ARTICLES

The Supreme Court and Affirmative Action: Whose Classification Is Suspect?

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Racial politics were central to the republic's founding and have evolved apace with the nation's development. Two centuries ago the Constitution was drafted and ratified in terms that countenanced racial inequality. At least ten provisions[1] in the document owe their presence to the imperatives of slavery. The effective denomination of whites as persons and blacks as property, and consequent extension of rights and freedoms along racial lines, reflected a calculated sense of the terms and conditions necessary to ensure ratification.[2] A century later, shortly after amendments prohibiting slavery[3] and guaranteeing equal protection[4] and the lapse of Reconstruction, the Supreme Court expressed antagonism toward persisting efforts to remedy racial disadvantage. It thus declared that the time had come when former slaves must "take[ ] the rank of a

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1. The Constitution has been identified as directly or indirectly accommodating the interests of slavery by: (1) apportioning federal representation upon the premise that slaves constituted three-fifths of a person, U.S. CONST. art I. § 2; (2) calibrating federal taxation in a like mode, U.S. CONST. art. I. §§ 2, 9; (3) authorizing Congress to activate state militias to suppress domestic insurrection, U.S. CONST. art. I § 8; (4) prohibiting Congress from terminating the slave trade prior to 1808, U.S. CONST. art. I, § 9; (5) barring federal and state taxation of exports that might have included products of slave labor, U.S. CONST. art. I §§ 9, 10; (6) denying states the power to liberate fugitive slaves, U.S. CONST. art. IV § 2; (7) requiring the federal government to protect states against domestic violence, U.S. CONST. art. IV § 4; and (8) excluding from the amendment process provisions for continuation of the slave trade and tax apportionment, U.S. CONST. art. V. *See* W. WIECEK, SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848, at 62-63 (1977).

2. Concessions to slave states represented the currency of exchange for securing the constitution's ratification and ending the political and economic chaos characterizing the post-Revolutionary era. *See* D. BELL, RACE, RACISM AND AMERICAN LAW 29-30 (1980).

3. U.S. CONST. amend. XIII.

4. U.S. CONST. amend. XIV.

mere citizen, . . . cease[ ] to be the special favorite of the law . . . [and] be protected in the ordinary mode by which other men's rights are to be protected."[5] Emphasis upon racial neutrality, rather than special consideration, was followed by several decades of overt racial politics yielding official segregation and inequality as societal norms.[6]

Not until the mid-1960s, after the Court had determined that "[s]eparate [was] . . . inherently unequal,"[7] did comprehensive federal civil rights legislation attempt to secure voting rights,[8] facilitate desegregation of public schools,[9] accommodations, and facilities,[10] and prohibit discrimination in the workplace.[11] Later, as a means of rectifying the continuing fallout from societal discrimination, Congress established racial preferences in federal contracting and hiring.[12] A decade ago the Court approved limited use of race-conscious remediation.[13] Since then, the concept of affirmative action has operated on tenuous constitutional footing subject to claims that preferences victimize their intended beneficiaries[14] and innocent persons[15] and may create limitless preserves.[16]

Individually and collectively, the arguments against race-conscious remediation comport with a pattern of equal protection analysis that consistently has served majoritarian inclinations.[17] Contributing further to the impression that equal protection speaks to minority interests largely in rhetorical terms is the Court's recent insistence upon color blindness, in *City of Richmond v. J.A. Croson Co.*,[18] at a time when it coincides most neatly with the dominant culture's convenience.

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5. Civil Rights Cases, 109 U.S. 3, 25 (1883).

6. Courts applied the separate but equal doctrine, which openly deferred to concepts and customs of racial superiority, for 58 years of the Fourteenth Amendment's 122 years of existence. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

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

8. Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973dd-6.

9. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6(d).

10. *Id.*, 42 U.S.C. §§ 2000a to 2000b-3.

11. *Id.*, 42 U.S.C. §§ 2000e to 2000e-2(j).

12. Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6705.

13. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 320 (1978); *id.* at 326 (Brennan, J., concurring and dissenting). *See* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 638 (1987).

14. Race-based preferences have been criticized for perpetuating negative stereotypes and thus stigmatizing beneficiaries of remediation. Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting).

15. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

16. *Id.*

17. *See infra* notes 21-35 and accompanying text.

18. 109 S. Ct. 706, 721, 724 (1989) (racial classifications are suspect whether denominated as burdensome or remedial); *id.* at 735 (Scalia, J., concurring) (race an unconstitutional consideration for official action under any circumstance).

Espousal of that standard was accompanied not only by recital of familiar arguments against affirmative action but also by the notion that race-conscious remediation presents unacceptable risks of political divisiveness along racial lines.[19] Consistent with that pitch, the Court observed that societal discrimination alone, if a reference point for racial preferences, would encourage limitless claims by every disadvantaged group to the point that the "dream of . . . a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[20]

Holding an essentially reactive variant of race consciousness responsible for impeding or disrupting an ideal already long deferred would be remarkable but for the analytical consistency it betrays. Despite varying standards over the course of its history, equal protection invariably has been a function of majoritarian preference. The Fourteenth Amendment was originally understood to be centrally concerned with securing and facilitating racial equity.[21] Nonetheless, it soon countenanced the separate but equal doctrine and became noteworthy as a source of economic liberty benefitting the privileged rather than the disadvantaged.[22] Rights of privacy and individual autonomy later were glossed upon the Amendment[23] but eventually were cramped in a way that denied their full availability to equal protection's intended and most obvious beneficiaries.[24] Even the desegregation mandate was cautiously introduced,[25] eventually

19. *Id.* at 727.

