the “opportunity . . . to participate [equally] in the political process” and instead have focused exclusively on language securing the “opportunity . . . to elect the representatives of [the protected group’s] choice.” Especially since 1986, the courts have measured black political representation and participation solely by reference to the number and consistent election of black candidates. The submergence of black electoral potential and the subsequent emergence of black voting majorities capable of electing black candidates have become the preferred indicia of a statutory violation. Issues of voter participation, effective representation, and policy responsiveness are omitted from the calculus. Lani Guinier, \textit{The Triumph of Tokenism: The Voting Rights Act and The Theory of Black Electoral Success}, 89 Mich. L. Rev. 1077, 1093 (1991).
  \item \textsuperscript{36} J\textsc{ohn} H. E\textsc{ly}, \textsc{D}emocracy \& \textsc{D}istrust: A \textsc{T}heory of \textsc{J}udicial \textsc{R}eview 135 (1980)(quoting J\textsc{ames} R. Pen\textsc{nock}, \textsc{D}emocratic \textsc{P}olitical \textsc{T}heory 8-9 (1979)).
  \item \textsuperscript{37} This period roughly corresponds with the beginning and end of the civil rights movement.
  \item \textsuperscript{38} For a detailed discussion see Johnny C. Parker, \textit{Equal Protection Minus Strict Scrutiny Plus Benign Classification Equals What? Equality of Opportunity}, 11 \textsc{P}ace \textsc{L}. \textsc{R}ev. 213 (1991).
  \item \textsuperscript{39} T. Alexander Aleinikoff, \textit{A Case For Race-Consciousness}, 91 C\textsc{o}lum. L. Rev. 1060, 1061 (1991). “In the mid-1980s, one could say with confidence that, despite a number of differing justifications and constitutional analyses, the Supreme Court had generally ratified race-conscious programs and policies aimed at ameliorating the continuing social and economic consequences of several centuries of American racism.” Id. The Reagan administration, through its arguments in court and its judicial appointments, launched an attack on race-conscious policies.
\end{itemize}
By 1978, in *Regents of the University of California v. Bakke*, the Supreme Court, beginning its descent to the rationale of the days of old, would cite to Justice Harlan's sole dissent in *Plessy* for the proposition that the Constitution was "colorblind." This retreat has continued and, even today, federal courts currently use the idea of colorblindness to promote the notion of similarity without ascribing to it any practical political or social reality. Colorblindness, had it been adopted by the majority of justices in *Plessy*, would not have prevented segregation and its consequences. This reality is due, in large part, to the fact that colorblindness is not necessarily consistent with the notion that the Equal Protection Clause contains "necessary implications." Thus, contemporary courts have failed to ascribe to "col-

42. Although the Court noted that colorblindness was never the proper standard for measuring the equal protection clause, the tone of the decision suggested that color was only minutely relevant in analyzing remedial measures taken to alleviate past racial discrimination in education. *Bakke*, 438 U.S. at 336.
43. The current reality is still best described by Justice Thurgood Marshall's dissent in *Bakke*:

The position of the Negro in America today is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

I do not believe that the Fourteenth Amendment requires us to accept that.

Id. at 395-96 (Marshall, J. dissenting) (citations omitted).
44. The tendency of the United States Supreme Court, in the area of race, has been to create vague and amorphous legal standards which often do no more than allow individual justices to make, justify, and, where necessary, conceal their own value judgments behind an apparently impecable concept.

The social philosophy of segregation and race survived the Civil War. This philosophy permeated every walk of life including the courtroom. *See infra* note 197.
orblindness" the meaning which its creator, Justice Harlan intended.\textsuperscript{46} Harlan firmly believed that the constitutional conferral of citizenship had clothed Congress with the power to protect all rights implied by citizenship.\textsuperscript{47}

Today, colorblindness, as an attitude toward equal protection interpretation, mirrors the social/political dichotomy. Colorblindness, as a euphemism for this dichotomy, is best described by Professor Aleinikoff's observations that "one of the most deceptive antiracial equality principles in society, scholarship, politics, and the law is the persistent treatment of race as if there is no difference that need be noticed between the races, rather than seeing the difference that race makes."\textsuperscript{48} In the social context Aleinikoff further observed:

[r]ace is among the first things that one notices about another individual. To be black is to know an unchangeable fact about oneself that matters everyday . . . . To be born white is to be free from confronting one's race on a daily, personal, interaction-by-interaction basis . . . . Most blacks have to overcome, when meeting whites, a set of assumptions older than this nation about one's abilities, one's marriageability, one's sexual desires, and one's morality.

\textsuperscript{46} During his 34-year tenure on the United States Supreme Court (1877-1911), Justice Harlan acquired the reputation as the Court's "great dissenter." He dissented in the Civil Rights Cases of 1883 which struck down a Reconstruction-era statute banning racial discrimination by inns, restaurants, and public conveyances. The Civil Rights Cases, 109 U.S. 3 (1883) (Harlan, J., dissenting). The majority argued that equating such discrimination with slavery and involuntary servitude which Congress was empowered to forbid under the 13th Amendment "would be running the slavery argument into the ground." \textit{Id.} at 24. Harlan asserted that Congress had the power to eliminate not merely slavery but also its "badges and incidents" including denial of services by places of public accommodation. \textit{Id.} at 20. In Plessy he prophetically observed:

[t]he destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?


\textsuperscript{47} See supra note 43 and accompanying text.

\textsuperscript{48} Aleinikoff, supra note 39, at 1065, 1066 n.29.
Most whites, when they are being honest with themselves, know that these racial understandings are part of their consciousness. 49

It is significant that while there has been substantial improvement over the past three decades, African Americans, as a group, remain worse off than whites in every important social category. 50 Of greater significance is the current decline in economic stability and the rise in racial bigotry and hostility. 51 The central theme of the civil rights movement was equality. This aspiration for equality was two fold: equality of opportunity in employment, housing, education, and voting, and the actual attainment of equality in the full participation in these aspects of American life. Whites have always desired and sought to attain equality in social institutions and in the political sphere. Many whites, however, are less likely to espouse or practice equality of treatment for minorities in their personal behavior. Thus, the divergence between social principles and actual individual practices frequently led to white avoidance of minorities in those institutions where equality was most needed. Consequently, the Constitution is the only tool available to narrow the gap between the reality and the idea.

Today, as in 1896, racial inequality maintains an increasing tension in African American and white relations. Cited as foremost among the reasons for this tension are negative attitudes toward African Americans and the actual disadvantaged conditions in which many persons of color live. 52 Gerald Jaynes and Robin Williams point out that:


Since Reagan’s election in 1980, racial pejoratives have been more openly and more unashamedly expressed. George Bush’s use of Willie Horton, a black felon, freed by opponent Michael Dukakis, as a campaign strategy and Bill Clinton’s conduct toward Jesse Jackson suggest that racial hostility need no longer be kept in the closet. STUDS TERKEL, RACE: HOW BLACKS AND WHITES THINK & FEEL ABOUT THE AMERICAN OBSESSION 4, 5 (1992).

Many commentators suggest that there is a direct and visible correlation between economic trends and racism. When economic conditions spiral downward for a continued period, racial hostilities tend to rise. See, e.g., Richard Delgado, et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, Wis. L. Rev. 1359, 1379 (1985) (discussing several studies connecting struggle for economic survival to the rise in racial prejudice).

52. JAYNES & WILLIAMS, supra note 50, at 5.
[t]here remain important signs of continuing resistance to full equality of black Americans. Principles of equality are endorsed less when they would result in close, frequent, or prolonged social contact, and whites are much less prone to endorse policies meant to implement equal participation of blacks in important social institutions.\(^{53}\)

Nevertheless, the civil rights movement and the corresponding period of liberal equal protection interpretation restored African Americans' confidence in the Constitution as the protector of individual rights. Consequently, though most African Americans believe that social institutions reflect the biases and values of those who dominate the political process, they also believe their relative position in society will not improve without government intervention into these social institutions on their behalf.\(^{54}\)

Has the ghost of \textit{Plessy}, like the Egyptian phoenix which consumed itself by fire and arose renewed from the ashes, arisen to haunt equal protection interpretation? The answer to this question may be gleaned from equal protection opinions in the areas of education, employment, and the law. These areas are significant not only because they are socially important, but also because they offer barometers with which to measure the qualitative and quantitative successes of past, present, and future equality.

A. \textit{Education}

Education is a social institution that reflects patterns of race relations throughout American society. It mirrors conditions that prevail in other components of the social system. Not unexpectedly, power in education is vested disproportionately among dominant-group members, who control administrative and supervisory functions, decision-making authority, and financial resources that support the structure and operation of the institution.\(^{55}\)

"Education is viewed as the great equalizer. It is said to be available to everyone; therefore it is assumed to provide advantages for all,

\(^{53}\) \textsc{Jaynes & Williams, supra} note 50, at 11.

