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## Paternalism, Tolerance, and Acceptance: Modeling the Evolution of Equal Protection in the Constitutional Canon

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PATERNALISM, TOLERANCE, AND ACCEPTANCE:  
MODELING THE EVOLUTION OF EQUAL PROTECTION IN  
THE CONSTITUTIONAL CANON

JOHN TEHRANIAN\*

ABSTRACT

*This Article proposes a legal taxonomy through which we can model changes in interpretations and applications of antidiscrimination principles to best understand the evolution of equal protection doctrine. The goal for doing so is two-fold. First, through a careful exegesis of a wide range of equal protection cases from the past hundred and fifty years, the analysis provides a positive theory to chart how respect for minority rights can progress within a given doctrinal space. Second, the analysis provides an unabashedly normative assessment of how closely a given legal regime comes to accepting and celebrating the inherent dignitary interests of marginalized groups and the extent to which its jurisprudence begins to subvert subordination practices. Consequently, the Article attempts to trace both how far we have come and to criticize the potential shortcomings of the extant body of jurisprudence from the Supreme Court on issues related to equality.*

*In advancing this evolutionary model of civil rights jurisprudence, the Article charts the key characteristics of the three stages in the development of equal protection under the law: paternalism, tolerance, and acceptance. In the process, the Article scrutinizes and*

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*reassesses some of the most canonical decisions in the civil rights firmament and considers how these purported hallmarks of progressive jurisprudence—from Justice Harlan’s prescient dissent in Plessy v. Ferguson and the Supreme Court’s rare moment of post-Reconstruction racial awakening in Strauder v. West Virginia to Mendez v. Westminster and Brown v. Board of Education, right through the modern-day sexual-orientation triumvirate of Lawrence v. Texas, Windsor v. United States, and Obergefell v. Hodges—fell short in critical ways. In the end, the goal of this Article and the model it presents is to encourage a more robust and fulsome notion of equal protection—one that is proactive rather than reactive; one that affirmatively renounces, rather than stays silent on, supremacist ideologies; and one that uses the legal machinery of the state to accept and celebrate the inalienable rights and worth of individuals who are members of targeted groups.*

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## INTRODUCTION

This Article proposes a legal taxonomy through which we can model changes in interpretations and applications of antidiscrimination principles to best understand the evolution of equal protection doctrine. The goal for doing so is twofold. First, the analysis provides a positive theory to chart how respect for minority rights can progress within a given doctrinal space. As such, this Article seeks to explain the course of equal protection jurisprudence through various stages of legal development. Second, the analysis provides an unabashedly normative assessment of how closely a given legal regime comes to accepting and celebrating the inherent dignitary interests of marginalized groups and the extent to which its jurisprudence begins to undo the impact of long-entrenched prejudices. Consequently, the Article attempts to trace both how far we have come and to scrutinize the potential shortcomings of the extant body of jurisprudence from the Supreme Court on issues related to equality.

Specifically, the Article conducts a close textual reading of a wide range of equal protection cases of the past hundred and fifty years to argue that juridical conceptions of minority rights have advanced in roughly three stages: paternalism, tolerance, and acceptance. In the first stage, courts, driven by noblesse oblige, reluctantly prohibit discrimination on the grounds that those who warrant the government's protection cannot help what or who they are. In the process, first-order protection expressly reaffirms hierarchy and tiers of citizenship, thereby doing little, in practice, to address inequality or challenge the supremacist ideologies underlying "proto-tolerant" regimes. In the second stage, courts advance a less condescending form of tolerance that rejects discrimination against minority groups. But this judicial pivot is typically both laissez-faire in its approach and instrumentalist in its drive. As such, it promotes tolerance primarily when doing so advances the praetorian interests of the majority and those in power. Finally, in stage three, courts actively solemnize the rights of minorities and reject structural hierarchies that put that group on an unequal footing. As such, the

law begins to play a role in actively resisting and subverting subordination practices.<sup>1</sup>

In advancing this evolutionary model of civil rights jurisprudence, the Article charts the key characteristics of these three stages of advancement in the protection of minority rights. In the process, the Article reassesses and critiques some of the most canonical decisions in the civil rights firmament and considers how these purported hallmarks of progressive jurisprudence—from Justice Harlan’s prescient dissent in *Plessy v. Ferguson*<sup>2</sup> and the Supreme Court’s rare moment of post-Reconstruction racial awakening in *Strauder v. West Virginia*<sup>3</sup> to *Mendez v. Westminster School District*<sup>4</sup> and *Brown v. Board of Education*,<sup>5</sup> right through the modern-day sexual orientation triumvirate of *Lawrence v. Texas*,<sup>6</sup> *United States v. Windsor*,<sup>7</sup> and *Obergefell v. Hodges*<sup>8</sup>—fell short in key ways. Based on an exegesis of these cases, the Article posits that the work of creating a society and legal system free of invidious discrimination is not nearly done and that we can, and should, demand more from the Court.

This Article begins by examining the proto-tolerance exhibited by seemingly progressive decisions from the late-nineteenth and early-twentieth centuries. The starting point is Harlan’s celebrated dissent in *Plessy*, which, despite its position against the constitutionality of segregation, was imbued with a paternalistic approach to the Fourteenth Amendment that fetishized formal colorblindness

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1. As Michel Foucault has argued, modern forms of power often come in the form of “a dynamic or network of non-centralised forces ... [that] are *not* random or haphazard, but configure to assume particular historical forms,” Susan Bordo, *Feminism, Foucault and the Politics of the Body*, in *UP AGAINST FOUCAULT* 179, 191 (Caroline Ramazanoglu ed., 1993), and the law can play an active role in either metastasizing or opposing such forms. See generally MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* 100-02 (Robert Hurley trans., 1978) (describing the ability of the subordinated to resist power and domination); Michael Ryan, *Foucault’s Fallacy*, in *RECONSTRUCTING FOUCAULT* 159, 171-72 (Ricardo Miguel-Alfonso & Silvia Caporale-Bizzini eds., 1994) (“By designating the characteristics of one group—heterosexual males—as an ideal ..., the Greek ideological discourses assured that the characteristics of the other groups ... were excluded from qualification for power.”).

2. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

3. 100 U.S. 303 (1880).

4. 64 F. Supp. 544 (S.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947).

5. 347 U.S. 483 (1954).

6. 539 U.S. 558 (2003).

7. 570 U.S. 744 (2013).

8. 576 U.S. 644 (2015).

and ultimately supported White supremacy.<sup>9</sup> As I argue, a closer examination of Harlan's other race-related jurisprudence, including his seemingly inconsistent decisions in *Chae Chan Ping v. United States*,<sup>10</sup> *United States v. Wong Kim Ark*,<sup>11</sup> and *Cumming v. Richmond County Board of Education*,<sup>12</sup> limns his consistently circumscribed notion of equality. I also assess the impact of Harlan's trope of colorblindness in giving rise to a new first-order interpretation of equal protection in the modern period: the Supreme Court's recent jurisprudence on remedial race-based government action.

First-order notions of protection are, of course, not limited to Harlan and his colorblindness progeny. As I further illustrate, even the rare moments of victory for civil rights plaintiffs in such cases as *Strauder*—which struck the facial prohibition of African Americans from serving on juries<sup>13</sup>—perpetuated inequities and literally established the legal machinery of White hegemony that would come to dominate the post-Reconstruction/Jim Crow era. In the limited “victories” related to other suspect classifications such as gender, court decisions also reaffirmed patriarchy and grounded decisions upholding the rights of female workers in the most paternalistic of terms. In sum, these first-order cases are characterized by the reaffirmation of supremacist ideologies, the fetishization of formal colorblindness, and facial neutrality in a manner that severely constrains the scope of equal protection scrutiny by elevating appearance over impact.

The analysis then turns its attention to second-order protection cases, in which courts began to exhibit a more robust interpretation of the Fourteenth Amendment that averts an overt embrace of supremacist ideologies. Instead, courts started to demonstrate a commitment to broader nondiscrimination principles. Nevertheless, in second-order cases, protection is often grounded in conditional language and the service of majority interests, rather than a fulsome embrace of the dignitary interests of the targeted group. At the same time, in these decisions, courts carefully dole out tolerance

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9. See *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

10. 130 U.S. 581 (1889) (joining Justice Field's majority opinion).

11. 169 U.S. 649, 705-32 (1898) (Fuller, J., joined by Harlan, J., dissenting).

12. 175 U.S. 528 (1899).