20. *Id.*

21. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (equal protection "clearly a provision" concerned with "action of a state . . . directed by way of discrimination against negroes as a class, or on account of their race.").

22. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (contractual liberty interposed to defeat state regulation of working conditions). The *Lochner* era of substantive due process review persisted until 1937. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (even if legislative wisdom debatable Court may not supersede its judgment).

23. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (liberty to elect an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy concerning intimate sexual matters).

24. *See* Harris v. McRae, 448 U.S. 297 (1980) (restrictions upon federal funding of abortions upheld although impacting poor black women most heavily); Maher v. Roe, 432 U.S. 464 (1977) (restrictions upon state funding of abortions upheld although impacting poor black women most heavily).

25. Recognizing the incendiary potential of its decree, the Court delayed its desegregation order for a year and couched it in terms of "all deliberate speed." Brown v. Board of Educ., 349 U.S. 294, 301 (1955). What followed for much of the next decade was widespread evasion, delay and tokenism. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966) (minimal constitutional progress was the result of official stalling and bad faith facilitated by lower courts), *corrected*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

eviscerated, and disabled in large part so that it did not reach so-called de facto segregation.[26] Since then, discriminatory purpose has become a general prerequisite for establishing any institutional claim of official discrimination.[27]

If a competition were conducted to determine the most effective means for paying tribute to minority interests in word but not deed, it is doubtful that any methodology would surpass the discriminatory purpose standard. Incorporation of an intent requirement has proved vexing because it impairs vitalization of minority concerns, services majoritarian convenience almost invariably, and is effectively criticized in other constitutional contexts even by those who embrace it for equal protection purposes.[28] Illegal purpose may be disguised by racially neutral reasons.[29] When officials are on notice that they must conceal illicit motive to avoid constitutional consequences, searching for wrongful intent becomes an exercise well-known for its futility.[30] Collective intent generally is an illusion.[31] Motive-based inquiry essentially transforms equal protection into a guarantee against overt discrimination. Because obviously burdensome classifications are largely obsolete and can be addressed without resorting to strict scrutiny,[32] modern equal protection is

26. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1971) (conditioning duty to desegregate upon proof of segregative purpose). The line between de jure and de facto segregation seems more political than logical. Residential segregation, resulting from restrictive covenants enforced by the courts, federal lending policies denying home financing that would contribute to racially mixed neighborhoods, and official decisions concerning the siting of public housing and distribution of urban development funds, is deeply rooted in discriminatory purpose. Insofar as the result is not considered a product of official design, however, no duty to remedy it exists.

27. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (capital punishment); Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252, 265 (1977) (housing); Washington v. Davis, 426 U.S. 229, 239 (1976) (employment).

28. Inquiry into illicit motive has been criticized in multiple constitutional contexts. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (freedom of speech); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (Establishment Clause). Justice Rehnquist has remained a proponent of such review for equal protection purposes despite identifying its defects in another setting. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting) (state police power in relationship to federal commerce power).

29. *See* Lawrence, *The Id, the Ego and Equal Protection; Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

30. *Id.*

31. *See* United States v. O'Brien, 391 U.S. at 383-84; Edwards v. Aguillard, 482 U.S. at 636-37 (Scalia, J., dissenting).

32. If it is assumed that exclusionary racial classifications serve no rational purpose, they can be invalidated pursuant to the most deferential level of judicial review that asks whether government action is supported by any conceivable basis. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955). Such an assumption seems implicit in the Court's holdings that at most have mustered plurality support for segregation under extreme circumstances.

pertinent and currently effective as a means of defeating race-conscious remediation. Discrete instances of discrimination, if proved, may be subject to remediation,[33] but contemporary motive-focused standards make that possibility more theoretical than real. Pursuant to invigorated notions of color blindness, the broader realities and legacies of societal discrimination cannot even be factored into policies of redress.[34]

Given principles establishing an absolute barrier and nearly insurmountable obstacle, the bottom line suggests that the equal protection revolution that displaced the separate but equal doctrine has been almost fully eclipsed by a counterinsurgency reasserting majoritarian conventions. Attributing the possibility of political tribalism to general remediation moves the Court into a new phase of evading or rationalizing actual cause and effect that differs from its analytical antecedents only in time and form. By removing race as a factor in remediating racial problems, however, the Court has discounted the consequences of a politico-economic system consciously founded and maintained upon racial considerations and inequality. Because specific cause, nature, and effect of a problem are legitimate reference points for legislatively confronting any other issue, the Court has now created an exclusionary classification that is pernicious and itself a basis for suspect status.

Given a backdrop in which race has insinuated itself so deeply into both public policy and private decisions, dismissal of remedial initiatives on grounds they engender racial divisiveness seems Orwellian. The result is a twist on Justice Stewart's famous comment to the effect that he knew obscenity when he saw it.[35] The Court may be able to see a legacy of racial inequality but does not want to know about it. The purpose of this Article is: (1) to examine the Court's recent pronouncements on affirmative action as a part of a continuing heritage of majoritarian-sensitive equal protection review; (2) to show that the affirmative promotion of equal protection values is not as alien a constitutional concept as the

See Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan, & Stewart, JJ., concurring) (constitutionality of segregation to ensure prison security under racially tense circumstances).

33. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 727-28 (1989).