\(^{54}\) \textsc{Jaynes & Williams, supra} note 50, at 13.

regardless of race, ethnicity, or class." Brown v. Board of Education\(^5\) is beyond a doubt the most significant decision about African Americans and their rights to a quality education. Brown addressed the issue of whether the segregation of white and African American children in state public schools denied African American children equal protection of the law.\(^6\) Chief Justice Warren, noting the importance of a quality education, stated:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\(^5\)

Brown is as important for what it did not do as for what it did do.\(^6\) Brown did not stand for the proposition that African American children were entitled to a quality education. Rather, it merely provided that children were entitled to an educational opportunity on terms equal to white children.\(^6\) The question of how equal is equal was never discussed by the Brown Court. Moreover, while the facts presented in the case included a suspect classification (race), state legislation, and an equal protection challenge, the Court failed to refer to the traditional strict scrutiny test.\(^6\) This fact raises the question, what triggers strict scrutiny analysis?\(^6\)

In 1972, the Senate Select Committee on Equal Educational Opportunity described education as being unequal in three interrelated ways:

First, children from minority and economically disadvantaged families live their lives isolated from the rest of society. The fact is that education in this country is still—for the most part—segregated by race, economic and social class . . . .

Second, minority and disadvantaged children are often treated in unequal ways by schools themselves . . . .

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58. Id. at 493.
59. Id.
60. Derrick A. Bell, Jr. noted that "the Supreme Court's 1954 decision in Brown v. Board of Education has taken on a life of its own, with meaning and significance beyond its facts and perhaps greater than its rationale." Derrick A. Bell, Jr., Race, Racism and American Law 544 (3d ed. 1992).
61. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Brown, 347 U.S. at 495.
62. See supra note 38.
63. It also supports the argument that not all cases involving race, especially benign classifications, should be subject to heightened scrutiny.
Third, the financial resources for public elementary and secondary education are both raised and distributed inequitably so that the quality of a child’s education is largely dependent upon the taxable wealth of each school district and its citizens. Nevertheless, the Supreme Court, fully apprised of the Senate’s report on the unequal practices and treatment given disadvantaged minority children, hastened its retreat from liberal equal protection interpretation.

One of the first education cases to clearly reflect a return to the social/political dichotomy was Regents of the University of California v. Bakke. In Bakke the medical school of the University of California at Davis had developed two admission programs for an entering class of 100 students. Under the regular admissions program, candidates with an undergraduate grade point average below 2.5 on a scale of 4.0 were rejected. Thereafter, select applicants were given an interview, following which they were rated on a scale of 1 to 100 by each member of the faculty committee. The rating was based on the interviewer’s summaries, overall grade point average, science course grade point average, medical college admissions test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total bench score. The full admissions committee then made offers of admission on the basis of its review of the applicant’s file and score.

A separate committee, a majority of whom were minorities, operated a special admissions committee. Special candidates, including individuals who were economically and/or educationally disadvantaged or members of a minority group, did not have to meet the 2.5 grade point average cutoff and were not ranked against candidates in the regular admissions process. Special candidates were otherwise rated in the same manner as employed in the regular program. No white applicant had ever been admitted through the special program.

66. Id. at 273-74.
67. Id. at 274.
68. Id. at 275.
In 1973 and 1974, Bakke, a white male, applied to Davis. Although he had a score of 468 out of 500 in 1973, he was rejected because no applicants with less than 470 were being accepted through the regular admissions program. In 1974, Bakke scored 549 out of 600, but he was again rejected. In both years, special applicants with scores less than Bakke’s were admitted. After his second rejection, Bakke filed suit claiming the special admissions program operated to exclude him on the basis of race in violation of the Equal Protection Clause of the federal Constitution, a provision of the California Constitution, and Section VI of the Civil Rights Act of 1964.

The California Supreme Court, applying strict scrutiny analysis, found that the special admissions program violated the Equal Protection Clause. The United States Supreme Court affirmed the judgment in favor of Bakke; however, it reversed the holding that race could not be taken into account during the admissions process.

Justice Powell, writing for the plurality, noted that strict scrutiny was the proper standard because a suspect classification (i.e. race) was involved. In examining whether race was necessary to accomplish the University’s purpose, Justice Powell noted that the special admissions program’s purposes of: (i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body were neither necessary nor compelling in light of the absence of a judicial, legislative, or administrative finding of statutory or constitutional violations.

As noted earlier, Bakke signaled the end of the period of judicial liberalism in equal protection interpretation and the beginning of racial slippage in education. Bakke is the first case in which the high
Court utilized the shield of strict scrutiny, which was originally developed to protect racial minorities from discriminatory laws, as a sword against benign classifications intended for the benefit of racial minorities. *Bakke* is not only a case without a majority opinion, it is also a case where a majority of justices agreed on certain results for conflicting reasons. For example, several justices advocated that the Constitution was colorblind and did not protect or recognize colors or classes. The *Bakke* court also failed to clearly articulate how race could or should be taken into account.

The Supreme Court, in the area of education, completed its journey towards the reinstallation of the social/political dichotomy in

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Professor Blackwell observed that racial slippages were evident in the following:

1. The apparent contempt of the federal government for the support of minorities in education, especially with respect to enforcing the mandates ordered by the decision in *Adams v. Richardson* . . . . The one major exception is the occasional financial relief granted to seriously troubled, historically black colleges and universities . . . .
2. The declining numbers of blacks in graduate schools.
3. The declining production of blacks with doctoral degrees, as evidenced in the fact that the 820 doctorates received by black Americans in 1986 were equal to the number received in 1976.
4. The decline in the number of blacks in college and university faculty positions in predominantly white institutions and the continuing underrepresentation of Hispanics in such positions, despite slight increases in their numbers . . . .
5. The persistence of academic tokenism and the ghettoization of minority faculty and administrators in predominantly white institutions.
6. The resurgence of campus racism, as manifested in outbreaks of racial assaults against blacks, Hispanics, Asians, and Native Americans: physical assaults, beatings, attempted rapes, racial epithets, slurs, ethnophualisms, cross burnings, racial graffiti, and the wearing of Ku Klux Klan garb on campus. The resurgence is also manifested in the articulation of a belief among some white students that "institutions are doing too much for minorities" or that "most minorities do not belong" in white colleges. Racism is often evident in the manner in which some white professors treat minority students. Often conveyed either verbally or nonverbally are such sentiments as "minority students do not belong here" (in the predominantly white institution) or the notion that standards by definition, have been lowered in order to admit minority students. Occasionally, similar ideas are expressed by a few professors who are themselves members of a minority group.
7. The perpetuation of stereotypes about dominant and minority groups. These stereotypes impede interracial and intercultural understanding and cooperation within an institution that should provide leadership in this area for the majority of Americans.
8. The virtual absence, as in the external marketplace, of informal social interaction among colleagues and students once they have left their own workplaces or the classroom environment.
9. The failure of black and Hispanic students to achieve parity with white students in moving through the educational pipeline.
10. The declining number and proportion of public school teachers from minority group populations. Some researchers . . . project that at the present rate of entry of blacks and Hispanics into teacher training programs, and at the present rate of failure of these groups to meet certification requirements, the number of minority group members in public school teaching positions will have been reduced by 50% over the next 12 years.

United States v. Fordice. In Fordice petitioners asserted that Mississippi had failed to desegregate and was continuing de jure segregation in its public university system by maintaining five almost completely white and three almost exclusively black universities.

The Supreme Court formulated the primary issue in Fordice as “whether the State ha[d] met its affirmative duty to dismantle its prior dual university system.” The Court, in response to this question, examined four policies of the university system of Mississippi. Those policies included the admissions standards, program duplication, institutional mission assignments, and the continued operation of all eight public universities. The Court concluded that the combined effect of these factors was a continuation of the “separate but equal” regime. The most compelling issue in Fordice, however, was what the proper standard of equal protection review was for determining whether a state had fulfilled its duty to desegregate in the university context. In response to this issue, the Court observed that the state bore the burden of proving that its policies were educationally justified and noted:

[i]f the State perpetuate[d] policies and practices traceable to its prior system that continue[d] to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such polices [were] without sound educational justification and [could] be practically eliminated, the State ha[d] not satisfied its burden of proving that it ha[d] dismantled its prior system.

What “educationally justified” meant, however, was never clearly articulated by the Court’s decision. What it did signify was that the

80. Id. at 2733.
81. Id. at 2735.
82. Id. at 2738.
83. Fordice, 112 S. Ct. at 2743.
84. The debate centered around the Court of Appeals’ reliance on Bazemore v. Friday, 478 U.S. 385 (1986). In Bazemore, the Supreme Court was called upon to decide “whether the financing and operational assistance provided by a state university’s extension service to voluntary 4-H clubs and Homemaker Clubs was inconsistent with the Equal Protection Clause because of the existence of numerous all-white and all-black clubs.” Fordice, 112 S. Ct. at 2737. Finding that the state did not foster segregation in its financing and operational assistance to 4-H clubs, the voluntary membership system was held not inconsistent with the Equal Protection Clause. Id. The Court, however, found this standard inapplicable in Fordice. The Fordice Court noted: “Bazemore plainly does not excuse inquiry into whether Mississippi has left in place certain aspects of its prior dual system that perpetuate the racially segregated higher education system.” Id.
85. Fordice, 112 S. Ct. at 2737.
86. Justice O’Connor, in her concurring opinion, suggested that to be educationally justified meant that the state had the burden of showing that it had counteracted and minimized the segregative impact of its remnant system to the extent possible. Id. at 2744. Justice Thomas,
high court had, once again, relinquished its role as the arbiter of equality under the laws and returned control of education back to the states.\textsuperscript{87}

One meaning of "educationally justified" and its possible effects on education for minorities may be garnered from Justice White's observation that while all four policies were traceable to the separate but equal system of education, "[i]f we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request."\textsuperscript{88}

The majority opinion in \textit{Fordice} strongly suggested that the closing of one or more of the institutions would decrease the discriminatory effects.\textsuperscript{89} The Court ordered the district court, on remand, to carefully explore by inquiring and determining whether retention of all eight institutions itself affect[ed] student choice and perpetuat[ed] the segregated higher education system, whether maintenance of each of the universities [was] educationally justifiable, and whether one or more of them [could] be practicably closed or merged with other existing institutions.\textsuperscript{90}

Assuming arguendo that a merger or closure of one of the universities is practical, it behooves one to guess which, historically black or historically white, institutions will be closed or merged—especially in light of the fact that "[t]hat an institution is predominantly white or black does not in itself give rise to a constitutional violation."\textsuperscript{91} Justice Scalia, dissenting in the principal case, put forth the following answer: "the Court's test is designed to achieve . . . the elimination of predominantly black institutions. While that may be good social policy, the present petitioners, I suspect, would not agree . . . ."\textsuperscript{92}

\textsuperscript{87} This conclusion is supported by other equal protection cases involving minorities and education. \textit{See}, \textit{e.g.} Board of Educ. of Okla. City v. Dowell, 111 S. Ct. 630 (1991)(holding the desegregation decree was not intended to operate in perpetuity and federal supervision of a local school system should only be a temporary measure).