13. *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880).



using a negative conception of the right to equality that ultimately supports the maintenance of entrenched social hierarchies and tiers of citizenship. The oft ignored but problematic aspects of *Brown* and its processor case, *Mendez v. Westminster (Mendez I)*,<sup>14</sup> illustrate these shortcomings. For all of its merit, the groundbreaking district court decision in *Mendez I* still grounded its holding in the service of White assimilatory interests and presumptions of cultural superiority. Meanwhile, the appellate court decision cravenly failed to reject the notion of inherent racial differences and left desegregation to the whimsies of the legislature.<sup>15</sup> *Brown* also elided any denunciation of White supremacy. Meanwhile, its piecemeal approach to antidiscrimination principles precipitated predictably devastating consequences for a large group of African American professionals. Thus, as a close reading of both cases demonstrates, these key landmarks in civil rights jurisprudence ultimately continued to advance White hegemony. All the while, the watershed holding in *Lawrence*, the Supreme Court's celebrated foray into the recognition of gay rights,<sup>16</sup> suffered similar constraints. In *Lawrence*, the Court's tone of moral remove and its restrained and aloof language epitomized the ultimately tolerant, but not celebratory, basis of its holding and its negative conception of the equality to which gays are entitled.

With the limitations of *Mendez I*, *Brown*, and *Lawrence* in mind, I then ask, for aspirational purposes, what form a third-order level of protection might take and how courts might ultimately achieve it. To wrestle with this issue, I examine the seismic change in the Supreme Court's approach to sexual-orientation claims in recent years, as illustrated by *Windsor* and *Obergefell*. Though I argue that the Court has come close to third-order protection in these cases, a careful analysis reveals their stubborn resistance to celebrating acceptance and recognizing the inherent dignity interests of marginalized groups.

In particular, I emphasize two key areas of caution as the law attempts to evolve into third-order protection. First, I document how the continuing fetishization of immutability in the equal protection

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14. 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

15. *See* Westminster Sch. Dist. v. Mendez (*Mendez II*), 161 F.2d 774 (9th Cir. 1947).

16. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

calculus has impeded the realization of a jurisprudence of acceptance (rather than one of mere tolerance) and stymied the achievement of a more potent form of constitutional equality—both with respect to sexual orientation and, more broadly, to other classifications that also have little or no link to merit and have a long history of targeting on the basis of animus. As I argue, while the framing of protected traits in immutable terms may help rationalize the early stages of equal protection (paternalism and tolerance), it ultimately stymies the cause of acceptance and restrains the structural impact such rulings can have. Second, I fault the continued grounding of civil rights protection in the replicating of majority culture and lifestyles (for example, in the context of sexual orientation, “like-straight” logic) and the service of assimilatory interests, as such a tactic impairs individual and group autonomy and fails to give sufficient weight to the dignity interests of minorities.

I conclude by considering objections to the taxonomy, including concerns that a third-order vision of protection might vitiate interests in judicial restraint and neutrality. With an examination of the Supreme Court’s recent ruling in *Trump v. Hawaii*,<sup>17</sup> I also caution that the taxonomy is certainly not meant to imply any linear view of progress. In the end, the goal of this Article and the model it presents is to encourage a more robust and fulsome notion of equal protection—one that is proactive rather than reactive; one that affirmatively renounces, rather than stays silent on, supremacist ideologies; and one that uses the legal machinery of the state to accept and celebrate the dignity of individuals who are members of targeted groups.

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17. 138 S. Ct. 2392 (2018).

Concept	Dominant Theme	Rationale	Key Viewpoints	Examples
FIRST-ORDER PROTECTION	Paternalism/ Noblesse Oblige	“You cannot help what you are, so we will not discriminate against you.”	Expressly reaffirms supremacist ideologies; fetishizes formal colorblindness and facial neutrality; adopts narrow scope to equal protection scrutiny; elevates appearance over impact.	<i>Plessy v. Ferguson</i> (Harlan, J., dissenting); <sup>18</sup> <i>Strauder v. West Virginia</i> . <sup>19</sup> Cf. <i>Muller v. Oregon</i> . <sup>20</sup>
SECOND-ORDER PROTECTION	Tolerance	“So long as you are not hurting us (and possibly even helping us), we will not discriminate against you.”	Eschews discussion of, but implicitly reaffirms, hierarchy and subordination; takes a laissez-faire/negative approach to equality; conditions protection on service of majority interests.	<i>Brown v. Board of Education</i> ; <sup>21</sup> <i>Mendez v. Westminster School District (Mendez I)</i> ; <sup>22</sup> <i>Lawrence v. Texas</i> . <sup>23</sup> Cf. <i>Grutter v. Bollinger</i> . <sup>24</sup>
THIRD-ORDER PROTECTION	Acceptance/ Celebration	“We appreciate and celebrate you, and we will not allow discrimination against you.”	Denunciates supremacist ideologies; actively resists hierarchy and pushes back against subordination; does not rest protection on immutability or replication of, or assimilation into, majority culture.	<i>United States v. Windsor</i> (almost); <sup>25</sup> <i>Obergefell v. Hodges</i> (almost). <sup>26</sup>

18. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

19. 100 U.S. 303 (1880).

20. 208 U.S. 412 (1908).

21. 347 U.S. 483 (1954).

22. 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

23. 539 U.S. 558 (2003).

24. 539 U.S. 306 (2003).

25. 570 U.S. 744 (2013).

26. 576 U.S. 644 (2015).

## I. PATERNALISM/NOBLESSE OBLIGE AND FIRST-ORDER PROTECTION

This Article's analysis begins with an examination of one of the most famous opinions in American history: Justice John Marshall Harlan's much-celebrated<sup>27</sup> dissent in *Plessy*.<sup>28</sup> Long vaunted for its foresight and oft cited as the lone voice of reason during one of the darkest moments in our jurisprudence—when the Supreme Court gave segregation constitutional cover in 1896—Harlan's opinion presaged, by half a century, the ultimate demise of segregation with *Brown v. Board of Education*.<sup>29</sup> The opinion also earned Harlan the moniker “the Great Dissenter.”<sup>30</sup> Not surprisingly, therefore, Harlan's dissent in *Plessy* has long held top-tier status in the civil rights canon.<sup>31</sup>

Yet an equanimous assessment of the opinion reveals that, for all the accolades it has received, it still suffers from critical shortcomings. In particular, Harlan's dissent epitomizes the perspectives of first-order protection, which exhibits proto-tolerance driven by paternalistic instincts. First-order protection finds its roots in noblesse oblige and comes with all its attendant condescension. As such, while it might ultimately come to the “right” result, it does not hesitate to reaffirm White supremacy and, in the end, presents an enervated vision of equal protection that elevates form over substance in the protection of minority rights. As we shall see, the

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27. See, e.g., G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 107 (3d ed. 2007) (deeming Harlan a “visionary prophet” for his *Plessy* dissent); Derek Bok, *A Call for Pressure on Apartheid*, BOS. GLOBE, Apr. 7, 1985, at A21 (praising Harlan's dissent for reflecting “ideals central to our national creed”); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 267 (1996) (valorizing Harlan's dissent as “justly lauded”); cf. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 151, 168 (1996) (noting “the symbolic power of Harlan's rejection of segregation of African Americans and whites in New Orleans streetcars is rivaled only by the Reverend Martin Luther King, Jr.'s *I Have a Dream* speech and *Brown v. Board of Education* itself,” but critiquing the decision by society and the academy “to offer a sanitized version of Harlan's point of view,” which included, among other things, deep animus against the Chinese).

28. *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

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

30. Gilbert King, *The Great Dissenter and His Half-Brother*, SMITHSONIAN MAG. (Dec. 20, 2011), <https://www.smithsonianmag.com/history/the-great-dissenter-and-his-half-brother-10214325/> [<https://perma.cc/G3GT-4WUY>].

31. See *id.*

proto-tolerance exhibited by Harlan's dissent found a voice in much of the seemingly progressive jurisprudence of the late nineteenth and early twentieth centuries, and it continues to resonate in the colorblindness jurisprudence of the modern era.

*A. The Unbearable Lightness of Dissenting: The Limits of Equality in Harlan's Interrogation of Segregation*

With his famous dissent, Harlan became the sole Justice to oppose the Supreme Court's otherwise unanimous adoption of the infamous "separate but equal" doctrine, which upheld the constitutionality of racial segregation.<sup>32</sup> As Harlan maintained, the doctrine was "hostile to both the spirit and letter of the Constitution of the United States" and ran afoul of the guarantee of equal protection under the law by facially distinguishing between White and Black people in the facilities to which they had access.<sup>33</sup> In language admittedly progressive for 1896, he opined,

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.<sup>34</sup>

Ultimately, therefore, Harlan called for the elimination of de jure racial discrimination against African Americans. With prescient language, he warned that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*."<sup>35</sup>

Yet for all its merit, Harlan's dissent advanced only a deeply restrained notion of equality before the law that ultimately fueled a philosophical approach to equal protection that served regressive impulses bent on preserving White rule. Most overtly, Harlan's dissent carefully eschewed any endorsement of racial equality; in

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32. *Plessy*, 163 U.S. at 552, 558-59 (Harlan, J., dissenting).