34. The Court, however, has allowed congressionally mandated preferential policies to the extent they promote an "important governmental objective" and "are substantially related to the achievement of that objective." Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053, 5058 (June 26, 1990). Rules designed to facilitate minority ownership in broadcasting, by awarding preferences in the licensing process, thus were upheld because "they serve the important governmental interest of broadcast diversity." *Id.* Review of the policies reflected "deference . . . in light of Congress' institutional competence as the national legislature, . . . as well as Congress' powers under the Commerce Clause, . . . the Spending Clause, . . . and the Civil War Amendments." *Id.* at 5057.

35. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Court suggests; and (3) to demonstrate that the case against affirmative action, far from promoting color blindness, actually introduces an invidious racial classification that makes the political process even less responsive to minority interests.

I. Affirmative Action as an Endangered Constitutional Species

Mounting judicial antagonism toward race-conscious remediation manifests itself simultaneously with the Court's observation that "[n]either our words nor our decisions should be interpreted as signaling one inch of retreat from . . . forbidding discrimination in the private as well as the public sphere."[36] Standards of racial neutrality viewed at a glance might seem congruent with such a characterization. At least three Justices have been moved, however, to "wonder whether the majority still believes that racial discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[37]

The notion of a color-blind constitution surfaced originally in Justice Harlan's dissent in *Plessy v. Ferguson*.[38] Harlan, criticizing the Court's investment in the separate but equal doctrine, maintained that "[o]ur Constitution is color blind, and neither knows nor tolerates classes among citizens."[39] Despite rhetorical similarities, contemporary articulations of hostility toward race-conscious remediation have no certain linkage to Harlan's doctrinal rendition. Harlan found official segregation repulsive because it represented the dominant culture's manipulation of the law to advantage itself at the expense of minorities.[40] Objection to policies that were overtly exclusionary do not translate automatically into intolerance of remediation which, albeit color sensitive, has inclusionary aims.

Given the history preceding it and the setting in which it arises, color blindness as a constitutional standard for all seasons does not merit uncritical evaluation. Remediation keyed toward redressing the general reality of societal discrimination is a logical option insofar as motive-dependent criteria have relegated indisputable realities of discrimination and prejudice beyond the legal system's perceptual and cognitive capacity. A focus upon societal discrimination and the sweeping methodology

36. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2379 (1989).

37. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting).

38. 163 U.S. 537 (1896).

39. *Id.* at 559 (Harlan, J., dissenting).

40. *Id.* at 563-64 (Harlan, J., dissenting).

it implies, however, has been dismissed as "too amorphous."[41] It is in response to initiatives conceived to account for the broad legacy of racial injustice, therefore, that strict racial neutrality is being emphasized. In *City of Richmond v. J.A. Croson Company*[42] the Court summarized its objections to remediation when not employed to fix theoretically provable instances of past discrimination. It thus expressed concern that racially preferential policies would: (1) lead to special preserves for minorities; (2) even if well-intended, demean and reinforce negative stereotypes; (3) promote rather than defeat color consciousness; (4) make the legislative process hostage to racial politics.[43]

Racial favoritism, no matter how lofty its aim, has the potential to be harmful in its application. A preferential scheme, that essentially tracks whites and blacks into slots reminiscent of a plantation economy, might be benign in depiction but genuinely invidious in its effect upon minority interests. Another potentially questionable policy might be a preferential scheme formulated in a jurisdiction where a national minority traditionally had been the dominant political force. Favoritism in such a context might require judicial appraisal to determine whether a uniquely local advantage was being constitutionally abused.[44]

Despite the possibilities for abuse of color-conscious schemes, objections to remediation are unpersuasive and even troubling to the extent they are expressed in categorical terms. Concern that preferences will convert into enduring rather than temporary preserves probably is exaggerated because equal protection consistently has been reducible to terms and consequences of majoritarian suffrance,[45] and any self-burdening policies are likely to remain responsive to self-interest. Fear that negative stereotypes will be promoted also seems misplaced, especially to the extent experience and performance eventually supersede perceptions of preferential beneficiaries as less qualified. A fixation upon short-term consequences that are an inevitable result of any significant change unnecessarily sacrifices more profound long-term interests. Furthermore, worries about stigmatization tend to be overstated. Successful white males have been advantaged by not having to compete against a full lineup. They bear a stigma, attributable to the traditional exclusion of mi-

41. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

42. 109 S. Ct. 706 (1989).

43. *Id.* at 721.

44. The Court's invalidation of a municipality's set-aside scheme for contracting referred to a national minority's dominant numbers in the particular jurisdiction. *Id.* at 722. Such a reality might justify a careful examination of the program but should be regarded as a possible rather than a certain source of abuse.

45. *See supra* notes 1-5, 21-34 and accompanying text.

norities and women, that affirmative action actually might help erase. Stereotyping flowing from deeply ingrained attitudes predating any concept of affirmative action will persist with or without remedial initiatives. Selective reference to affirmative action as a barrier to broadly conceived remediation disregards the real sources and nature of inequality. The mentality is reminiscent of insensitivity to unequal bargaining power when contractual liberty was identified as the paramount concern of the Fourteenth Amendment.

In a society functionally disposed toward race-dependent judgment and, until recently, countenancing overt legal distinctions too, it seems impertinent to hold affirmative action to a high level of accountability for continuing race consciousness. Even more preposterous is the notion that color-calibrated remediation would be responsible for injecting race into the political process. From the time the Constitution was drafted and slavery was negotiated as the price for ratification, constitutional, statutory, and common law have been functions of racial politics.[46] No other influence explains official segregation or even contemporary voting patterns reflecting dominant racial considerations.[47] Fretting that remediation to correct societal discrimination would sacrifice "[t]he dream of a Nation of equal citizens in a society where race is irrelevant"[48] expresses anxiety over a reality already well-established. Forbiddance of the racial politics of remediation from a process already noted for historical exclusion and underrepresentation—the very conditions which originally justified strict scrutiny[49]—effectively creates a classification of the most traditional and suspect order. The inexplicable net consequence is that racial politics may proceed in customary fashion but not in a way that has more positive consequences for minority interests.