\textsuperscript{88} \textit{Fordice}, 112 S. Ct. at 2743.
\textsuperscript{89} \textit{Id.} at 2742-43.
\textsuperscript{90} \textit{Id.} at 2743.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Fordice}, 112 S. Ct. at 2752 (Scalia, J., dissenting).
"Educationally justified" as the term is applied in Fordice clearly is not statistically or socially justified. Statistics reflect that the status of blacks in higher education, as undergraduates, graduates, and faculty has worsened or stalled since the mid-1970s. The most significant factor in accounting for this disparity is the socio-economic differences existing between blacks and whites. This factor, however, is of no legal consequence since contemporary federal courts have uniformly held that historical discrimination alone is not enough to support an equal protection claim. A petitioner, asserting violation of the Equal Protection Clause on racial grounds, must bear the onerous burden of proving intentional or specific acts of discrimination. The justification for this view is that the "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." This justification, like the rule it procreates—educationally justified—is fundamentally flawed. It fails to recognize the distinction between de facto and de jure discrimination. Thus, judicial ambivalence, during a period of heightened racial hostility and a depressed economy, is reminiscent of the social and political conditions which fostered Plessy.

Unfortunately, Fordice means relatively nothing to the masses of disadvantaged minorities in America. This is primarily due to two factors. First, the vast majority of American schools remain segregated and schools attended by blacks have always been under-financed. Second, and more importantly, the majority of disadvantaged individuals are so caught up in the day-to-day struggle to survive, they have relatively little time to consider the effect of judicial or legislative policies which do not directly or immediately impact upon their reality. Consequently, in order to convey a complete picture of the current use of the dichotomy, a review of the Court's position with regards to equal protection, minorities, and employment is necessary.

93. Jaynes & Williams, supra note 50, at 331-78.
94. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989)(holding "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . ."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)(noting that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy").
95. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987)(holding that to prevail on an equal protection challenge, an African American defendant sentenced to death for killing a white person must show that the decision maker in defendant's case acted with a discriminatory purpose; a general showing of racial disparity in death sentences would not suffice).
97. See Jaynes & Williams, supra note 50.
B. Employment

Blacks have a strong interest—stronger than the white majority—in national policies that hold unemployment low and keep the economy expanding vigorously. At the same time, their sensitivity to the nation’s macroeconomic performance is a symptom of their continuing marginality and inferiority in economic status.\(^9\)

As expressed above, equality of opportunity in employment was a central theme of the civil rights movement. A combination of factors, including civil rights legislation, a general anti-discrimination ethos, affirmative action, and pressure from blacks and whites greatly expanded the employment opportunities of racial minorities during this period.

The most significant achievement of the movement in the area of employment was Title VII of the Civil Rights Act of 1964. Litigation under this legislation played an important role in advancing the employment of blacks.\(^9\) Title VII litigation also represents a coordinated effort by the legislative, executive, and judicial branches to end discrimination in employment. This coordinated effort altered the social context of hiring, firing, and promoting. Consequently, between 1964 and 1975, blacks began entering the labor force in greater numbers. These numbers never approached those of whites, however.\(^10\) Nevertheless, Title VII and coordinated government efforts demonstrate that laws and their enforcement can change individual attitudes and behavior, as well as social institutions.

The history of equal protection, race, and employment paralleled that of education.\(^11\) Federal courts enforcing Title VII between 1964 and 1975 utilized such remedial measures as consent decrees and affirmative action plans to encourage the incorporation of minorities into segregated workforces. Consequently, it is not surprising that the

\(^9\) Jaynes & Williams, supra note 50, at 294.
\(^10\) Several studies indicate that litigation under Title VII had a greater impact on the employment of blacks than affirmative action. See studies listed in Jaynes & Williams, supra note 50, at 318.
\(^11\) Jaynes & Williams, supra note 50, at 271-324.

The interplay between education and employment cannot be overstated because it is the prospect of employment that motivates individuals, especially minorities, to pursue educational goals. When the relationship between educational attainment and employment opportunities appears weak or non-existent the most significant motivating factor for seeking an education is lost.
waning judicial commitment to equality of opportunity for minorities in employment corresponded with that in education.

Wygant v. Jackson Board of Education\(^{102}\) should have signaled the Court's retreat from liberalism in employment. In Wygant, the Court addressed the specific question of whether a public employer could extend preferential protection against layoff to some employees based on race or national origins.\(^{103}\) The Court ultimately found that the plan violated the Equal Protection Clause of the Fourteenth Amendment.\(^{104}\) The Court, however, specifically recognized the constitutionality of preferential, affirmative action programs in public employment.\(^{105}\) There also seemed to be agreement that race could be affirmatively taken into account in employment plans even if there had been no finding of past discrimination.\(^{106}\) Thus, even though the plan was struck down, Wygant was construed positively due to the fact that the Court expressly reserved the question of whether any preferential layoff plan, e.g., affirmative action plan, could withstand strict scrutiny.\(^{107}\)

The encouragement offered by Wygant was quickly shattered, however. Judicial retreat from liberal equal protection interpretation in employment was completed in City of Richmond v. J.A. Croson Co.\(^{108}\) In Croson, the City of Richmond adopted a minority set-aside program, which required non-minority owned prime contractors with city contracts to subcontract at least 30% of the dollar amount of the contract to one or more minority businesses from anywhere in the United States.\(^{109}\) In a public hearing that preceded the ordinance's adoption, there was no direct evidence of race discrimination on the part of the city in letting contracts, or any evidence that the city's prime contractors had intentionally discriminated against minority-owned subcontractors. Evidence revealed, however, that a number of contractors' associations had virtually no minority businesses within their membership and that in a city, approximately 50% of which was African American, African Americans received only 0.67% of the


103. Wygant, 476 U.S. at 269-70.

104. Id. at 283-84.

105. Id. at 287. (O'Connor, J., concurring).

106. Id. at 286-90. (O'Connor, J., concurring).


109. Id. at 477-78.
city's construction contracts. The city's legal counsel believed that the ordinance was constitutional under the United States Supreme Court's decision in *Fullilove v. Klutznick* which held that the federal congress could institute a federal set-aside program.

Justice O'Connor, writing for a plurality, confirmed that strict scrutiny was the traditional standard of review for race-based classifications under the Equal Protection Clause. Further, O'Connor observed that the desire to have more black businessmen alone was not sufficiently compelling to support race-based classifications. Likewise, historical or societal discrimination, without more, was too amorphous a basis for imposing a racial classification. Rather, the Equal Protection Clause required a strong evidentiary basis that the remedy was necessary. This evidence should also identify the discrimination with specificity. Though finding the absence of a compelling interest in *Croson*, the Court continued its analysis into the second prong of strict scrutiny review—narrowly tailored.

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110. Id. at 480.
111. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (holding that the equal protection component of the Due Process Clause of the Fifth Amendment was not violated by a federal set-aside requirement that 10% of certain federal public work grants be awarded to minority contractors).
112. Id.
113. *Croson*, 488 U.S. at 493-98. Strict scrutiny requires that the court initially ascertain whether the state or its agency has a compelling governmental interest in a given area which will support the use of race-based classifications. Subsequent to an affirmative finding, the court must determine whether the legislation or remedy adopted is narrowly tailored to that end.