33. *Id.* at 563.

34. *Id.* at 559.

35. *Id.*

fact, it expressly reaffirmed the notion of White supremacy.<sup>36</sup> In striking language that was wholly unnecessary to deciding the legal issue at hand, he took pains to insist that the White race was still superior “in prestige, in achievements, in education, in wealth and in power,” and he issued a resounding prediction that this dominance would “continue ... for all time.”<sup>37</sup> And after all of his high-minded language about equality before the law “without regard to race,” he had no trouble condemning Chinese people as excludable from the country because they are “a race so different from our own,” that is, the White race.<sup>38</sup> When viewed in conjunction with this active embrace of racial hierarchy, Harlan’s constitutional rebuke of segregation constitutes a genteel spin on White supremacy that reads the Constitution as an instrument of noblesse oblige intended to provide a minimal semblance of protection—but nothing more—to racial minorities accursed with (apparently immutable and inherent) inferiority in all other aspects of life.

Of course, one might attempt to ascribe Harlan’s rhetoric to strategic messaging—an attempt to sell his (radical, for its time) proposition of political equality to his White audience while assuaging its concerns that such a turn would necessarily dictate economic and social equality for Black people and others.<sup>39</sup> But there is good reason to take Harlan’s comments at face value, particularly given the thrust of his other jurisprudence, which resoundingly dispelled any illusion that he was a fervent advocate for racial justice. For example, in *Chae Chan Ping*, Harlan joined a unanimous Supreme Court in upholding the constitutionality of the Chinese Exclusion Act—the federal government’s wholesale prohibition of Chinese immigration to the United States.<sup>40</sup> In the case, he agreed that Congress possessed the unilateral power to exclude

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36. *See id.*

37. *Id.*

38. *Id.* at 560-61.

39. In other words, Harlan’s assurances of White superiority could be interpreted as an early example of heading off what we now call “White Fragility.” *See* Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 54 (2011) (“White Fragility is a state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves. These moves include the outward display of emotions such as anger, fear, and guilt, and behaviors such as argumentation, silence, and leaving the stress-inducing situation. These behaviors, in turn, function to reinstate white racial equilibrium.”).

40. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

“foreigners of a different race” from our country.<sup>41</sup> He also supported the federal government’s explicit use of color-based distinctions in citizenship determinations in *Wong Kim Ark*.<sup>42</sup> And, just three years after *Plessy*, he had no compunction about refusing to stop an all-White school board in Georgia from closing, under the guise of fiscal economy, a county’s only publicly supported high school for Black children in *Cumming*.<sup>43</sup>

*B. White Paternalism, First-Order Equal Protection, and Harlan’s Fourteenth Amendment Jurisprudence: Reconciling the Plessy Dissent with Chae Chan Ping, Wong Kim Ark, and Cumming*

At first blush, reconciling Harlan’s opinions in other equal protection cases with his dissent in *Plessy* presents a grave challenge—until one considers that it was not racial inequity to which Harlan objected. In fact, Harlan’s seemingly progressive dissent in *Plessy* was entirely consonant with his tolerance of government discrimination elsewhere. In this sense, *Chae Chan Ping*, *Wong Kim Ark*, and *Cumming* powerfully illustrate the consequences and limitations of Harlan’s Fourteenth Amendment jurisprudence and first-order notions of equal protection.

As Molly Townes O’Brien has argued, Harlan possessed a worldview “steeped in white paternalism and Republican federalism.”<sup>44</sup> Harlan’s vision of colorblindness rejected any notion of social or economic equality for members of non-White races<sup>45</sup> and viewed the Fourteenth Amendment as applying the requirements of equal protection only to government action by the states, not the federal

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41. *Id.* at 606.

42. *United States v. Wong Kim Ark*, 169 U.S. 649, 705-32 (1898) (Fuller, C.J., joined by Harlan, J., dissenting) (rejecting the idea of birthright citizenship and advocating for the federal government’s use of race-based distinctions in citizenship determinations).

43. *See Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 541-45 (1899).

44. Molly Townes O’Brien, *Justice John Marshall Harlan as Prophet: The Plessy Dissenter’s Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 755 (1998).

45. As Jack Chin argues, Harlan possessed “a literalistic, non-transformative view of the Fourteenth Amendment,” which conceptualized the Equal Protection Clause as prohibiting “discrimination against African Americans because the Fourteenth Amendment prohibits discrimination against African Americans, not because, say, the Fourteenth Amendment embodies a general anti-discrimination principle, or because discrimination is, in general, normatively undesirable.” Chin, *supra* note 27, at 171-72.



government.<sup>46</sup> Not surprisingly, therefore, Harlan adopted a “race jurisprudence in which constitutionally cognizable discrimination could be found only in the language of state law or in intentionally harmful racist acts.”<sup>47</sup> So while Harlan looked askance at overt facial discrimination at the state level, he often blessed it elsewhere. For example, he did not hesitate to permit the race-based discrimination by the federal government at the heart of both *Chae Chan Ping*<sup>48</sup> and *Wong Kim Ark*.<sup>49</sup>

Moreover, Harlan’s view of equal protection—even as applied to the states—was exceedingly formalistic and limited to only the most obvious forms of facial discrimination. While the “conventional view” of *Cumming* reads the case as showing that “Harlan eventually renounced color blindness,”<sup>50</sup> an exegesis of his opinion suggests that it was very much the product of, rather than in opposition to, Harlan’s view of colorblindness, which myopically immunized all but the most facially discriminatory action from equal protection scrutiny. In other words, Harlan’s fetishization of rigid colorblindness<sup>51</sup> meant that, as long as a given policy was formally colorblind (for example, shutting down the only public high school for Black students in the county on fiscal grounds in *Cumming*),<sup>52</sup> it survived Harlan’s circumscribed form of constitutional scrutiny. Harlan’s embrace of colorblindness, therefore, gave rise to an enervated,

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46. See O’Brien, *supra* note 44, at 763-64.

47. *Id.* at 755.

48. 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”).

49. 169 U.S. 649, 731 (1898) (“[T]he presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests.” (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893))).

50. James Lindgren, *Seeing Colors*, 81 CALIF. L. REV. 1059, 1071 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)); see also Alexander M. Bickel & Benno C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910-21*, in *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 759 (Paul A. Freund & Stanley N. Katz eds., 1984).

51. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

52. *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 545 (1899).



paternalistic interpretation of the Fourteenth Amendment that reaffirmed and advanced the cause of White supremacy.

As a preliminary matter, Harlan's contention that the Constitution demanded fealty to an unpliable notion of colorblindness is curious from both a textualist and originalist point of view. First, there is nothing explicit in the text of the Fourteenth Amendment that, per se, outlaws government consideration of race.<sup>53</sup> Indeed, the language simply reads, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."<sup>54</sup> The Equal Protection Clause consequently lacks any manifest edict calling for fealty to a notion of colorblindness. Meanwhile, a rigidly colorblind interpretation of equal protection is likely at odds with the original meaning and intent of the Framers. Notably, the drafters of the Fourteenth Amendment did not view the Equal Protection Clause as an outright ban on race consciousness by the government.<sup>55</sup> As Melissa Saunders has observed, the Thirty-Ninth Congress, which ultimately passed the Fourteenth Amendment, rejected several draft versions of the Amendment that expressly forbade distinctions or discrimination on the basis of race.<sup>56</sup> Instead, the Framers ultimately adopted a Fourteenth Amendment that made no mention of racial categorizations, race consciousness, or even the concept of race.<sup>57</sup> Consequently, argues Saunders, "the strong inference is that [the Framers] intended the clause to aim at some evil other than the bare consideration of race."<sup>58</sup>

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53. See U.S. CONST. amend. XIV.

54. *Id.* § 1.

55. For example, the Framers of the Amendment saw no inconsistency between the Equal Protection Clause and miscegenation laws that accounted for race, because the laws, in their (misguided) view, applied equally to all races. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 274-75 (1997) (referencing statements by various senators); CONG. GLOBE, 39th Cong., 1st Sess. 321-22 (1866) (statement of Sen. Lyman Trumbull); *id.* at 505 (statement of Sen. William P. Fessenden); *id.* at 632 (statement of Rep. Samuel W. Moulton).

56. Saunders, *supra* note 55, at 275-76. As Saunders concludes, "The Joint Committee's consistent rejection of proposals explicitly forbidding racial distinctions and racial discrimination—even in access to basic civil rights—casts considerable doubt on the assertion that the framers intended the language of the Equal Protection Clause to strike at all race-based or race-conscious state action." *Id.* at 280.