While holding preferential policies to a more exacting standard, the Court simultaneously has destabilized foundations for existing and approved affirmative action plans. To correct identifiable discriminatory practices, consent decrees commonly are used to impose contractual remedial obligations backed by the judiciary. Although negotiated, such decrees originate from adversarial litigation and have the effect of a judgment.[50] When Birmingham, Alabama entered into a consent decree with black firefighters and the NAACP, it did so in an effort to redress a long

46. *See supra* notes 1-2 and accompanying text.

47. Voting patterns still evince racial preference as a dominant influence, especially among whites. *See* Detroit Free Press, Oct. 22, 1958 § 1, at 1, cols. 1-2.

48. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 727 (1989).

49. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

50. *See* Martin v. Wilks, 109 S. Ct. 2180, 2190 (1989) (Stevens, J., dissenting).

history of departmental discrimination in hiring and promotion.[51] The order was implemented pursuant to a hearing that included arguments by the city firefighters' association in opposition to the plan.[52] Following actual entry of the decree, several white firefighters sued the city on grounds that promotion practices pursuant to the consent decree discriminated against them.[53]

In *Martin v. Wilks*,[54] the Court strictly construed procedural rules in declaring that the affirmative action plan could be challenged by nonparties to the original litigation. As the dissent noted, however, the effect of the decree did not and could not deprive persons of their legally protected contractual rights.[55] Attention to procedural imperatives does not explain why a decree may not structure employment conditions in a way that conditions hiring and promotion prospects. Defining or delimiting terms of entry or advancement is not necessarily synonymous with deprivation of legal rights.[56]

The *Martin* decision, if representing an invitation to challenge established affirmative action plans, evinces a selective license to disrupt the interests of finality. Although conclusiveness of result is discounted in the affirmative action area, it is precisely the rationale constantly emphasized in the criminal justice context to deny postconviction relief even when a compelling claim can be made that a constitutional right has been denied.[57] Common to the respective slackening and hardening of general rules is a visible lack of sympathy for affirmative action and for criminal defendants. Since the Birmingham plan had been contested by disaffected employees,[58] the Court's decision particularly intimates a calculated interest in destabilizing the entire concept of affirmative action. At a minimum, the holding brings uncertainty and vulnerability to judicially enforced affirmative action. A consent decree, even if entered into in good faith and with a recognition that liability would result if the case were tried, will not shield an employer from competing race-based litiga-

51. *Id.* at 2183.

52. *Id.*

53. *Id.*

54. *Id.* at 2185-88.

55. *Id.* at 2188-89 (Stevens, J., dissenting).

56. *Id.* at 2189 (Stevens, J., dissenting).

57. *E.g.*, Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (emphasizing the importance of perception that a criminal trial "in state court [is] a decisive and portentous event"); Reed v. Ross, 468 U.S. 1, 26 n.3 (1984) (Rehnquist, J., dissenting) (arguing that "orderly administration of justice and concerns of finality . . . have significance for the allocation of societal resources, . . . distribution of those resources . . . and ultimately, what justice remains to be dispensed").

58. *See Wilks*, 109 S. Ct. at 2191.

tion.[59] The consequent prospect is that resolution of one set of discrimination claims may cause exposure to another set of claims.[60] Such complications and the resultant chilling effect upon employers are difficult to reconcile with abiding imperatives of equal protection and associated policies.

Depreciation of remediation pitched toward societal discrimination seems disingenuous given the construction of doctrine that blunts identification of discrimination on virtually all significant fronts of contemporary society. Redress has been proposed in such broad terms because demonstration and correction of discrete instances of wrongdoing have been so seriously confounded. Jurisprudential impediments couched in terms of constitutional mandate, when pierced to their essential nature, reveal dominant and persisting values that continue to inspire equal protection thinking and results. The enduring influence of majoritarian preference in delineating constitutional perimeters is paralleled and reinforced by increasingly cramped readings of both statute[61] and procedure.[62] The net consequence is a definition of equal protection and related policies that consistently disables concepts that would truly remediate. Redress of the legacy and reality of racial injustice thus becomes a function of what does not offend the majority, which necessarily is ineffective and renders equal protection largely powerless.

II. Affirmative Action as a Constitutional Norm

Affirmative action as a means of remediating racial discrimination ignites controversy that surpasses the concept's divisive potential in the abstract or in other contexts. Although invariably controverted when actually propounded, the concept of promoting constitutional values is hardly novel. Because the Constitution is not self-defining, its animation requires the grafting of principles effectuating selected values. Given a constitution that does not speak for itself, except to the extent it utters several precise, discrete, and uncontroverted commands,[63] and justices who cannot truly hear voices originating from within the four corners of

59. *See id.* at 2199-2200 (Stevens, J., dissenting).

60. *See id.* at 2198-2200 (Stevens, J., dissenting).

61. *E.g.*, Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2372-73 (1989) (holding that 42 U.S.C. § 1981 prohibits discrimination in the formation of contracts but does not cover postformation harassment).

62. *E.g.*, *Martin*, 109 S. Ct. 2180, discussed *supra* notes 50-60 and accompanying text.