Two points must be noted about strict scrutiny: (1) the Supreme Court has shown great deference in race-based remedial actions by lower federal courts and Congress; this deference has not been accorded to the states or its agencies; (2) in only a few instances has a race-based classification withstood strict scrutiny. *See Korematsu v. United States*, 323 U.S. 214 (1944)(holding constitutional an order excluding all persons of Japanese ancestry from the west coast military area during a time of war based upon national security concerns); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(giving deference to Congress' findings and upholding federal legislation granting of 10% of federal funds granted for local public works must be used to procure either services or supplies from minority groups); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)(giving deference to Congress' judgment and upholding policies adopted by the Federal Communications Commission giving special treatment to minority enterprises).
115. Id. at 499.
116. The decision recognized that a municipality has a compelling interest in redressing not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipality's legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 491-92, 537-38. The mere infusion of tax dollars into a discriminatory industry may be enough to give rise to a compelling interest.
Croson suggested a minimum of four characteristics as indicative of narrow tailoring. First, a minority set-aside plan should be instituted after, or in conjunction with, race-neutral means of increasing minority business participation. Second, the plan should avoid the use of rigid numerical quotas. Third, a set-aside program must be limited in its effective scope to the boundaries of the enacting jurisdiction. Finally, the plan should specifically identify groups that had suffered specific discrimination and not merely name minority groups in general. The precise value of these characteristics in shaping a constitutional affirmative action program is questionable. Croson, in essence, places a heavy burden on States and their agencies to confess to intentional discrimination prior to developing affirmative action plans. It is highly unlikely that any agency would do this because such a confession would constitute a violation of the laws and give rise to liability for damages.

Croson is especially significant because the City of Richmond relied on federal legislation that had previously withstood an equal protection challenge in Fullilove to develop its own set-aside program. The Supreme Court, however, was not convinced that state governmental bodies had the same power as Congress to remedy discrimination. The decision also added a new twist to strict scrutiny as applied to race conscious remedies. The requirement of a specific finding, based on empirical evidence, of discrimination on the part of the agency proposing the voluntary programs, in essence, makes strict scrutiny “stricter scrutiny” — a steady progression toward a new, more conservative judicial philosophy in the area of benign legislation.

Croson, like Fordice, provides ample fodder for intellectual and scholarly fires; likewise, it lacks the directness and immediacy necessary to awaken or attract the concern of those who are most affected. While affirmative action has assisted those who were in a position to exercise the privileges of equality of opportunity in employment, it did not trickle down to the great benefit of the masses of disadvantaged minorities who continue to sweep, mop, dust, and otherwise maintain the machinery upon which the existence of capitalism depends.

The absence of directness and immediacy are of societal importance. The vast majority of racial minorities live in isolated vortexes wherein they engage in the constant and continuous struggle of day-to-day survival. Engrossed in this ceaseless continuum, few can or will

117. Id. at 507-08.
118. Croson, 488 U.S. at 507-09.
119. Id. at 480.
120. Id. at 490.
achieve the level of awareness of either their blue-collar or middle class racial counterparts.

Many disadvantaged individuals live equality vicariously. They content themselves with the hope that others, because of their efforts, will actually experience or achieve equality. As a result, reinstitution of the social/political dichotomy will not receive mass social objection until it directly and immediately impinges upon something within the reality of the masses.

That "something" necessary to enrage and unite the attention of the masses, must be important to their reality and an essential medium in the vicarious enjoyment of equality. The concepts of directness and immediacy and their relatedness to the social/political dichotomy is best illustrated by the principle of equality of law.

C. Law

The social/political dichotomy supports the view that the State, acting as agent of the people, and not the federal government, is the proper arbiter of social rights. The dichotomy is currently used to support the return of power, over the interests of citizens, to local legislatures. Thus, the relevant issues become: (1) whether the states are capable and willing to cope with the problems, concerns, and interests of racial minorities; and (2) assuming inability or unwillingness, what will be the response of those directly and immediately affected by the state's decision.

One of the most important ideals within our society is that of law. While most minorities view criminal law and the criminal process as biased and unfair, they nevertheless, accept the legal system as a necessary ingredient of civil society. The tolerance of prejudice in the criminal system is also supported by the concept of "wrongfulness." Wrongfulness triggers the criminal process and also operates as a legitimizing force which creates a level of tolerance for all but the most egregious acts of racial biases. Take, for example, the Rodney King case.

In the case of Rodney King, three African Americans were pulled over by law enforcement officials. The three individuals were asked to exit their vehicle and take the official position. The driver of the
vehicle, Rodney King, became enraged and argued with the white police officers.

What transpired after that remains sketchy except that a bystander, armed with a camcorder, captured on tape a brutal scene of four police officers kicking, hitting, and shooting the driver with a stun gun while another cadre of officers stood idly by and watched. The tape was subsequently played on national television and citizens all over the country were outraged by the level of brutality displayed by the officers. Racial minorities, however, were not surprised because the tape merely reflected what they have always complained of—police officer abuse of minorities.

Nevertheless, public pressure was placed on the police force and justice system to redress the wrong. A trial was conducted on the issue of whether or not the police officers used excessive force. The trial took place in Simi Valley, California, a predominately white community. This fact, however, was initially of no consequence because the majority of citizens felt that despite this fact, justice would be done. After a long trial, during which the tape was played for the jury, the policemen were acquitted.

This case illustrates several points. First, law is an integral part of the lives of all citizens regardless of race. Second, for racial minorities, the law, at least in theory, is the same for everyone and no one is above the law. Third, that racial prejudices and biases still influence white citizens to such an extent that they are unable or unwilling to recognize and protect the interest of non-white citizens. Finally, the King case illustrates what happens when States are unable or unwilling to properly deal with matters that directly and immediately impact upon minority interests.

This latter point is further illustrated by what follows the acquittal. After the return of the acquittals, race riots broke out in major metropolitan areas throughout the nation. It is important to note that the mere fact that the brutality took place did not spawn civil unrest; rather, it was only after a perceived breakdown in the pro-

122. See generally Abraham L. Davis, The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?, 10 Harv. Blackletter J. 67 (1993)(asserting that the vast majority of African Americans have always believed that they received harsher treatment from the police than their white counterparts).
cess—the acquittal—that civil disobedience occurred. Furthermore, civil rest was restored only when the president of the United States personally guaranteed that justice would be done and the federal government interceded. At bottom, the King case illustrates that equality of law has a directness and immediacy in the reality of the vast majority of disadvantaged racial minorities which is not present in the areas of education and employment. Directness and immediacy, thus, act as catalysts for social unrest.

The King case clearly illustrates that racial prejudices and biases still exist in society. Nevertheless, it does not convey a complete picture. Many state legislatures, as well as individual citizens, have attempted to circumvent the rights of racial minorities. For example, in 1991, the legislature of the state of Mississippi, pursuant to the Voting Rights Act, submitted a proposed plan for legislative redistricting to the United States Department of Justice. The Department of Justice, after careful review of the plan and the 1990 Census Bureau statistics, declared that the plan did not reflect the increase in the number of black voting-age individuals. This growth should have entitled blacks to more majority black voting-age districts than existed under legislative redistricting plans which preceded the 1990 census. Of greater relevance, however, was the fact that the Department of Justice observed that the plan demonstrated an attempt to engage in intentional discrimination on the part of the Mississippi senate. Ultimately, the matter was brought before a three judge panel, consisting of two federal district court judges and one federal court of appeals judge. Following a detailed trial questioning the constitutionality of the original plan as well as several modified plans, the matter was ultimately settled when the plaintiffs accepted a plan which would allow blacks at least eleven new majority black voting-age population districts. This number was fewer than what the statistics suggested, but more than what the black plaintiff lawyers believed the all white judges would order.

127. Id.
128. The author was one of six African American attorneys representing the plaintiffs. Pursuant to the three judge panel's order, parties submitted proposed redistricting plans, memoranda, affidavits, and other supporting documents. Plaintiffs, on July 26, 1991, filed a motion for a preliminary injunction predicated upon the 14th Amendment and section two of the Voting Rights Act.
The fact that a state legislature would engage in “intentional discrimination” in an attempt to dilute black voting strengths in 1991, further demonstrates that racism is alive and well. It also emphasizes the depths and effects of racism since voting is the right that ensures all other rights, both social and political. At bottom, this case clearly reflects that racial prejudice does not exist in a vacuum.129

II. OF LAWS AND MEN

I PROPOSE, taking men as they are and laws as they can be... I was born a citizen of a free state, and a member of its sovereign; so that however slightly my voice may affect public affairs, my right to vote on them is enough to impose upon me the duty of learning about them.130

Laws and their interpretations do not exist in isolation. Ordinarily laws are devised to reflect community notions of right and wrong, justice and morality. Legal interpretation is a natural and necessary progression of this process of reflection. As discussed earlier, for a short while during the decades of the 1960s and 1970s, judicial interpretation deviated from this norm and undertook to make good on the guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments.

One objective of the constitutional rule of law expressed by these amendments has been to solidify the notion of American society as a whole—a cultural melting pot. The significant feature of using this analogy to describe society is that it must consist of many smaller parts. Moreover, each entity has its status and function largely de-

Rights Act of 1965, as amended, seeking to enjoin the use of the 1982 apportionment plans for 1991 legislative elections. Plaintiffs presented uncontradicted evidence that the 1982 apportionment plans were unconstitutionally malapportioned and diluted black voting strength, in light of the 1990 census statistics. The three judge panel rejected all remedial plans submitted by the parties and ordered that the primary and general elections be held as scheduled under the 1982 reapportionment plans.

Plaintiffs viewed use of the 1982 plans as equally deleterious of their rights as the proposed 1991 apportionment plans rejected by the Justice Department. Consequently, plaintiffs felt constrained to settle the case for fewer majority black voting age population districts than the 1990 census statistics suggested they were entitled to have. This number was believed to be more than could be achieved in an election under the 1982 apportionment plans which, essentially, maintained the status quo.