57. See U.S. CONST. amend. XIV.

58. Saunders, *supra* note 55, at 280-81.

Moreover, the very same Congress passed numerous laws that expressly accounted for race, typically in the course of providing particular benefits for African Americans.<sup>59</sup> If colorblindness were the law of the land, as enshrined by the Fourteenth Amendment, it would make no sense for the very drafters thereof to pass such laws as the Freedmen's Bureau Act,<sup>60</sup> the Southern Homestead Act,<sup>61</sup> and the Sundry Civil Expenses Appropriations Act of 1866.<sup>62</sup>

More pointedly, while rigid adherence to colorblindness might "root out color-conscious legal standards and identifiable acts of intentional discrimination," elevation of the concept to primacy in the process of constitutional scrutiny enables courts to "ignore[ ] the pervasively discriminatory reality faced by black plaintiffs and ... fail[ ] to provide a remedy for racial injustice."<sup>63</sup> Instead of mandating government blindness to race, equal treatment under the law may well require government consideration of, and accounting for, racial disparities and discrimination in order to foster equal opportunity. Indeed, the Supreme Court's *Cumming* decision provides a particularly compelling example of the foibles of colorblindness and the role of the doctrine in assisting the reassertion of White

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59. See, e.g., Brief Amici Curiae of The Hispanic National Bar Ass'n & the Hispanic Ass'n of Colleges and Universities in Support of Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Amici Curiae] ("[T]he same Congress that proposed the Fourteenth Amendment also enacted race-conscious legislation."); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997) (noting that numerous pieces of legislation from the same congressional period as the Fourteenth Amendment "expressly refer to color in the allotment of federal benefits").

60. See Freedmen's Bureau Act of 1866, ch. 200, 14 Stat. 173 (repealed 1872) (seeking to provide practical assistance, including food; housing; and medical, educational, and legal aid to newly freed African Americans); see also Amici Curiae, *supra* note 59, at 10 ("Since the drafters of both the Civil Rights Act of 1866 and the Fourteenth Amendment supported the Freedmen's Bureau legislation, it follows that the equal protection language of the Fourteenth Amendment was not intended to eliminate the racial restrictions within the Freedmen's Acts. If the Fourteenth Amendment had eliminated the racial limitations, it would have eliminated the Bureau as well. Moreover, some of the race-specific functions of the Bureau were extended by statute after the adoption of the Fourteenth Amendment."); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 785 (1985) ("No member of Congress hinted at any inconsistency between the [F]ourteenth [A]mendment and the Freedmen's Bureau Act.").

61. Southern Homestead Act of 1866, ch. 127, 14 Stat. 66 (repealed 1876) (granting priority to freed African Americans over White people in certain southern states).

62. Act of July 28, 1866, ch. 295, 296, 14 Stat. 310, 317 (appropriating funds specifically "for the relief of destitute colored women and children").

63. O'Brien, *supra* note 44, at 756.

hegemony in post-Reconstruction America.<sup>64</sup> In *Cumming*, a unanimous decision penned by Justice Harlan just three years after *Plessy*, the lone *Plessy* dissenter adopted a limited view of equal protection that effectively sanctioned school segregation and, in the process, ensured the perpetuation of racial inequities.<sup>65</sup>

*1. Colorblindness and White Supremacy: The Curious Case of Cumming*

In 1897, three African Americans—Joseph W. Cumming, James S. Harper, and John C. Ladeveze—filed suit to challenge a decision by the Richmond County Board of Education to close Ware High School, a secondary school in Augusta, Georgia, established in 1880 to educate African American teenagers.<sup>66</sup> The Board cited economic reasons, not any discriminatory motivation, for its decision; but, as even the Court admitted, the Board’s decision effectively “withdrew from and denied to the colored school population any participation in the educational facilities of a high school system in the county.”<sup>67</sup> In short, while the county’s White high schools remained operational, the Board had chosen to close the only African American high school.<sup>68</sup>

Nevertheless, Harlan, writing for the Court, rejected the claim that the Board’s actions violated the Fourteenth Amendment and saw no reason to question the Board’s putative rationale: that the move was necessary to preserve the Board’s commitment to elementary school education for African American children.<sup>69</sup> In the process, the Court adopted the Board’s false dichotomy regarding the allocation of resources—a posture that claimed preservation of the elementary educational program for African Americans necessarily required cessation of the Board’s secondary educational program for them.<sup>70</sup> The illogic of this narrative is readily apparent.

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64. See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 542-45 (1899).

65. See *id.* at 545.

66. *Id.* at 529-32; C. Ellen Connally, *Justice Harlan’s “Great Betrayal”? A Reconsideration of Cumming v. Richmond County Board of Education*, 25 J. SUP. CT. HIST. 72, 72 (2000).

67. *Cumming*, 175 U.S. at 530.

68. See *id.* at 532.

69. *Id.* at 544-45.

70. The Board argued that

After all, if the county could fund both elementary and high school education for White students, there is no reason (other than the obvious fact of racial animus) why it could not provide both elementary and high school education for African American students. If funding limits did not present a Hobson's choice for White education, they should not have presented one for African American education.<sup>71</sup> Meanwhile, the Court did not even bother to question the very requirement of having different facilities for Black and White children<sup>72</sup> or to scrutinize the vast disparity in funding made available for Black versus White educational institutions.<sup>73</sup>

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[b]ecause four hundred or more of negro children were being turned away from the primary grades unable to be provided with seats or teachers; because the same means and the same building which were used to teach sixty high school pupils would accommodate two hundred pupils in the rudiments of education ... it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write.

*Id.* at 532-33. The Court agreed, noting that

[t]he Board had before it the question whether it should maintain, under its control, a high school for about sixty colored children or withhold the benefits of education in primary schools from three hundred children of the same race. It was impossible, the Board believed, to give educational facilities to the three hundred colored children who were unprovided for, if it maintained a separate school for the sixty children who wished to have a high school education. Its decision was in the interest of the greater number of colored children.

*Id.* at 544.

71. As the Court disingenuously suggested, "The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children." *Id.*

72. *But see* Connally, *supra* note 66, at 72-73 (pointing out that the issue of the constitutionality of school segregation was not before the Court in *Cumming*). Admittedly, the Court claimed that

[i]t was said at the argument that the vice in the common school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings.

*Cumming*, 175 U.S. at 543. Yet the Court did acknowledge that the complaint in the suit at hand alleged that

plaintiffs, being taxpayers, are debarred the privilege of sending their children to a high school which is not a free school, but one where tuition is charged, and that a portion of the school fund, raised by taxation, is appropriated to sustain white high schools to which negroes are not admitted.

*Id.* at 542. By implicating the separation of White and Black people, this allegation would seemingly be sufficient to give a willing court the ability to address the legality of educational segregation.

73. *Cumming*, 175 U.S. at 542 ("[A] portion of the [Board's] school fund, raised by

Although some observers have interpreted Harlan's decision in *Cumming* as an abandonment of the high-minded principles asserted in his *Plessy* dissent,<sup>74</sup> there is good reason to question that view. After all, both decisions reflected a consistent commitment to, and myopic concern with, colorblindness. Since Harlan could find no explicit evidence in *Cumming* that the Board had acted with an intent to harm Black children (that is, acted in a manner that was not colorblind), the Board's decision could not offend his carefully circumscribed notion of equal protection, which fetishized formal colorblindness.<sup>75</sup> In the process, however, Harlan's colorblindness played an instrumental role in rationalizing governmental efforts to actively suppress educational and economic opportunities for African Americans. As O'Brien argues, Harlan's decision in *Cumming* "made a 'color-blind' decision that dealt a serious blow to black efforts to require white school boards to provide equal educational facilities for black children."<sup>76</sup>

Indeed, *Cumming* actively embraced a vision of African American education that served White needs by ensuring a competent labor market for White owners of property and capital while limiting African American economic mobility. Because equal educational opportunities were not required by the Fourteenth Amendment, "the Court gave weight to the economic system where White decision makers could control the labor market by giving Blacks only the education they needed for work in the agri-economy controlled by Whites."<sup>77</sup> As a result, Harlan's assertion of White supremacy, which immediately precedes his embrace of colorblindness in the *Plessy* dissent,<sup>78</sup> is not as incongruous as it first appears; Harlan's genteel notion of White supremacy was reflected in his commitment to rigid colorblindness. Colorblindness allowed him to plausibly claim fealty to the purported values of our Constitution and the vague idea of

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taxation, is appropriated to sustain white high schools to which negroes are not admitted."). *But see id.* at 543 ("While the Board appropriates some money to assist a denominational school for white boys and girls, it has never established a high school for white boys.").

74. *See* O'Brien, *supra* note 44, at 755.

75. *See Cumming*, 175 U.S. at 544-45.

76. O'Brien, *supra* note 44, at 756.

77. Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 115 (2006).

78. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

racial equality before the law (but nowhere else) while still promoting an interpretation of the Fourteenth Amendment that was tolerant of, and even participated in, the maintenance of deep racial divides.