63. Age restriction upon candidates for federal office exemplifies an explicit constitutional prescription that is indisputable with respect to its meaning. *E.g.*, U.S. CONST. art. I, § 3, cl. 3 and art. II, § 1, cl. 5. They contrast with the open-ended terminology of fundamental guarantees set forth in the Bill of Rights and subsequent amendments including the Fourteenth Amendment.

the charter itself, the principles begetting fundamental law are chosen from competing societal values. The documental actuation process is routine even if the choice of values and consequent embellishment of the Constitution is not preordained.

The promotion of equal protection values in the name of affirmative action is not the first time that constitutional interests have been ordered and facilitated. The exclusionary rule was designed to promote fourth amendment interests,[64] and *Miranda* warnings were formulated to facilitate fifth and sixth amendment concerns.[65] Desegregation and concomitant remediation, including busing plans, were calculated to further equal protection values.[66] The Voting Rights Act was adopted to advance fifteenth amendment goals.[67]

Affirmative schemes for redressing racial discrimination even in broad societal terms are not unique insofar as they may assign or reallocate burdens. Modern technological and economic forces and consequent concern with the media's pervasive nature, for instance, have engendered a restructuring of first amendment rights. The public's interest in receiving diverse viewpoints has been identified as a constitutional priority particularly when mass communication is limited to a relative few.[68] Having been glossed onto the First Amendment, the public's right has been declared paramount to the traditional constitutional interests of broadcasters in editorial autonomy.[69] Content regulation, including the fairness doctrine, has been justified pursuant to that "unusual order" of first amendment rights.[70]

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64. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("sanction of exclusion" a means of effectuating fourth amendment guarantees).

65. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (procedural safeguards in the form of warnings prior to custodial interrogation required to utilize privileges against self-incrimination).

66. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971) (affirmative steps required to "desegregat[e] a state-enforced dual system in light of the Equal Protection Clause").

67. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (civil rights legislation designed to work "against voting discrimination").

68. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969).

69. *See id.* (recognizing public's paramount first amendment right of suitable access to diverse views and voices).

70. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) (reaffirming public's overarching first amendment interests in diverse programming but denying general right of access). Despite the FCC's recent abandonment of the fairness doctrine, the notion that the public's first amendment interests are paramount endures. Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5055-57 (1987) (abandoning fairness doctrine and thereby elevating first amendment status of broadcasters but nonetheless adverting to public's paramount first amendment rights), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). The Commis-

It is ironic that formalized minority preferences engender so much dispute when other promotive policies resting upon less stable footing seem to have been better tolerated. Unlike principles calculated to promote first amendment values, federal affirmative action plans designed to remedy past wrongs to minorities are tied to specific constitutional language enabling the federal government at least to promote fourteenth amendment interests.[71] To the extent such policies are formulated by democratic entities normatively responsive to majoritarian interests, facilitation of minority concerns should be less worrisome. Legislatures and unions, for instance, tend to be repositories of majoritarian sentiment. For affirmative action to become enacted or adopted, therefore, it must transcend whatever prejudice, irrationality, disinterest, or other majoritarian sentiment that may be institutionally present. Review of any plans emerging from such circumstances reasonably could be confined to determining whether procedures responsible for a preferential scheme were fair and any consequent harm was inimical to long-term equal protection objectives.[72]

The separate but equal doctrine, constitutionally enshrined in *Plessy v. Ferguson*,[73] represented the affirmative promotion of majoritarian values, customs, and comfort. The formula as constructed and interpreted was an assertive methodology for protecting a dominant class.[74] It also formalized classification schemes that stigmatized blacks and perpetuated stereotypes.[75] Official segregation was subject to the feeble demand that any exercise of state police power creating a racial classification had to be reasonable.[76] Unlike modern equal protection analysis when discriminatory intent is present,[77] review of official racial classification was deferential rather than heightened.[78] Racial classification schemes rarely

sion merely has determined that those concerns are better served by marketplace forces rather than regulatory controls. 2 F.C.C. Rcd. at 5057.

71. *See* U.S. CONST. amend. XIV § 5.

72. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 (1986) (Stevens, J., dissenting).

73. 163 U.S. 537 (1896).

74. *See id.* at 560 (Harlan, J., dissenting) (noting the existence "in some of the States, [of] a dominant race—a superior class of citizens, which assumes to regulate . . . civil rights . . . upon the basis of race"). The legacy of *Plessy* includes a series of cases that supported racial separation and heavily discounted the equality element of the doctrine. In Cumming v. Georgia, 175 U.S. 528, 542 (1899), for instance, a school board was allowed to deny high school education to blacks even though such schooling was provided to whites.

75. *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting) (arbitrary separation on basis of race imposes a "brand of servitude and degradation upon a large class of fellow citizens").

76. *Id.* at 550.

77. Upon proof of discriminatory intent, judicial review becomes strict. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238-41 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

78. *See Plessy*, 163 U.S. at 550 (standard of review was mere reasonableness).

failed to pass constitutional muster whether motivated by morally underdeveloped notions of promoting public harmony[79] or by more overtly oppressive and supremacist instincts.[80] As the legacy of *Plessy v. Ferguson* demonstrated, concern for separateness was genuine but commitment to equality was not.[81] Consequently, the naked servicing of majority convenience at the expense of minority interests begot the longest running affirmative action scheme in the history of the Fourteenth Amendment.