129. The Rodney King case demonstrates that racism continues to exist in society. Therein, the jurors combined their individual prejudices and biases to effectuate a total disregard for justice. The existence of racism in American society at large has never been doubted. In Watkins v. Mabus, however, the government officials, judicial and legislative, attempted to diminish the rights of black citizens in Mississippi. This attempt suggests that racism is larger than individual preferences and has once again infiltrated America’s courts and legislatures.

fined for it or imposed upon it by the larger whole of which it is a part. The human body can be used to illustrate both the ideal and the reality of this view of society.

The human body is one and many. All anatomical parts are important to the overall aesthetic, psychic, and vitality of the whole. However, certain limbs, as well as organs, are dispensable or unnecessary to the ultimate task of survival. In this society, such is the reality for racial minorities and women. Like the finger, hand, arm, leg, pancreas, tonsil, or gall bladder, they have been viewed as dispensable parts and the protection of their distinct interests and rights has been treated as unnecessary for the well being of the greater whole.

Humans are not merely individual parts of the societal whole. Humans are also a part of groups in which each is conscious of his own personal identity, jealous of his integrity of character and freedom of action and concerned with his own affairs. The group, with which an individual identifies himself or herself, serves as a device for the furtherance of self interests, either through exploitation or protection. As Blackwell notes:

[I]nstitutional structures exist to serve the needs of individuals and groups who control inordinate power, authority, and resources within a social system and who simultaneously limit the access of others to the advantages of power. This power, is used to maintain privilege, to monopolize resources, and scarce commodities, and to determine eligibility for sharing privileges and scarce rewards associated with status positions within a racially and ethnically stratified social system . . . . [G]roups in power exercise presumed authority to establish standards, to determine procedural norms, and to make declarations of normative requirements and expectations—all of which serve as gatekeeping methods and boundary-maintenance devices between the powerful dominant group and the relatively powerless minority group.

Those who control power and the decision-making process may restructure the rules of the game, alter procedural imperatives, or simply change standards or normative expectations whenever these actions are deemed necessary either to satisfy their needs or to protect their position of power, privilege, and high status . . . .

By the same token, groups that either lack power or have limited power and that are convinced of their inalienable rights to a greater share of power and scarce resources may conclude ulti-
mately that struggle is the most efficacious path to changing power relations. Sensing that determination and suspecting that the price for resistance to changes in power relations may be much higher than at least some movement toward placating dissidents, dominant groups sometimes make grudging concessions to some of the more pressing demands of minority and less powerful groups. Such a situation led to a semblance of compliance with selected demands made by minority groups during the civil rights period . . .

Law, as initially developed, supplements the principle of order. Therefore, it usually emanates as a response to undesired or desired past conduct. The retrospective character of law reveals its inherent limit on legal effectiveness because law exists prospectively only as an ideal. This ideal envisions the future by reference to past and present circumstances. As the uses humans make of law change—exploitation and corruption—a corresponding change in the ideal must take place. For example, the rule of open competition and free play of individual initiative manifests that there are far too many losers, and the few winners win far too often. This reality requires that the purpose of law be changed so that law can be called upon to protect individuals from misfortune as well as from each other.

Laws, at least theoretically, can be placed into one of three well defined fundamental modes: normative; prescriptive; and expository. Normative principles are best illustrated by the language of the Declaration of Independence and the Preamble to the Bill of Rights. Normative laws describe the ideal order of things. These laws define society as it should be and they dictate that we use our efforts to achieve this goal. Normative conduct represents man’s search for a perfect society which if left to itself would encounter many frustrations and great difficulties in developing. For example, the ideal that underlies the constitutional order can be attributed to

131. Blackwell, supra note 55, at 37. Blackwell also noted that some improvements were made in the socioeconomic status and educational attainment of many minority groups during the civil rights movement, and, further that inroads were achieved in the political process as well as employment and accommodation.

Civil rights enforcement, however, has always been cyclical in nature. This is due largely to the fact that “[c]hange is not self-sustaining, especially with respect to alterations or transformations in power relations between dominant and subordinate groups. Enduring change depends on constant mobilization of pressure and competitive resources.” Blackwell, supra note 55, at 38.

132. IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY 19 (1980). Jenkins theorized that “[p]ositive law [was] a supplemental principle of order that [arose] and develop[ed] in the human context when other agencies and forces [became] inadequate to the conditions and the challenge that man confront[ed].” Id.

133. Id. at 69.

134. Id. at 70.

135. Id.
the founding fathers, many of whom also participated in the drafting of both the original Constitution and Bill of Rights. These men defined and identified the ideal society. They can also be credited with having violated the ideal in its infancy. This has led to a permanent retardation of law as a solution to social problems because the ideal as formulated by the founding fathers and framers excluded a large and significant segment of society—women and African Americans. Thus, the modern reality of normative law is that those who are most affected have had little, if any, input in creating or otherwise defining the ideal it is designed to achieve. Consequently, our greater than 300 years of experience reflects minimal gains toward creating a good and equitable society. Thus, "it is reasonable to say that those who could take part in the initial agreement, [are] ... assured equal justice."  

Prescriptive law, on the other hand, describes the evolution from the actual to the ideal society. It consists of two types: advisory and imperative. The former merely provides a protocol for achieving a certain end; it is based on the assumption that the individuals to whom it is addressed have certain presupposed ends in view. The sanction of law is simple—"the success or failure that ... follow[s] ... [the law's] acceptance or rejection." The latter type of prescriptive law commands certain patterns of conduct and prohibits others on the grounds that it is unnecessary to achieve the desired goal. This type of law is apt to be challenged by individuals either because these individuals reject the goal in question or because they resent the efforts and restrictions it demands. Prescriptive law manifests the schism which

136. Slavery stands as the greatest hypocrisy of the original constitution. This hypocrisy is magnified by the fact that the first person to die in America's quest for independence was Crispus Attucks—a runaway slave. The racial equality commitment has had to survive the undeniable fact that the Constitution's Framers initially opted to protect property, a category that included enslaved Africans. In addition, the political motivations for the Civil War amendments almost guaranteed that when political needs changed, enforcement of laws to protect the former slaves would likely lapse. American racial history has demonstrated both steady subordination of blacks in one way or another and, if examined closely, a pattern of cyclical progress and cyclical regression.


137. JOHN RAWLS, A THEORY OF JUSTICE 509 (1971).
138. JENKINS, supra note 132, at 71.
139. JENKINS, supra note 132, at 71.
140. JENKINS, supra note 132, at 71.
141. JENKINS, supra note 132, at 71.
142. JENKINS, supra note 132, at 71.
divides various group interests along racial lines. Such laws are fundamentally flawed because they are laws only to the extent that they are accepted by the affected groups as such.

Expository law represents a state of current affairs.\(^{143}\) It reflects a pre-established and self-sustaining state of affairs.\(^{144}\) Expository law embodies what is; it does not create, determine, or maintain. It is best illustrated by local customs that exist and are adhered to as if they were written laws. It describes what individuals accept as fact—whether actual or not.

These modes of law are significant because they reflect a fundamental weakness in law. For example, expository law has historically dominated with regard to the liberty interests of women and racial minorities. Accepted ways of thinking and doing have so affected the reality of law that Congress saw fit to incorporate “customs” as an unaccepted, prohibited form of legal behavior.\(^{145}\) Supporters of expository law are in many instances opposed to prescriptive laws which tend to be inconsistent with their ideal of order and an ordered society. Thus, the means (i.e. prescriptive law) is as offensive as the ideal or end (normative law) it is intended to achieve.

The current conservative voting block of the United States Supreme Court articulates its opposition to imperative prescriptive civil rights laws in the form of legal interpretation. The Court's opposition motivated Congress to draft the Civil Rights Bill of 1990,\(^{146}\) which was initially vetoed by President George Bush and subsequently signed into law in 1991. The 1990 Bill is historically significant because Congress included, in the findings and purpose sections, its intention to restore the civil rights protection which had been drastically limited by recent Supreme Court opinions.\(^{147}\) This attempt, had

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143. JENKINS, supra note 132, at 70.
144. JENKINS, supra note 132, at 70.

Every 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

147. (a) Findings—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.
it been successful, would have marked only the third time in United States history that Congress legislatively overruled Supreme Court precedent in the context of race.\textsuperscript{148}

Despite this failed congressional admonishment, the Supreme Court continues to send the message that the Constitution is not the proper tool for remediying social problems regarding race. The conservative majority of the Court has chosen as the medium for this communication a form of jurisprudence totally devoid of public policy considerations\textsuperscript{149}—pure analytical reasoning.\textsuperscript{150}

Pure analytical reasoning allows the Court to disregard public policy while seemingly adhering to the principals of stare decisis. It

\begin{quote}
(b) Purposes—The purposes of this Act are:

\begin{enumerate}
\item to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and
\item to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.
\end{enumerate}
\end{quote}


\textsuperscript{148} See supra notes 22-23.

\textsuperscript{149} Generally courts interpret public policy so far as it is understandable. Some jurists assert that they are confined to looking solely at constitutions, statutes, and prior decisions, interpreting and applying them as the source from which they may determine what public policy requires. This ideal is not true even though these are the sources first to be considered and often may be conclusive.

"In determining what public policy requires, there is no limit whatever to the 'sources' to which the court is permitted to go; and there is no limit to the 'evidence' that the court may cause to be produced. . . ." 6A CORBIN ON CONTRACTS § 1375, at 1165 (1952).