*2. The Historicization of Racism and the Legacy of  
Colorblindness: The Enfeeblement of  
Equal Protection into the Modern Era*

Thus, while Harlan's *Plessy* dissent gave an important jurisprudential voice to the integration movement, which ultimately prevailed with *Brown*,<sup>79</sup> it contained another lasting legacy with more problematic consequences: the notion that the Fourteenth Amendment demands strict colorblindness. As this concept's revival in the latter part of the twentieth century has illustrated, the trope of colorblindness has long served as a powerful tool in severely limiting the ability of the government to counter and undo longstanding inequalities that fall along racial lines (inequalities that the government itself played an instrumental role in creating).<sup>80</sup>

Specifically, Harlan's concept of the colorblind Constitution has enjoyed remarkable resonance in modern political and legal rhetoric and found its most salient expression in the affirmative action jurisprudence of the past two decades—an area of remedial, rather than invidious, race consciousness.<sup>81</sup> Critics of remedial, race-conscious policies in education and employment have seized upon the moral heft and elegant simplicity of Harlan's words to paint such programs as outmoded and regressive by unnecessarily preserving racial differentiation in an otherwise (purportedly) post-racial society.<sup>82</sup>

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

80. Cf. HELEN A. NEVILLE, MIGUEL E. GALLARDO & DERALD WING SUE, *THE MYTH OF RACIAL COLORBLINDNESS* (2016) (collecting essays from psychology, sociology, and education scholars that challenge the concept of colorblind racial ideology; argue that interpersonal and institutional racism still exists; and advocate for the use of race-conscious policies and practices, rather than color-blind racial beliefs, to promote equal access and opportunities for all).

81. See *infra* notes 162-64, 193 and accompanying text.

82. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 n.14, 747-48 (2007) (quoting the colorblindness language in Harlan's *Plessy* dissent and tautologically asserting that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," and, in the process, striking as unconstitutional the use

The intuitive appeal of such arguments—with their ability to create a bright-line rule on racial consideration by the government—is certainly understandable. But, in both Harlan’s nineteenth-century instantiation and its more modern guise, a particularly revisionist narrative about race has undergirded the trope of colorblindness: that, although racism was an unfortunate and regrettable part of our past, its existence and impact has been extinguished in the present.<sup>83</sup> This historicization of racism has, therefore, played a central role in rationalizing a constitutional mandate for colorblindness. For example, just twenty years after the end of slavery, the Supreme Court struck down the Civil Rights Act of 1875 as unconstitutional.<sup>84</sup> In so doing, the Court criticized the legislation on colorblindness grounds,<sup>85</sup> castigating its supporters for

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of race as an admission tiebreaker for the purpose of promoting diversity in secondary schools); *Grutter v. Bollinger*, 539 U.S. 306, 349-78 (2003) (Thomas, J., concurring in part and dissenting in part) (dissenting from the majority’s allowance of the limited use of race to promote classroom diversity in admissions policies at the University of Michigan Law School by quoting Harlan’s dissent in *Plessy* and asserting that such policies violate the absolute mandate for government colorblindness); *id.* at 346-49 (Scalia, J., concurring in part and dissenting in part) (positing that “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception” and that, therefore, race-conscious admissions policies at state educational institutions are unconstitutional); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (applying strict scrutiny to the use of a subcontracting incentive bonus implemented by the federal government to assist businesses owned by socially and economically disadvantaged individuals, including those from minority groups, to win contract bids, and arguing that “under our Constitution, the government may not make distinctions on the basis of race”); *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment) (arguing that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction” and that, therefore, the policy at issue should be rejected out of hand rather than remanded to the district court for the application of strict scrutiny, as “under our Constitution there can be no such thing as either a creditor or a debtor race.... In the eyes of government, we are just one race here. It is American.” (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 520 (1989))).

83. See Helen A. Neville, Miguel E. Gallardo & Derald Wing Sue, *Introduction: Has the United States Really Moved Beyond Race?* in *THE MYTH OF RACIAL COLORBLINDNESS*, *supra* note 80, at 9-10.

84. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

85. It is worth acknowledging that Harlan filed a dissenting opinion in the *Civil Rights Cases* in which he criticized the majority for viewing the legislation as creating “special favorite[s]” of African Americans. *Id.* at 61 (Harlan, J., dissenting). As he wrote,

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had



advancing a law that made “special favorite[s]” of African Americans:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.<sup>86</sup>

Thus, in the aftermath of the Civil War, the Court had no issue brushing aside the powerful persistence of bigotry and gainsaying the continued existence of vast divisions on the basis of race. Instead, it claimed with a straight face that, far from being necessary to protect the basic rights of African Americans, basic civil rights legislation protecting members of all races from discrimination served to grant African Americans unequal privileges.<sup>87</sup>

In more recent times, even jurists who have supported the survival of affirmative action have signaled reservations over its inconsistency with the ideals of colorblindness and their vision of the new reality of race relations in our country. Writing on behalf of the Court’s majority in *Grutter v. Bollinger*, Justice Sandra Day O’Connor declared, with unusual certainty, that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>88</sup> While O’Connor

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already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more.

*Id.* Even here, however, Harlan argued that the Act itself was colorblind (it literally made no reference to any particular race, after all) and therefore passed constitutional muster. *Id.* at 61-62.

86. *Id.* at 25. The “special favorites” rhetoric has also found its way into discourse surrounding gay rights, as evidenced by its adoption by supporters of Colorado’s Amendment 2, which was struck down as unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). In that case, Colorado argued that Amendment 2—which precluded any state or local government action from protecting the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”—merely blocked gay people from enjoying “special rights” from the state. *Id.* at 624, 626. The Supreme Court disagreed, finding that it actually imposed a special legal disability by preventing these individuals from seeking certain legal safeguards “without constraint.” *Id.* at 631.

87. *Civil Rights Cases*, 109 U.S. at 25.

88. 539 U.S. 306, 343 (2003).



understandably hoped that, in an ideal world, “all governmental use of race must have a logical end point,”<sup>89</sup> her edict reflected several problematic suppositions.<sup>90</sup> Besides the arbitrariness of the time limit, there was little basis for the unwarranted optimism that centuries of pervasive institutional racism could be undone with a few decades of carefully circumscribed government intervention of dubious efficacy.<sup>91</sup> Notably, O’Connor’s declaration assumes that, while the government may need to undertake remedial race-based policies in limited forms to attack the vestiges of past discrimination, racism does not exist in the present and is unlikely to spur further inequities in the future.

Whether used intentionally or not, the colorblindness trope has effectively defanged courts on racial matters, preventing them from combatting all but the most overtly invidious racist policies and constricting their ability to sustain most forms of remedial legislation. By limiting the scope of governmental actions subject to meaningful equal protection scrutiny, Harlan’s embrace of rigid colorblindness immunized political processes, such as the Richmond County School Board’s “fiscal” decision,<sup>92</sup> from judicial interference and allowed them unrestrained power to exacerbate racial inequalities and reassert White hegemony. All the while, as it turns out, his

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89. *Id.* at 342.

90. See Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172 (2004) (“At first blush, the Court’s pronouncement seemed overly optimistic, if not woefully out of place in a judicial opinion.”).

91. See, e.g., Dan Slater, Opinion, *Does Affirmative Action Do What It Should?*, N.Y. TIMES (Mar. 16, 2013), <https://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html> [<https://perma.cc/QGV9-6F59>] (discussing the scholarship of “mismatch theory,” which argues that “affirmative action can harm those it’s supposed to help by placing them at schools in which they fall below the median level of ability and therefore have a tough time,” ultimately hurting them in the long term); Richard D. Kahlenberg, *Affirmative Action Fail: The Achievement Gap by Income Is Twice the Gap by Race*, NEW REPUBLIC (Apr. 27, 2014), <https://www.newrepublic.com/article/117529/affirmative-action-fail-achievement-gap-income-twice-gap-r> [<https://perma.cc/A2BS-DVWW>] (considering the value of replacing affirmative action by race with affirmative action based on income); Tanner Colby, *Affirmative Action: It’s Time for Liberals to Admit It Isn’t Working*, SLATE (Feb. 10, 2014, 11:52 PM), <https://slate.com/human-interest/2014/02/affirmative-action-its-time-for-liberals-to-admit-it-isnt-working.html> [<https://perma.cc/FH3F-EGR8>] (critiquing the failure of affirmative action and positing that, inter alia, “[a]ffirmative action[s] ... net result was to absorb and neutralize black demands for equality, not fulfill them”).

92. See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 545 (1899); see *supra* Part I.B.1.

jurisprudence of colorblindness worked in harmony with other purportedly progressive moments in late nineteenth-century jurisprudence, such as *Strauder*,<sup>93</sup> to construct a post-Reconstruction society that paid limited lip service to a (constricted) notion of equality while, in fact, giving rise to legal mechanisms that perpetuated the existence of sharp social, political, and economic divides among the races.