The Supreme Court's conclusion in 1954 that separate inherently was unequal[82] introduced doctrine and standards that largely have come to accommodate rather than displace majoritarian impulses. Affirmative remedial schemes were implicit in the new constitutional alignment insofar as busing proved necessary to effectuate desegregation.[83] Restrictions upon the use of busing[84] and the consequent collapse of the desegregation mandate are instructive in responding to the modern concern that affirmative action plans may be limitless. Judicial intervention to ensure that remediation does not operate beyond control reflects not only sensitivity to majoritarian convenience but a reaction that is both excessive and unnecessary. Concern that affirmative action causes injury significant enough to merit close attention, because it advances unthinking stereotypes, injures innocent whites, and is potentially limitless,[85] is exaggerated because such remedial schemes target a highly discrete subcategory of persons and are subject to profound, if not always perceived, limitations. In the employment context, affirmative action policies often benefit those individuals already possessing certifiable qualifications such as a

79. *See id.* (reasonableness of legislation referenced to "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").

80. Antimiscegenation laws were intended to maintain "white supremacy" and remained undisturbed until the late 1960s. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).

81. Not until 1938 did the Court actually find inequality present in a segregated educational setting. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Even so, the determination was not made until the disparity, created by the absence of any black law school, was so egregious that it could not be ignored. "[A]t the university level, no provision for Negro education was a rule rather than an exception." Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 319 (1952).

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

83. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 18 (1971) (bus transportation for students one of several remedies that may be required for "eliminat[ing] invidious racial discrimination in public schools").

84. *See* Milliken v. Bradley, 418 U.S. 717 (1974) (invalidating metropolitan desegregation plan absent satisfactory showing of discriminatory intent by suburban school districts).

85. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989).

skill or a degree.[86] Quite the opposite from being infinite in scope or duration, race-conscious hiring plans tend to be constrained too by majoritarian attitudes and values governing their operation. Conscious policies to hire minorities to enhance diversity may be circumscribed abruptly once a certain level of diversification is reached.[87] Even exceptionally qualified minority applicants subsequently may be rejected pursuant to a dominant sense that the institution has accomplished its diversification objectives or to an altered definition of merit.[88]

Whether precisely tied to provable instances of specific wrong or more generally to societal discrimination, it is difficult to envision how any initiative dependent upon the dominant culture's acquiescence is likely to be limitless. Coursing of policy to secure voting rights typifies the resilience of majoritarian impulses that subject any minority-conscious scheme to constant jeopardy. The Voting Rights Act of 1965[89] essentially represented an affirmative action methodology designed to protect the franchise from denial or dilution by race-conscious schemes. Standards governing political gerrymandering unrelated to race evolved toward prohibiting substantial deviations in equality among districts regardless of intent.[90] Districting plans challenged on grounds that they diminished minority voting power, however, became captive to discriminatory intent criteria.[91] The Court's analytical framework then, as in the affirmative action context now, essentially created an exclusionary racial classification of the most traditionally suspect nature. Although Congress amended the law so that effect rather than purpose was the opera-

86. Affirmative action plans as contemporaneously conceived focus upon a relatively small and elite proportion of minorities who are well-educated or possess certain acquired and certifiable skills. *See* W. WILSON, THE DECLINING SIGNIFICANCE OF RACE 120 (1978).

87. So-called tipping points have been referred to as a basis for denying educational and housing opportunities to blacks pursuant to concern that their presence beyond a certain number would drive away whites and defeat integration aims. *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1140 (2d Cir. 1973).

88. Some prestigious schools have been accused, for instance, of operating a functional quota system that denies admission to Asian-American students whose grades and test scores suggest they are exceptionally well-qualified pursuant to traditional criteria of merit. *See Do Colleges Set Asian Quotas?* NEWSWEEK, Feb. 9, 1987, at 60.

89. 42 U.S.C. §§ 1973 to 1973dd-6.

90. *See* Avery v. Midland County, 390 U.S. 474, 484-85 (1968) (county commission elected from single member districts unconstitutional because of gross overrepresentation of rural and underrepresentation of urban areas).

91. *See* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) (discriminatory purpose required to establish violation of Fifteenth Amendment, but illicit motive not established in this case); *id.* at 103 (White, J., dissenting) (discriminatory purpose required and established).

tive standard,[92] the Justice Department persisted in asserting that wrongful purpose must be proved.[93] The Court eventually determined that discriminatory intent was not required to establish a violation of the Voting Rights Act.[94] In so doing, however, it responded not only to the claims of minorities but also to Republicans who stood to benefit from changes in the apportionment scheme at issue and thus had joined the litigation.[95]

History discloses that affirmative action is a common methodology for facilitating constitutional concerns. Its availability and utility appear to be a function, however, of race-dependent considerations.

III. Color Blindness as an Invidious Classification: Reburdening the Political Process

Equal protection at its inception was recognized "clearly [as] a provision" concerned with racial discrimination.[96] Within a few decades the Court turned a deferential if not blind eye toward official segregation.[97] While equal protection was dismissed as the "last resort of constitutional arguments,"[98] the Fourteenth Amendment in general had been converted into a vehicle for effectuating concepts of marketplace liberty.[99] The eventual demise of economic liberty was coupled with the intimation that judicial attention still would be enhanced for matters concerning "discrete and insular minorities."[100] Several years later, the Court concluded that policies "curtail[ing] the civil rights of a single racial group are immediately suspect [and] . . . must [be] subject . . . to the most rigid scrutiny."[101] The concept of suspectness eventually led to invalidation of official segregation.[102] However, the Court ultimately diminished the principle's significance by directing equal protection toward concern with the purpose rather than the consequences of policy.[103] To the extent

92. Voting Rights Act of 1982, 42 U.S.C. § 1973.

93. Thornburg v. Gingles, 478 U.S. 30, 61-62 (1986) (asserting that intent and other factors must be proved).

94. *Id.* at 62, 70-74 (need not prove "discriminatory intent in order to prove prima facie case").