\textsuperscript{150} Pure analytical reasoning is a form of jurisprudence not unlike that of the formalistic legal thinking which dominated the court during the early part of the 20th century. Formalism viewed the law as a formal group of common law rules, which when properly applied to the situation at hand, would lead to a correct and therefore just result. Pure analytical reasoning differs because its users are not attempting to apply formal rules in reaching their decisions. Rather, they rely solely on the traditional analytical process to reach the desired, predetermined conclusions. Formalism, as a form of legal jurisprudence, was subjected to criticism from critics who viewed themselves as legal realists. According to realists, courts should not apply law without considering the social, economic, and political ramifications, (i.e., the practical reality in which those subject to the law live). Legal historian Professor G. Edward White observed:

Legal scholars who came to call themselves Realists began with the perception that many early twentieth-century judicial decisions were "wrong." [The decisions] were wrong as matters of policy in that they promoted antiquated concepts and values and ignored changed social conditions. They were wrong as exercises in logic in that they began with unexamined premises and reasoned syllogistically and artificially to conclusions. They were wrong as efforts in governance in that they refused to include relevant information, such as data about the effects of legal rules on those subject to them, and insisted upon a conception of law as an autonomous entity isolated from nonlegal phenomena. Finally, they were wrong in that they perpetuated a status quo that had fostered rank inequalities of wealth, status, and condition and was out of touch with the modern world.

tends to be extremely theoretical in nature and represents a strict form of abstract reasoning which often leads, at a minimum, to theoretically correct legal conclusions. Pure analytical reasoning leads to very narrow interpretations of civil rights laws because it fails to factor into the analytical equation such considerations as intent, purpose, and other policy concerns.

In the context of civil rights, the Supreme Court's adherence to pure analytical reasoning is best illustrated in *Saint Mary's Honor Center v. Hicks*. *Hicks* involved St. Mary's Honor Center, a halfway house which employed respondent Melvin Hicks as a correctional officer and later as a shift commander. After being demoted and ultimately discharged, Hicks filed a suit alleging that this action was taken because of his race in violation of Title VII. The district court found that Hicks had established by a preponderance of the evidence a prima facie case of intentional discrimination; that St. Mary's had rebutted the presumption by introducing evidence of two legitimate nondiscriminatory reasons for their actions; and that St. Mary's proffered reasons were pretextual. Nevertheless, the district court, disbelieving the employer's evidence, held that Hicks had failed to carry his burden of proving that the adverse action was racially motivated. The court of appeals set-aside this determination and concluded that Hicks was entitled to a judgment as a matter of law once he proved that all of the employer's proffered reasons were pretextual. Justice Scalia, formulated the dispositive issue as whether in a suit against an employer alleging intentional discrimination in violation of Title VII, the trier of fact's rejection of the employer's asserted reasons for its action mandated a finding for the plaintiff as a matter of law.

Scalia's analysis began with a prelude concerning the prima facie requirements of a Title VII action as established in *McDonnell Doug-
las Corporation v. Green and further refined in Texas Department of Community Affairs v. Burdine. Scalia, consistent with his philosophically refined reading of McDonnell Douglas and Burdine, construed the rebuttable presumption which arises from proof of the prima facie requirements, as not creating a rule of law mandating a finding of liability, but rather as establishing a mode and order for presenting evidence. Thus, according to Scalia, the presumption of racial discrimination “simply drops out of the picture,” once it fulfills its role of forcing defendant to come forward with a reason for its actions. This is so whether the proffered reasons are believed by the trier of fact or not.

In contrast, a public policy analysis of Hicks manifests just how far the Supreme Court has removed itself from the issue of race. In this context, two significant issues exist: (1) the role of circumstantial evidence in employment discrimination cases, and; (2) the meaning to be attributed to defendant’s burden of articulating a legitimate, non-discriminatory reason for its action.

Title VII reflects Congress’ policy decision to assure equality of employment opportunities and to eliminate discriminatory practices in the workplace. Because Title VII tolerates no racial discrimination, subtle or otherwise, the Supreme Court, in early cases construing the statute, created an analytical framework which was both consistent with and implemented this policy. The rule of law that racial discrimination could be proven solely by circumstantial evidence gave the statute the biting power necessary to carry out the identified policy.

Thus, the traditional policy-oriented approach required that plaintiff prove by a preponderance of the evidence that he was: (1) a member of a protected class; (2) qualified for the position; (3) subject to adverse treatment; and (4) denied a position which remained open

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163. Id. at 2749.
164. Id.
165. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(holding that a prima facie case of discrimination could be made by plaintiff showing that he was qualified, and he was rejected for a position that the employer held open); see also United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)(holding that an equal opportunity employment racial discrimination case could be proved by circumstantial evidence).
and subsequently filled by a white person. In the context of Title VII, as distinguished from other non-civil rights cases, a prima facie case is a proven case. By satisfying the prima facie requirements a Title VII plaintiff eliminates "the most common nondiscriminatory reasons for demotion and firing: that he was unqualified for the position or that the position was no longer available." Thus, creating the inference that it was more likely than not that impermissible factors were considered in the employers decision.

This inference, in the absence of proof by the employer of a legitimate nondiscriminatory reason for the adverse actions, rises to the level of a mandatory presumption in favor of plaintiff. The legal inquiry, however, does not terminate upon the employer's proof of a legitimate nondiscriminatory reason for its decision. Rather, public policy is again reflected in the rule that the burden then shifts back to the plaintiff to show that the employer's proffered reasons were pretextual. Prior to Hicks, pretext or pretext for discrimination could be proven either directly by persuading the court that a discriminatory reason, more likely than not, motivated the employer or, indirectly, by showing that the proffered reasons were unworthy of credence.

The word legitimate, as expressed in the defendant's burden of rebutting the plaintiff's prima facie case, qualifies the nature of the proffered nondiscriminatory reasons. Its plain meaning suggests that, at a minimum, the employer's reasons be credible. The word legitimate, the use of circumstantial proof, and allowing plaintiff two opportunities to prevail on the merits reflect the policy orientation of Title VII. The majority's view that "either . . . or" means "both . . . and" breaks with the policy considerations of the statute.

Pure analytical reasoning obscures the imperative prescriptive nature of civil rights laws. It also allows judges to avoid confronting their lack of humanity. The social, economic, and political context

167. Typically a prima facie case only requires the production of enough evidence to raise an issue for the trier of fact. In the Title VII context, however, in the absence of evidence to the contrary by defendant, it has traditionally received decisive weight. Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748 (1993) (Souter, J., dissenting).
168. Id. at 2758 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).
170. See Burdine, 450 U.S. at 254-55, n.7 & 8.
171. Hicks, 113 S. Ct. at 2760 n.7.
172. The biographical data of the conservative voting block of the current Supreme Court is very similar to that of the court which decided Plessy v. Ferguson. Plessy was written by Justice Henry B. Brown, who attended Yale and Harvard Law Schools, and was supported by Chief
in which cases such as McDonnell Douglas and Burdine arose has changed little. Yet, there has been a drastic change in the attitude of federal courts towards the issue of race. "Sadly . . . [o]ne wonders whether the majority [of the Supreme Court] still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was." To say that the presumption, once the defendant "come[s] forward with some response" simply drops out of the picture, ignores the social, political, and economic context within which cases such as McDonnell Douglas and Burdine arose. It also disregards the present reality as illustrated by Hicks. Civil rights cases must be construed in light of common experience as it bears on the critical issue of race. Pure analytical reasoning can not be used to create a metaphysical hypothesis upon which to justify a loss. Rather, federal courts must return to the practice of looking at the substance of the whole transaction within the relevant context and make good the loss.

The reality of law is that it is formed by man, for man, and in the image of man. Consequently, it suffers from its interpreters' imperfections and biases. Colorblindness is just one of the law's many imperfections. The law cannot and should not treat as equal, individuals who are blatantly unequal; where individuals are far from similarly situated it is impossible to treat them alike. For instance, if one man possesses economic, political, and social clout and another completely lacks these resources, colorblindness, as a policy for equal protection interpretation, provides greater protection to the former. The greater the disparity in resources the more equal protection demands that the latter, at least until he has been given a "reasonable opportunity" to

Justice Melville Fuller and Justice Horace Gray, both alumni of Harvard Law School, and Justice George Shiras, a graduate of Yale Law School. The sole dissent in Plessy was registered by Justice John Harlan, a graduate of Transylvania, a small law school in Kentucky.

The following observation made with regard to the Plessy majority fits the current conservative voting block of the Court: "[t]he tragedy with Plessy v. Ferguson, is not that the justices had the "wrong" education, or that they attended the "wrong" law schools. The tragedy is that the Justices had the wrong values, and that these values poisoned this society for decades." A. Leon Higginbotham, Jr., An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague, 140 U. PA. L. Rev. 1005, 1010 (1992).


174. Hicks, 113 S. Ct. at 2749.

175. Again, this view was well articulated by Justice Souter in his dissent in Hicks.

176. Many would argue that African Americans have been given ample opportunities to acquire the resources necessary to compete with majority persons. The author finds it interesting,
acquire comparable resources, be accorded greater protection. Otherwise, equal protection becomes a tool for maintaining the status quo between the haves and the have-nots. Thus, colorblindness further rewards the party with the most resources. Race matters!