### *C. Establishing the Legal Machinery of White Hegemony: The Limited Progressivism of Strauder*

#### *1. Facial Neutrality and White Hegemony*

Even in the rare instance of a victory for racial justice, nineteenth-century courts still unabashedly invoked the language of hierarchy and, ultimately, reaffirmed and advanced the cause of White supremacy. In *Strauder*, a case that Sanford Levinson has lauded as the most important (and underappreciated) in the equal protection canon,<sup>94</sup> the Supreme Court held that denying a defendant a jury that might contain members of his or her own race constituted a deprivation of equal protection and due process rights.<sup>95</sup> The result was unusual for the era: the Court reversed the murder conviction<sup>96</sup> of an African American man named Taylor Strauder in Ohio County, West Virginia, because the jury that decided his case

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93. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

94. Sanford Levinson, *Why Strauder v. West Virginia Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U. L.J. 603, 603 (2018).

95. *Strauder*, 100 U.S. at 307-10.

96. The undisputed facts showed that Strauder had murdered his wife, Anna, an African American, by bludgeoning her to death with a hatchet after an argument involving allegations of her marital infidelity. *State v. Strauder*, 11 W. Va. 745, 756 (1877), *rev'd sub nom. Strauder v. West Virginia*, 100 U.S. 303 (1880); *see also Horrible Murder. A Colored Woman Tomahawked by Her Husband. He Brains Her with a Hatchet. The Murderer Escapes.*, WHEELING DAILY INTELLIGENCER (Apr. 19, 1872), [https://chroniclingamerica.loc.gov/data/batches/wvu\\_belgium\\_ver01/data/sn84026844/0020219087A/1872041901/0382.pdf](https://chroniclingamerica.loc.gov/data/batches/wvu_belgium_ver01/data/sn84026844/0020219087A/1872041901/0382.pdf) [<https://perma.cc/4EK8-8C8D>]. A century later, the Court would grapple with empirical evidence showing that African American defendants were far more likely to receive the death penalty if their victim was White rather than African American. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). As such, it is fair to wonder if the Court would have come to the same conclusion about the exclusion of members of the defendant's own race from the jury if Strauder's victim had been White rather than Black.

was, by state law, drawn exclusively from a pool of White men over the age of twenty-one.<sup>97</sup>

Besides its outcome, there is much to celebrate about the *Strauder* decision, particularly its rationale that legal exclusion from jury pools placed a badge of inferiority on Black people. With remarkable clarity, Justice Strong's majority opinion held that

[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.<sup>98</sup>

In the process, the Court recognized, for perhaps the first time, the active role of the state and its legal regime in accentuating the very prejudices that courts had long blamed on society and about which more laissez-faire courts would, for many years, claim they could do nothing.<sup>99</sup> Thus, as Rachel Godsil argues, *Strauder* "defined discrimination to include protection from certain messages sent by a state's legislation."<sup>100</sup> This significant move would lay critical groundwork for later developments, including *Brown's* emphasis on the psychological damage that classroom segregation caused African American students<sup>101</sup> and *Obergefell's* recognition of the

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97. *Strauder*, 100 U.S. at 305, 308-09, 312.

98. *Id.* at 308.

99. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) ("If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.... Legislation is powerless to eradicate racial instincts.... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

100. Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 256 (2003); see also Levinson, *supra* note 94, at 617 (noting that Justice Strong's opinion recognizes an "awareness by white jurors that blacks were thought unworthy to serve on juries at all might have spillover consequences for their perception of Taylor Strauder and other African-American defendants who challenge the State's account of their conduct").

101. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

dignitary harm that failure to recognize same-sex marriage inflicted on such couples and their children.<sup>102</sup>

Yet for all of its theoretical broad-mindedness, *Strauder* comes up short in practice. To be sure, *Strauder* gave considerable attention to the role that governmental actions can have in either affirming or undermining social perceptions and prejudices.<sup>103</sup> But the decision ultimately took a narrow view of the government's responsibility (particularly under the Fourteenth Amendment) in supporting the cause of racial equality.<sup>104</sup> While *Strauder* forbade the express use of racial requirements for jury service, it had no problem allowing any number of other conditions with strong racial valences, such as educational attainment.<sup>105</sup> Use of such limitations would effectively ensure the preservation of the all-White jury system.<sup>106</sup> Lest one criticize such a reading as too ungenerous, such a result was not just implied by *Strauder* but, rather, explicitly suggested by it. Less than a generation removed from laws that criminalized African American literacy in many states,<sup>107</sup> the Court heartily approved of the use of facially "neutral" criteria that would effectively continue to prevent African Americans from serving on juries or exercising other civil and political rights.<sup>108</sup> Thus, *Strauder* elevated the government's words over the ultimate impact of its actions—a fatal flaw when one considers the systemic inequalities created by centuries of racial discrimination and educational disparities.

This failure to consider the impact of state policies came home to roost in the direct aftermath of *Strauder* with the reassertion of

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102. *Obergefell v. Hodges*, 576 U.S. 644, 666-69 (2015).

103. *See Strauder*, 100 U.S. at 308.

104. *See id.* at 310.

105. *See id.*

106. *Cf. Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUST. INITIATIVE 24-25 (2010), <https://ej.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/5J35-8M5H>] (explaining how formal educational achievement, among other factors, can be used to discriminate against African American jurists and yet still survive *Batson* challenges in some states).

107. *See Uzonna Anele, Anti-literacy Laws in the United States Once Prevented Blacks from Getting an Education*, LISTWAND (Feb. 7, 2020), <https://listwand.com/anti-literacy-laws-in-the-united-states-once-prevented-black-men-from-getting-an-education/> [<https://perma.cc/QQ5N-YENC>] (explaining that national attention was drawn to anti-literacy laws in 1854, with Virginia's being abolished in 1867).

108. *See Strauder*, 100 U.S. at 310.

White hegemony following Reconstruction. *Strauder* therefore loses much of its egalitarian gravitas because it virtually wrote the playbook for how future efforts at discrimination against African Americans could easily survive constitutional scrutiny. Indeed, in the century that followed *Strauder*, African Americans were still systematically excluded from juries in many parts of the country.<sup>109</sup> As Sanford Levinson points out, this result was not in spite of *Strauder*; it may well have been because of *Strauder*.<sup>110</sup>

Although the decision found that direct racial prohibitions against jury service violated the Equal Protection Clause, it stated that other, ostensibly neutral, prohibitions would not raise such concerns.<sup>111</sup> As the Court explained, while the

State may not prescribe the qualifications of its jurors, and in so doing make discriminations[,] ... [i]t may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.<sup>112</sup>

These words are remarkable because of what they suggest *was* permissible in terms of governmental restrictions on jury service (and, presumably, other benefits of citizenship): criteria, such as educational attainment, that did not nakedly rely on race.<sup>113</sup> In the process, the *Strauder* opinion virtually gifted the idea of grandfather clauses, literacy tests, and other disingenuous vehicles of minority vote suppression as means to reimpose all-White rule while evading the strictures of the Fourteenth Amendment (even as the Amendment had been interpreted by ostensibly progressive decisions, such as *Strauder*).

Thus, *Strauder* gave constitutional blessing to a series of disenfranchisement mechanisms that would dominate the racial politics of the next century. While one might conclude that such a

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109. Levinson, *supra* note 94, at 621.

110. Levinson states that “the opinion, intentionally or not, almost invited states to rely on other criteria that might well have a disparate impact on African Americans.” *Id.*

111. *Strauder*, 100 U.S. at 310.

112. *Id.* This aspect of the *Strauder* decision would endure for almost a century. See *infra* notes 115-17 and accompanying text.

113. See *Strauder*, 100 U.S. at 310.

result was an unwitting development that the *Strauder* Court could not have reasonably foreseen, it seems unlikely when one considers the context of the decision. After all, only paragraphs before he announced that tests based on educational attainment would not implicate race or the Equal Protection Clause (unlike an outright ban against African Americans serving on a jury), Justice Strong bemoaned the systemic educational deprivation endured by African Americans that limited their opportunities in society.<sup>114</sup> In authorizing the use of educational tests to restrict jury service (or other privileges of citizenship, such as voting), the Court knew or should have known that such policies would effectively serve as race bans, at least for the foreseeable future.