95. *See* Cooper, *Beware of Republicans Bearing Voting Rights Suits*, THE WASHINGTON MONTHLY, Feb. 1987, at 11-15.

96. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

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

98. Buck v. Bell, 274 U.S. 200, 208 (1927).

99. *See supra* note 23 and accompanying text.

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

101. Korematsu v. United States, 323 U.S. 214, 216 (1944).

102. Brown v. Board of Educ., 347 U.S. 483 (1954) (separate inherently unequal).

103. *See supra* notes 18-20 and accompanying text.

equal protection has been constrained so that it accounts for little beyond overt discrimination, which could be found irrational pursuant to the most deferential standard of review,[104] the notion of strict scrutiny has become largely irrelevant. Jurisprudential trends disfavoring affirmative action thus appear to fit a broader doctrinal pattern undercutting the utility of equal protection as a means of accounting meaningfully for race-based disadvantage.

Viewed in such a context, the notion that color-conscious remediation holds the political process hostage to tribal politics[105] seems especially double-minded. History discloses that race has been a dominant and constant factor in American politics to the special detriment of minorities. The dominant culture was responsible not only for slavery, official segregation, and resistance to desegregation, but also for voting behavior that continues to nominate and select persons for public office on the basis of race. Despite contemporary breakthroughs in electing blacks to offices heretofore occupied exclusively by whites, electoral patterns continue to reveal racial allegiance especially on the part of whites.[106] Interest groups reflecting racial concerns are less a cause than a consequence of enduring racial politics. Holding affirmative action responsible for jeopardizing the ideal of a society in which race is irrelevant[107] at best is myopic. At worst, it sacrifices broad-based remediation to a vision that is more rhetorical than substantive and derogated by a long record of official and private action. Considerations and concessions made during the Constitution's drafting and ratification ensured the relevance of race at the republic's commencement. Policies formulated by all branches of government since have reinforced the pertinence of race and, coupled with attitudes of racial superiority, fashioned a legacy of majoritarian advantage. Racial dissonance endures not as a function of remedial effect but of original cause.

The singling-out of race as an impermissible reference point for remediation constructs a classification that excludes in the most traditional manner and thus possesses the most suspect striping imaginable. The legislative process in a representative, pluralistic society contemplates the factoring in and balancing of concerns pertinent to assorted groups. It further anticipates and is activated by coalitions operating to enable minorities to effectuate their interests. By foreclosing race as a reference point for problems of race, the Court selectively denies minori-

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

105. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721-22 (1989).

106. *See* Detroit Free Press, Oct. 22, 1989, § 1, at 1, cols. 1-2.

107. City of Richmond v. J.A. Croson Co., 109 S. Ct. at 727.

ties an avenue normally available for addressing other issues. The political process previously was pried open pursuant to the recognition that it underrepresented discrete and insular minorities.[108] Jurisprudence now reburdens the political process in the name of color blindness. The resulting inversion is consonant with a social order premised upon Justice Scalia's observation that "victims" of affirmative action are outcasts of the legislative process and "politically impotent."[109] Given a culture still disposed to race-dependent judgment and ways, a judicially prescribed classification excluding race consciousness in the interest of racial neutrality redounds again to the service of majoritarian convenience.

Foreclosure of race-sensitive remediation as a means of transcending race[110] makes even more imperative the need for standards that are sensitive and responsive to traditional forms of discrimination. If color blindness is to be the dominant constitutional standard, broad effectuation of its purpose necessitates departure from criteria that have minimal utility except for servicing majoritarian inclinations. A focus upon discriminatory purpose, although useful as a means of sheltering dominant priorities, has little if any relevance to the consequences of official policy in the real world. If constitutional principles are made more pertinent to their purported concern, it may be appropriate for the Court to cast analysis that more directly confronts legislative actions and policies. A useful model would be thirteenth amendment jurisprudence, which considers whether challenged actions and their effects can be interpreted as incidents or badges of slavery.[111] With only a slight change to make the formula more pertinent to modern times, appraisal of official action might focus upon whether the policy or action at issue was a function of racism.

Pursuant to such a criterion, the Court would have to sensitize itself to the realities and imageries of racism it seems inclined to avoid. Such a responsibility may be problematical because it does not always evince an awareness or appreciation of the nature and implications of cultural plu-

108. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (discussing hallmarks of suspectness for equal protection purposes); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1983) (formative identification of interests and conditions meriting enhanced judicial attention).

109. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

110. *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring and dissenting) ("In order to get beyond racism, we must first take account of race").

111. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (discrimination interfering with right to own property a badge and incident of slavery). *See also* Lawrence, *supra* note 29, at 349-55.

ralism.[112] Justice Kennedy, in another context, candidly acknowledged he did not know the significance of an important symbol for a prominent religious minority.[113] Such cultural deficiency, to the extent compounded by standards that do not cut to the heart of controversies, however, actually may be an argument for such confrontational inquiry. Review that forces the Court to focus upon racism and its consequences in a more direct way might have a healthy educational effect and heighten the Court's awareness of the need for more forceful doctrine.

So far, efforts to engage the Court in a more direct inquiry have been unproductive. A Southern city's street closure, which insulated a white neighborhood from traffic into and out of a black neighborhood,[114] was challenged as a badge and incident of slavery but held a legitimate means of preserving residential tranquility.[115] Instead of settling for a plausible racially neutral reason, allowing review to devolve to the level of mere rationality, the challenged practice could have been required to satisfy two demands. First, it would have been necessary for the state to provide justification that was compelling and convincing and not merely neutral. Second, even in the event of a strong reason, the Court would have had to balance it against possible perceptions of an incident or badge of racism and determine which harm was greater.