III. Correcting the Literature

Literature was a part of my earliest memories. To read was to know, believe, and to accept as truth. Neither primary, nor secondary education taught me to question the accuracy of literature. It was only after a white college classmate asked me about being black and thereafter, scrutinized my response against something that he had read, accepted, and thereafter, perpetuated as true about blackness that I became critical. I now quench my thirst to know not only by reading the words, but also by looking behind, between, and around them and thereafter applying them, to the experience which the color of my skin has created for me. And so, I have become attuned to the world around me of which I am but a negligible part.\textsuperscript{177}

Over the course of American history, law has been and still is used to promote similarity.\textsuperscript{178} The existence of our democratic system was thought to depend upon the maintenance and protection of certain basic similarities among its members. Thus, the notion of a "cultural melting pot" exemplifies the desire for a common language, tradition, culture, custom, and belief in the fairness of the social struc-

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however, that African Americans have been expected to acquire knowledge, learn how to put it to its best use, and compete in an amazingly short time frame. For example, emancipated men experienced some social, political, and economic success immediately following the civil war through the end of reconstruction. See John H. Franklin, From Slavery to Freedom: A History of Negro Americans 247-52 (4th ed. 1974) (describing short-term economic gains of Freedmen during reconstruction). This time frame can be described roughly as 1864 through 1876, or 12 years. The gains made during this period were all but negated by the influences of Jim Crow laws and the Ku Klux Klan. A national renewal of the struggle caught the nation's attention around 1954 with the heralded Brown v. Board of Education decision. This period is frequently referred to as the Civil Rights Movement, which has no official ending date but seemingly petered out around the mid 1970s—a little more than 20 years later. Therefore, all told, African Americans have been allotted less than 35 years as reparation for nearly 200 years of involuntary servitude.

The author applauds, and is especially proud of, the growing number of African Americans who have been able to achieve social, political, and economic rewards, despite the circumstances and conditions under which we are expected to successfully compete. Thirty-five years, however, is not enough time for an entire people, or a significant segment of society, to acquire the knowledge to successfully compete in a capitalist society such as ours.

177. The author created this passage in an attempt to describe his rise from unconsciousness to consciousness. The passage suffers, however, from the greatest literary flaw, being personal and consequently not representative of the experiences of all black persons or blackness.

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tute. 179 This desire for sameness is found in the expression of equality and in the maxim that all men are created equal; it is made effective in practice through the doctrines of due process and equal protection found in the Fifth and Fourteenth Amendments of the federal constitution.

The United States Supreme Court’s desire to achieve sameness is indeed praiseworthy. However, the means to the ends leave much to be desired. To illustrate, strict scrutiny as a standard of review for benign classifications attempts to treat everyone alike, regardless of social and historical handicaps. Thus, a proper metaphor would be a black track and field athlete who is required to run a race carrying a ten pound weight three-fourths of the distance to the finish-line, while all other participants are not so required. The metaphor is proper not only because the disadvantaged participant is carrying an additional physical burden, but also because the participant has not been informed of the mechanism by which the judges will determine that the designated three-fourths limit has been reached. History has taught this runner to distrust the racing officials who determine the three-fourths mark; consequently, the disadvantaged runner suffers from both physical and mental disabilities which are not considered in determining how well he has run under the conditions.

Necessary to an understanding of this critique of literature is a common denominator which recognizes the problem, legitimizes the problem solving process, and justifies the answer. In this context, the common denominator is the idea of pluralism. Pluralism is best described as a state of society in which “diverse ethnic, racial, religious, or social groups maintain an autonomous participation in and development of their traditional culture or special interest within the con-

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179. Words are as important as any tool devised by man. Language which can be used destructively as well as constructively allows man to shape ideas and emotions. Culture is closely tied to words and language, consequently the phrase “cultural melting pot” denotes the loss of cultural identity. Joan Mahoney notes the tie between language and culture in the following passage:

The problem with the theory of America as a melting pot was that it assumed we would all become the same at some point, that all of our cultures would merge into one. What a loss that would be. Each of the cultures that has become part of America is unique and should be preserved, not in isolation from the “majority” culture, but as part of it. The Canadians like to say that they have created a stew, rather than a melting pot, in which each culture is distinct, even as it mixes with the others to create a satisfying whole.

fines of a common civilization." Defined as such, the problematic nature of pluralism is revealed. The most obvious problems are how and by whom the rules of participation are to be established; who defines the common civilization at which pluralism is aimed. Professor Gerald Torres’ approach to the dilemma is to view pluralism not as a thing but as "an approach to politics and, through politics, law." Torres, utilizes the scholarship of Michelman and Sunstein to reveal the shortcomings in the literature. In response to the critical question of how cultural, political, and interest-group pluralism differ, Torres observes:

Frank Michelman, among others, has demonstrated in his recent work, both the republican ideal... and the strongly liberal-pluralist strains in American political consciousness start from an unstated, but common assumption: that the definition of citizenship presupposes a general, as opposed to particular, will and that this generality requires that the law be blind to group interests, at least where the group is smaller than the nation and where recognizing the "subgroup's" legitimacy risks undermining the solidarity of the state.

This depiction recognizes the relevancy of social relations and the interplay between the ideas of social group interest, politics, and ultimately law. Consequently, pluralistic literature must consider the ideological structures that encourage and protect systemic domination and subordination. This does not, however, require an acceptance or rejection of that ideology, but rather only that pluralistic theories be rooted in a historically specific practice. Unfortunately, the literature has severely failed in this regard. It has accepted certain historical, ideological views as truisms; consequently, creating a theory for justifying the deculturalization of subgroups. This is clearly contrary to the basic premises of pluralism.

The acceptance of historical ideology is further reflected when the above excerpt is compared to the following judicial language:

In determining the question of reasonableness it [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of

181. Torres, supra note 178, at 994.
183. Torres, supra note 178, at 997.
184. Pluralism's acceptance of the historical strictures as absolute truths perpetuates many of the practices it attempts to explain—especially that of group subordination. The end result is that the valor of pluralism is lost in the continuum between explaining racism and justifying its existence.
185. See supra note 116 and accompanying text.
their comfort, and the preservation of the public peace and good order.\textsuperscript{186}

The language, "generality requires that the law be blind to group interests, at least where the group is smaller than the nation, and where recognizing the "subgroup's" legitimacy, risks undermining the solidarity of the state,"\textsuperscript{187} suggests a theoretical and practical kinship exists between pluralism and the social/political dichotomy as articulated in \textit{Plessy}. The presupposition that the definition of citizenship, at times, requires blindness, provides the rationale for many of the recent United States Supreme Court equal protection decisions.

Pluralism is based on two very broad assumptions. First, that individual identity is deeply rooted in a politically defined culture. Second, that where contests arise over that identity and the amount of goods that are distributed socially, individuals are free to, and will realign themselves according to group interests.\textsuperscript{188} These assumptions, carried to extremes, visualize the realignment process as free, voluntary, and un-coerced. The same is the farthest from the truth because one's right to participate effectively in the political process requires association with the right group at the right time.\textsuperscript{189} The reality is that group participation may be severely restricted by the primary objective of the interest groups as well as the groups' membership. This reality "disavows the pluralist conception of fairness, which falsely assumes equal bargaining power simply based on access, or numerically proportionate electoral success for all groups."\textsuperscript{190} Assuming fairness based on naked participation in a self-interested bargaining process is inconsistent with information about prejudice.\textsuperscript{191} According to Professor Lani Guinier, fairness is related

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\item \textsuperscript{186} Plessy v. Ferguson, 163 U.S. 537, 550 (1896).
\item \textsuperscript{187} Torres, \textit{supra} note 178, at 997.
\item \textsuperscript{188} Torres, \textit{supra} note 178, at 998.
\item \textsuperscript{189} These assumptions fail to consider the right of interest groups to deny admission to individuals who seek to associate with them. Likewise, they obscure the fact that most interest groups have more than one agenda item. Consequently, an individual who desires to participate because of the political strength of the group is forced to accept or support interests with which he is not concerned or totally disagrees.
\item \textsuperscript{191} \textit{Id.} at 1136 n.288. Prejudice as used by Professor Guinier is defined by two criteria: (1) the presence of a permanent, hostile, fixed majority which dominates the policymaking agenda; and (2) the resulting absence of interest satisfaction for disadvantaged minorities on issues of greatest concern. Where there is prejudice against a
\end{itemize}
to responsiveness.\textsuperscript{192} Thus, a system may be fair, procedurally, merely because it allows participation; however, if it is unresponsive, it is in reality, unfair.

The allures of pluralism are further diminished by the principle of marginality. Pluralism seeks to explain why certain cultural groups have experienced social and political retardation and how resistance is a fundamental part of removing one's self or culture from an existence on the edge of society. Marginality, however, assumes that each individual is \textit{totally} free to make decisions about his or her life or lifestyle. Such has never been the case for the millions of individuals who, historically, have lived their lives on the margins. Rather, choice is restrained initially by the need to survive, the need for food, clothing, and shelter. Likewise, where resistance takes place, only those individuals who are in a position to take advantage of resistance do so. Consequently, when resistance subsides, the majority of those who resisted return to their customary position on the margins. Finally, generating resistance or mass rejection of the status quo is highly unlikely because few social or political policies possess the stimuli for resistance—immediacy and directness.