The disenfranchisement mechanisms condoned by *Strauder* would remain viable well into the years of the Warren Court. In 1959, the Supreme Court upheld literacy tests as constitutional, despite a challenge under the Equal Protection Clause.<sup>115</sup> Similarly, in 1965, the Warren Court affirmed the use of preemptory challenges—discriminatory consequences be damned—so long as they were not overtly race-based.<sup>116</sup> Indeed, it was not until 1975 with *Taylor v. Louisiana* that *Strauder*'s dictum on the right of the state to “confine” jury duty “to males” was expressly abrogated.<sup>117</sup> Thus, for all of its rhetorical good, *Strauder* provided a veritable template to allow policies with alarmingly discriminatory impacts to evade Fourteenth Amendment scrutiny.<sup>118</sup> In the process, *Strauder* elevated form over substance; it acknowledged that the Constitution may have secured an entitlement to a jury system that did not

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114. See *id.* at 306 (noting “[t]heir training had left them mere children”).

115. See *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959).

116. See *Swain v. Alabama*, 380 U.S. 202, 209 (1965).

117. 419 U.S. 522, 533, 536 n.19 (1975) (quoting *Strauder*, 100 U.S. at 310) (holding that uniform exclusion of women from jury venires deprives defendants of their Sixth Amendment right to a jury drawn from a fair cross section of their community).

118. It is worth noting that the intent/animus requirement of *Washington v. Davis*, 426 U.S. 229, 244-46 (1976), continues to protect such policies from constitutional scrutiny to this very day, albeit in a softened form. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 287, 297-99 (1987) (rejecting an African American death-row inmate's equal protection to imposition of the death penalty in Georgia, despite statistical evidence of its disparate administration on the basis of race (for example, a defendant who killed a White victim was over four times more likely to receive the death penalty than a defendant who killed a Black victim), because the disparate treatment could not be directly traced to actual animus or discriminatory intent by lawmakers and those implementing the penalty).

overtly deny African Americans the ability to serve on juries, but it failed to recognize a right for defendants to enjoy an actual jury of their representative racial peers or a constitutional mandate that required the jury system to actually allow African Americans to serve.

All the while, just as with Harlan's venerated dissent in *Plessy*,<sup>119</sup> the *Strauder* majority opinion expressly embraced and reaffirmed White supremacy.<sup>120</sup> In the course of its analysis, the *Strauder* Court did not hesitate to refer to African Americans of the time as "abject and ignorant, and in that condition ... unfit[ ] to command the respect of those who had superior intelligence."<sup>121</sup> Although the Court at least partly seemed to attribute its characterization of the African American condition to the denial of education to Black people, which had "left them mere children," its reference to the "superior intelligence" of White people suggests the existence of a purportedly innate advantage that no amount of education might overcome.<sup>122</sup>

Lest there be any remaining doubt as to the Court's view or the mutability of this situation, the Court also overtly deemed White people to be "the superior race."<sup>123</sup> With a heavy miasma of noblesse oblige and an air of condescension, the Court then intoned that it is the task of "a wise government ... [to] extend[ ] [protection] to those who are unable to protect themselves."<sup>124</sup> Not surprisingly, such paternalistic ideations prevented the Court from embracing a more capacious notion of equal protection that interdicted more than just the most brazen forms of race discrimination.

## *2. Not All Rights Are Created Equal: The False Dichotomy Between Civil Rights and Other Rights*

Finally, *Strauder* failed to condemn government support for race discrimination in a broad sense. As a result, it did not even serve as a speed bump on the road to *Plessy*'s constitutional sanctioning of

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119. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

120. 100 U.S. at 306.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*



segregation. By failing to tackle the distinction between the protection of civil rights and other types of rights that the Court would frequently invoke over the coming decades as a justification for limiting the scope of the Fourteenth Amendment, *Strauder* actually paved the way for *Plessy*. Specifically, the dissent in *Strauder*—filed by Justices Field and Clifford and spelled out in the companion case, *Ex parte Virginia*<sup>125</sup>—drew upon a distinction between equality in civil rights (to which Field and Clifford claimed the Equal Protection Clause pertained) and equality in other matters (which they believed lay beyond the scope of the Fourteenth Amendment).<sup>126</sup> To Field and Clifford, equality in civil rights merely required equal access to courts to secure person and property; they assumed that jury service was a different kind of right (one they billed “political”) as it involved “participat[ion] in the government of the State and the administration of its laws ... [and] be[ing] clothed with any public trusts.”<sup>127</sup> As they opined,

The equality of the protection secured [under the Equal Protection Clause of the Fourteenth Amendment] extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration.... It secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration, as they stood previous to [the Fourteenth Amendment’s] adoption.<sup>128</sup>

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125. *See id.* at 312 (Field, J., dissenting) (“I dissent ... on the grounds stated in my opinion in *Ex parte Virginia*.”).

126. *Ex parte Virginia*, 100 U.S. 339, 367-68 (1879) (Field, J., dissenting).

127. *Id.* at 367 (Equality in civil rights “opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offences. It secures to all persons their civil rights upon the same terms.”).

128. *Id.* at 367-68. To substantiate this view of the Fourteenth Amendment, Field and Clifford posited that

[n]othing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant



For further proof of this notion, Field and Clifford pointed out that, when political equality was required, as with the elimination of racial barriers to the franchise, a wholly separate amendment—the Fifteenth—was required.<sup>129</sup>

Interestingly, Field and Clifford's view of so-called political rights mimics the still-prevailing logic in equal-protection cases involving alienage. Although the Burger Court long ago held that strict scrutiny should generally apply to alienage classifications,<sup>130</sup> subsequent decisions by the Supreme Court have diluted this general principal through the adoption of a significant exception: classifications involving a matter of "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."<sup>131</sup> As the courts have rationalized, fundamental interests in democratic self-governance necessarily must allow for such an administrative and political exception to equal protection for alienage because Americans possess the "right ... to be governed by their citizen peers."<sup>132</sup> Thus, courts have applied only rational basis review in upholding the rights of states to bar noncitizens from becoming police officers<sup>133</sup> or public school teachers.<sup>134</sup> With similar

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irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure,—than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws.

*Id.* at 358. Field and Clifford's use of the words "humiliating and degrading" to describe the impact that imposing a Fourteenth Amendment check on the ability of states to restrict jury service on the basis of race would have is deeply ironic when one considers their lack of interest in considering how humiliating and degrading such a policy was on actual people (for example, non-White people) rather than an inanimate object (for example, states).

129. *Id.* at 368 ("This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required.").

130. *See* *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (holding alienage classifications "inherently suspect" and generally subject to strict scrutiny).

131. *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

132. *Id.*

133. *See id.* at 297, 300 (upholding a New York law requiring police officers in the state to be American citizens as, among other things, "execution of the broad powers vested in [police officers] affects members of the public significantly and often in the most sensitive areas of daily life").

134. *See* *Ambach v. Norwick*, 441 U.S. 68, 75-76, 81 (1979) (upholding a New York law barring noncitizens from becoming public school instructors on the basis that teaching

logic, Field and Clifford believed that the right to serve as a juror—because it necessarily involved the administration of law—was not a basic matter of civil rights secured for all citizens because it could (and should) be circumscribed as the polity deemed fit.<sup>135</sup>

As Sanford Levinson notes, Justice Strong’s majority opinion in *Strauder* “fail[ed] to offer any rebuttal at all to Justice Field’s arguments and instead almost blandly unit[ed] the ‘political right’ of jury service with the ‘civil rights’ that were protected by the Fourteenth Amendment.”<sup>136</sup> The absence of any effort to address Field and Clifford’s bifurcated view of rights under the Fourteenth Amendment is significant because the distinction they promoted between civil rights on one hand and other types of rights on the other hand would ultimately prevail in other post-Reconstruction cases, including *Plessy*. According to the *Plessy* Court, “The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law,” but segregation was permissible because “in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”<sup>137</sup> Or as the *Plessy* majority succinctly put it later in the decision: “If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”<sup>138</sup> Clearly, the *Plessy* Court would not acknowledge the vital role that legal frameworks can play in creating, accentuating, encouraging, and even fomenting inequalities of many kinds, including those on racial grounds.

In the end, therefore, *Strauder* and related cases of the era that ruled in favor of African American litigants bringing civil-rights challenges to jury exclusions (including *Virginia v. Rives*,<sup>139</sup> *Ex parte Virginia*,<sup>140</sup> and *Neal v. Delaware*<sup>141</sup>) still ultimately enabled the

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constitutes “a task ‘that go[es] to the heart of representative government’” (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (alteration in original)).

135. See *Ex parte Virginia*, 100 U.S. 339, 367 (1879) (Field, J., dissenting).

136. Levinson, *supra* note 94, at 619.

137. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

138. *Id.* at 552.

139. 100 U.S. 313 (1879).

140. 100 U.S. 339 (1879).