Because good reason exists to lack confidence in the Court's capacity to sensitively and directly confront the realities and implications of racism, or to place itself at odds with mainstream values and customs, a more promising option may require broadening the focus of remediation. Although the Court increasingly has foreclosed opportunities for race-conscious remediation, it has established a body of law that creates a clear opportunity for redressing general disadvantage that incidentally would include consequences of racial discrimination. The constitutional viability of broadly conceived racially neutral programs ironically has been established by jurisprudence that curbed the reach of equal protection. Claims concerning disparities in or unavailability of public funding respectively for education[116] and abortion[117] were rejected on grounds

112. FCC v. Pacifica Found., 438 U.S. 726, 776-77 (1978) (Brennan, J., dissenting) (decision upholding regulation of indecent expression reflects "depressing inability to" appreciate implications of cultural pluralism).

113. City of Allegheny v. ACLU, 109 S. Ct. 3086, 3146 (1989) (Kennedy, J., dissenting) (expressing unfamiliarity with significance of menorah to Jewish faith).

114. Memphis v. Greene, 451 U.S. 100 (1981).

115. *Id.* at 127.

116. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (disparities in funding and quality of education that are not the result of discriminatory intent are not strictly scrutinized).

117. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

that wealth classifications were not suspect. Accordingly, policies structured to remediate disadvantage, including but transcending racial discrimination, likewise should survive strict scrutiny and be subject to deferential review. Justice Scalia, who has taken an absolute position countenancing no racial classification whatsoever, has noted that preferential schemes having a racially disproportionate impact but not overtly based on race would present no constitutional problem.[118] Resulting policy may be vulnerable to the criticism that neutrality merely is a disguise for race consciousness. It is even conceivable that remediation would survive judicial review by concealment of actual purpose and objective. In reality, however, such a result might effectuate equal opportunity for all types of racial classifications and argue persuasively for eliminating motive-based inquiry altogether.

Conclusion

The Court's recent curtailment of abortion rights elicited Justice Blackmun's observation that future prospects for that liberty interest were "very ominous, and a chill wind blows."[119] Such a forecast seems doubly pertinent to the future of affirmative action, given redaction of societal discrimination as a permissible reference point for remediation and the continuing operation of discriminatory intent as a standard for discrete claims of constitutional wrongdoing. Dim prospects for race-conscious policies should not be surprising, however, given the consistent failure over the course of history to disentangle equal protection from majoritarian impulses. More than a century's worth of fourteenth amendment jurisprudence has demonstrated much judicial creativity in the form of economic liberty, privacy rights, and concepts of personal autonomy. Even those jurisprudential glosses have been structured, in some instances, to exclude the primary beneficiaries of the core provision. With respect to the Fourteenth Amendment's most obvious aim, the Court's legacy consists primarily of the separate but equal doctrine followed by motive-based inquiry and now color blindness.

Modern jurisprudence may be less hesitant to acknowledge and condemn racial injustice insofar as it constitutes a historical reality. Justice Holmes responded to claims of mass disfranchisement of blacks with the conclusion that judicial relief would be pointless given dominant local

118. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring) (remediation of discrimination permissible so long as beneficiaries not "identified *on the basis of their race*") (emphasis in original).

119. Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., dissenting).

attitudes responsible for the wrongs.[120] More recent jurisprudence includes the observation that " a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[121] Like most of its antecedents, however, the Rehnquist Court seems inclined to frustrate, at most points of inspiration, constitutional, statutory, or procedural renditions that would effectively account for minority interests. Merely expressing regrets for the vices of forebears does not diminish the Court's responsibility for crafting standards that accommodate an inherited order of racial advantage and reduce constitutional obligations to the level of a procedural ritual.

Cramping the political system in a way that makes it less responsive to racial grievances is the function of a classification process that burdens minorities in the most traditionally suspect way. Introduction of color blindness as a standard for all seasons may not be an unmitigated curse if it shatters the illusion that the judiciary is a natural and dependable ally of minorities. The Court's performance over the course of history demonstrates that it is a miscalculation to expect the judiciary, functioning within and primarily as a product of majoritarian convention, to stray from majoritarian norms. Considered as a whole, the Court's equal protection record reveals a disinclination to intervene on behalf of minority concerns unless the consequences prove acceptable to the majority. The Court's recent renderings, insisting on racially neutral policies for all purposes and blaming race-conscious remediation for political dissonance, merely extend a legacy of manipulated standards and rationales suiting majoritarian convenience. Regardless of outcome, litigation may serve a valuable educational purpose[122] and judicial decisions may perform a critical catalytic function.[123] The primary path toward further minority progress, however, leads in the direction of coalition building. Such a road remains open so long as the Court, which activated equal protection when the political system was perceived as dysfunctional, does not reburden the process as it responds more effectively to minority concerns.

120. Giles v. Harris, 189 U.S. 475, 487-88 (1903) ("pointless" to order relief that state and citizenry would disregard).

121. Reynold v. Sims, 377 U.S. 533, 566 (1964).

122. *See* D. BELL, AND WE ARE NOT SAVED 253-55 (1987).

123. Without the Court's intervention in 1954, and given a Senate held captive by Southern filibusters and influence, it is unlikely that official racial barriers would have fallen as soon as they did. Even so, due to the costs and reach of litigation and recalcitrant states and localities, official segregation was not really erased until comprehensive civil rights legislation was enacted. *See supra* notes 7-11 and accompanying text.