Marilyn Frye has succumb to the theory that those on the margins are free to participate, either positively, such as where society freely shares its resources with everyone, or negatively, by resisting social policies which hamper a free and open sharing process. Frye observes:

For the benefits of marginality to be reaped, marginality must in some sense be chosen. Even if, in one's own individual history, one experiences one's patterns of desire as given and not chosen, one may deny, resist, tolerate or embrace them. One can choose a way of life which is devoted to changing them, disguising oneself or escaping the consequences of difference, or a way of life which takes on one's difference as integral to one's stance and location in the world. If one takes the route of denial and avoidance, one cannot take difference as a resource. One cannot see what is to be seen from one's particular vantage point or know what can be known to a body so located if one is preoccupied with wishing one were not there, denying the peculiarity of one's position, disowning oneself.\textsuperscript{193}

\textsuperscript{192} Id. at 1137 n.292.
\textsuperscript{193} Id. at 1136.
This excerpt, contrary to general pluralistic literature, obscures the importance of group association.

Pluralistic literature, if it is to guide us toward a common good, must accept the "notion that various autonomous and competing groups will have to cooperate in ways that support the integrity of the various groups within the polity without using the concept of polity to collapse real differences." In order to achieve this acceptance, arbiters of social policy must consciously take the social and historical strictures of competing groups into account when ascertaining the common good. This must be true, whether the group constitutes a "group smaller than the nation" or "jeopardizes the solidarity of the state."

Words are essential to language. Accordingly, word usage and choice are essential to literature. Equal protection language must evolve to a point where it conveys a positive affirmation. For example, the word "minority" or any derivative thereof must be replaced in the literature. This term is demeaning because its genesis is traceable to the word minority—an insignificant or unimportant factor or element. Minority and derivatives thereof debase the identity of the complainant and perpetuate social and historical stigmas. Thus, to lend legal significance to the term minority perpetuates many of the same psychological and social prejudices and stigmas that use of the words negra, nigger, negro, and colored perpetuated when association of race or color with defendants in reported criminal law cases was in vogue.

194. See Torres, supra note 178, at 1000.
195. See Torres, supra note 178, at 997. The era of liberal equal protection interpretation demonstrates that the law need not be blind to the interests of groups smaller than the state. Likewise, many commentators asserted that this liberalism would lead to civil unrest among many white Southerners. The era of liberalism demonstrates that the notion that recognizing the subgroup’s legitimacy risks undermining the solidarity of the state is unfounded. The era of liberalism clearly proved that laws and their enforcement can change individual attitudes and social institutions, thus, increasing the solidarity of the state.
196. RANDOM HOUSE DICTIONARY 1226 (2d ed. 1987).
197. The terms negra, nigger, negro, or colored were uniformly used in reported opinions to describe African American criminal law defendants. This practice received much criticism from African American attorneys during the late 1960s and was ultimately abandoned by the mid-1970s. The practice of using these terms in media accounts and the courtroom perpetuated racial prejudices. It was also considered to be contrary to the notion that justice is blind. As Chief Justice Emeritus Higginbotham observed:

Even courts have at times tolerated the use of the term “nigger” in one or another of its variations. In the not too distant past, appellate courts have upheld convictions despite
Correction of the literature requires the adoption of affirmative language. In this context, the affirmative language is “multiculturalism.”\textsuperscript{198} It recognizes group interest but avoids the stigmas commonly associated with “minority group association.” Furthermore, multiculturalism is all-inclusive; it focuses on the concerns of culturally distinct groups within the context of the larger community without identifying the group as special or severing its interests from those of the larger community.

IV. Conclusion

The white American is not innately racist. I sense innate docility. He will follow the law if the leadership tells him to do that. He would not rebel if he thought he'd be punished. But if the laws are flouted and winked at, he'll wink, too. We should have a beautiful country by now. We have no business having to go back and remake this wheel.\textsuperscript{199}

Adoption of colorblindness, at this time and under current conditions, suggests that a sociological and psychological phenomena has taken place. The sociological phenomena exists by virtue of the Court's ability to detect the need for and develop a legal standard that reflects the dominant interests and views of the majority class. Accordingly, race is no longer a relevant consideration in all but the most egregious case, such as, where the complainant has been subjected to intentional and specific acts of discrimination.

The sociological component, to be valid, must be grounded in the Constitution. Otherwise, the cries of the civil rights movement that blacks are the true Americans would be vigorously renewed.\textsuperscript{200} The grounding process manifests the psychological phenomena. Herein,

\textsuperscript{198} See generally Linda S. Green, Multiculturalism as Metaphor, 41 DePaul L. Rev. 1173, 1173 (1992) (describing the term “multiculturalism” as an affirmative term of inclusion); Nadine Strossen, Thoughts on the Controversy Over Politically Correct Speech, 46 SMU L. Rev. (1992) (describing the term beyond its eurocentric focus to encompass multicultural perspectives).

\textsuperscript{199} TEREKEL, supra note 51, at 13.

\textsuperscript{200} In its early days almost all the significant [black] leaders, in spite of tactical and temperamental differences, relied on the Declaration of Independence and the Constitution. They could charge whites not only with the most monstrous injustices but also with contradicting their own most sacred principles. The blacks were the true Americans in demanding the equality that belongs to them as human beings by natural and political right.

the Court adopts or creates a standard that fulfills the sociological objectives while suggesting a compromise between ethnic group interests. History suggests that the compromise ultimately evolves into a standard reflecting only the interest of the dominant group. In this instance the constitutional grounding is equal protection. Colorblindness reflects how far the court has removed itself from the compromise. The issue of race cannot be understood without some consideration of the decision's value to whites. Examining the effect of interest convergence on equal protection interpretation, Professor Derrick Bell observed that "whites in policymaking positions able to see the economic and political advances at home and abroad"\(^\text{201}\) played a significant role in bringing about liberal equal protection interpretations. The influence of these individuals, however, did not displace the concerns of poorer whites who opposed the improvement of the social status of minorities. Bell observed:

Today, little has changed. Many poorer whites oppose social reform as "welfare programs for blacks" although, ironically, they have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.

Unfortunately, poorer whites are now not alone in their opposition to school desegregation and to other attempts to improve the societal status of blacks . . . . \(^\text{202}\)

Without attempting to do so, Bell provides an accurate explanation for the Court's return to a conservative philosophy. He suggests that by the late 1970s the economic and political advantages of desegregation were no longer as great as they were following World War II.

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\(^{202}\) Id. at 526. Derrick Bell notes:

Few whites are able to identify with blacks as a group—the essential prerequisite for feeling empathy with, rather than aversion from, blacks' self-inflicted suffering . . . . Unable or unwilling to perceive that "there but for the grace of God, go I," few whites are ready to actively promote civil rights for blacks. Because of an irrational but easily roused fear that any social reform will unjustly benefit blacks, whites fail to support the programs this country desperately needs to address the ever-widening gap between the rich and the poor, both black and white.

*Bell, supra* note 136, at 4.
Consequently, a deconvergence of interests took place and whites in policy making positions were considerably less concerned with minority issues.²⁰³

The social/political dichotomy represents the public retraction of the invitation to African Americans and other racial minorities who have been historically discriminated against to come and dine with white citizens on the fruits of liberty, justice, and equality for all. Whites must learn to understand how blacks and other historically disadvantaged groups feel and perceive the reality in which they are forced to exist. Race is always on a black person's mind from the time he wakes up until the time he goes to sleep.

Being black in America is like being forced to wear ill-fitting shoes. Some people adjust to it. It's always uncomfortable on your feet, but you've got to wear it because it's the only shoe you've got. Some people can bear the uncomfort more than others. Some people can block it from their minds, some can't. When you see some acting docile and some acting militant, they have one thing in common: the shoe is uncomfortable.²⁰⁴

Despite this truism most African Americans still hold onto past symbols of equality and aspire for one nation under God, indivisible with liberty and justice for all. White America must come to terms with the presence of their darker brothers. Those terms, if America is to become a great humanitarian nation, must be equitable and acceptable to all. As Frederick Douglass, in 1858, wrote in his newspaper the *North Star*:

> We deem it a settled point that the destiny of the colored man is bound up with that of the white people of this country . . . . *We are here*, and here we are likely to be. To imagine that we shall ever be eradicated is absurd and ridiculous. We can be remodified, changed, and assimilated, but never extinguished. We repeat . . . that we are *here*; and that this is *our* country; and the question for the philosophers and statesmen of the land ought to be, what principles should dictate the policy of action towards us? We shall neither

²⁰³. Bell supports his deconvergence theory by examining the leading Supreme Court decisions of the 1970s. He observed:

In *Swann v. Charlotte-Mecklenburg Board of Education*, Chief Justice Burger spoke of the "reconciliation of competing values" in desegregation cases. If there was any doubt that "competing values" referred to the conflicting interests of blacks seeking desegregation and whites who prefer to retain existing school policies, then the uncertainty was dispelled by *Milliken v. Bradley*, and by *Dayton Board of Education v. Brinkman (Dayton I)*. In both cases, the Court elevated the concept of "local autonomy" to a "vital national tradition."

Bell, *supra* note 201, at 526 (citations omitted).

die out, nor be driven out; but shall go with this people, either as a testimony against them, or as an evidence in their favor throughout their generations. We are clearly on their hands and must remain there forever.205

205. BELL, supra note 136, at 40.