141. 103 U.S. 370 (1880).

holding in *Plessy*. *Strauder*'s un rebutted dissent legitimated *Plessy*'s distinction between the types of equality that the Fourteenth Amendment did secure and those that it did not.<sup>142</sup> And with its carefully constrained reading of the right to be free from race discrimination (one that came equipped with a playbook on how to achieve discriminatory ends whilst averting heightened constitutional scrutiny), *Strauder* and its purportedly egalitarian progeny demonstrated that—Fourteenth and Fifteenth Amendments be damned—the courts would still tolerate the existence of two classes of citizenship in post-Reconstruction America. As Peggy Cooper Davis, Aderson Francois, and Colin Starger have argued, these cases were characterized by weak justifications.<sup>143</sup> Specifically, while the cases “held that the Fourteenth Amendment prohibited the exclusion of blacks from jury service,” they did so “because the exclusions constituted racially discriminatory state action that denied black jurors equal protection of the laws”—not on the grounds that “jury service is an entitlement of national citizenship.”<sup>144</sup>

By declining to embrace jury service as a formal entitlement of national citizenship and occluding recognition of the fundamental right of defendants to a jury, which is, in practice, picked from a pool of their (racial) peers, *Strauder* and its progeny only paid lip service to eliminating racial barriers to the exercise of the rights of citizenship. At best, these cases enabled the logic of *Plessy* and the triumph of the separate but equal doctrine; at worst, they provided the blueprint. First, the decisions elevated form over substance by focusing on whether the conditions for jury service were formally race neutral rather than inquiring as to whether the conditions for jury service constituted pretexts to effectuate racial exclusion. Second, the decisions expressly refused to embrace a broader reading of rights dictated by citizenship. As a result, this body of case law allowed the *Plessy* court to blithely conclude, with a straight face and a nod to prior jurisprudence, that separate but equal was constitutionally sound.<sup>145</sup> While it might be asking too

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142. See *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880) (Field, J., dissenting); *Ex parte Virginia*, 100 U.S. at 367 (Field, J., dissenting).

143. See Peggy Cooper Davis, Aderson Francois & Colin Starger, *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 319-22 (2017).

144. *Id.* at 319-20.

145. See *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (first citing *Strauder*, 100 U.S. 303;

much of a nineteenth-century court to do more than this, it is only fair to characterize the decision as exhibiting proto-tolerance at best.

#### *D. First-Order Protection and Suspect Categories Beyond Race*

The paternalism and subordination reaffirming nature of first-order equal protection was not just limited to cases involving race. It also found expression in cases involving other suspect categories, such as gender.<sup>146</sup> For example, although it was not formally an equal protection case, *Muller v. Oregon* famously addressed a constitutional challenge to a law expressly distinguishing between women and men: one that forbade employers from requiring women (but not men) from working more than ten hours on any given day.<sup>147</sup> Facing a fine of ten dollars for violating the law, Curt Muller, the owner of a laundry business, contested the punishment all the way to the Supreme Court.<sup>148</sup> Because the suit took place in the early part of the twentieth century, at a time long before gender was considered a suspect category amenable to heightened scrutiny, equal protection did not lie at the heart of the suit.<sup>149</sup> Rather, the gravamen of Muller's case centered on his allegation that the statute violated economic substantive due process rights, including the freedom to contract,<sup>150</sup> which, of course, the federal courts had fetishized during the *Lochner* era.<sup>151</sup> The Court disagreed with Muller and, in the process, handed a limited victory to the cause of labor by marking the first major strike against the inviolability of

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then citing *Virginia v. Rives*, 100 U.S. 313 (1879); then citing *Neal*, 103 U.S. 370; then citing *Bush v. Kentucky*, 107 U.S. 110 (1883); and then citing *Gibson v. Mississippi*, 162 U.S. 565 (1896) (relying on *Strauder*, *Rives*, and *Neal*—among other cases—for the distinction between civil and other rights).

146. Of course, gender was not recognized as a suspect classification until much later. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

147. 208 U.S. 412, 416-17 (1908).

148. *See id.* at 417.

149. *See id.* at 422-23.

150. *See id.* at 422 (framing the question facing the court as to whether the legislature can limit the contractual freedoms of a woman in order to protect “her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man”).

151. *See Lochner v. New York*, 198 U.S. 45, 64 (1905).

contracts imposed by *Lochner*.<sup>152</sup> But for all of its significance, the decision was carefully circumscribed and, in the end, reaffirmed paternalistic interests of the state in ensuring women continued to serve the procreative needs of a patriarchal society.<sup>153</sup>

Josephine Goldmark and Louis Brandeis, who served as head counsel for the defendant in the case, famously appealed to social science research on the baleful effects of long hours on the health of women (and any children they might bear) in a weighty 113-page brief filed before the Court.<sup>154</sup> A strategic gambit to induce the Court into allowing an exception to the constitutional barriers to the legislation erected by *Lochner*, the so-called Brandeis Brief premised its arguments on the purported “fact” of women’s greater physical frailty.<sup>155</sup> Whether cynical or genuine,<sup>156</sup> the maneuver worked, as the Justices on the Court happily embraced the disquietingly paternalistic viewpoint of the brief in upholding the legislation.<sup>157</sup> In language deeply steeped in gender stereotypes, the Court famously posited,

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.<sup>158</sup>

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152. *See Muller*, 208 U.S. at 423.

153. *See id.* at 422.

154. *See* Anne C. Dailey, *Lochner for Women*, 74 TEX. L. REV. 1217, 1217-18 (1996).

155. *Id.* at 1218.

156. David Bernstein, for example, questions the popular view of Brandeis as a champion for women’s rights by noting that he “evinced little sympathy for women’s rights in other contexts ... [and] was a late and unenthusiastic convert to the cause of women’s suffrage.... Brandeis’s reputation as a champion of women’s rights seems more a product of modern views of what an early twentieth-century Progressive *should have* stood for than Brandeis’s actual record on the subject.” David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 9, 14-15 (2011).

157. *See Muller*, 208 U.S. at 422-23.

158. *Id.* at 421.

In the process, the Court achieved a putatively progressive outcome while grounding its reasoning in the most condescending terms—terms that reaffirmed gender-based social hierarchies. The Court essentialized female existence as the practice of reproduction and child-rearing.<sup>159</sup> All the while, in framing *Muller* as a limited exception to *Lochner*, the Court could not conceive of the fact that male physical well-being might also be a matter of public interest and care.<sup>160</sup>

All told, the progressive victories of the late eighteenth and early nineteenth centuries were limited in ways in which modern observers often underappreciate. Although these decisions may have reached a result that ultimately affirmed the rights of the underclass, the rationale for extending such protections often derived from paternalistic impulses that ultimately constrained the impact of such decisions. Steeped in noblesse oblige, these proto-tolerant cases reaffirmed White male supremacy and protected, rather than reversed, the existence of multiple classes of citizenship. And in the end, they also gave rise to doctrines such as colorblindness that continue to stifle efforts to ameliorate the severe social, political, and economic inequalities that still haunt our nation.

## II. TOLERANCE, NOT ACCEPTANCE: EQUALITY, SUBORDINATION, AND SECOND-ORDER PROTECTION IN FOURTEENTH AMENDMENT JURISPRUDENCE

In the second stage of its evolution, equal protection takes on a more robust meaning. White supremacy is no longer expressly embraced, the affirmative right to be free from discrimination begins to receive recognition, and tolerance is advocated. But second-order protection has critical limits. Antidiscrimination norms are not grounded in the inherent dignity and worth of the targeted group. Instead, invocation of equal protection flows from a certain passive, laissez-faire sufferance of targeted groups that do no harm, and rights are instrumentally driven<sup>161</sup> and recognized when they might

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159. *See id.*

160. *See id.* at 421-23.

161. As Bill Eskridge argues, “An instrumentalist justification for tolerance is that it

serve the interests of those in power. An exegesis of such cases, as provided below, reflects their detached, conditional calculus of rights and their consistent failure to celebrate the values and contributions of the targeted group. In the end, therefore, such second-order cases ultimately fail to challenge White supremacy and, in many ways, continue to enable it.

Consider, for example, the conditional tolerance that lies at the heart of the most recent jurisprudence on affirmative action, in which the practice remains legal by the thinnest of margins. Since initially blessing the practice in higher education with its decision in *Regents of the University of California v. Bakke*,<sup>162</sup> the Supreme Court has significantly constrained the rationale for, and limits of, affirmative action. In *Grutter*, the Supreme Court suggested that the sole remaining acceptable rationale for affirmative action rests on the promotion of diversity in the classroom<sup>163</sup>—grounds that primarily benefit a White majority.<sup>164</sup> Such instrumentalist notions

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enables different people to cooperate productively with one another in an institutional setting—not just the family, but also the state.” William N. Eskridge Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1077 (2004).

162. 438 U.S. 265, 272 (1978).

163. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’... These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” (citations omitted)).

164. See, e.g., Joshua M. Levine, Comment, *Stigma’s Opening: Grutter’s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457, 462 (2006) (“The *Bakke* diversity rationale, with its emphasis on minorities’ ‘contribut[ion],’ is about the use of people of color to advance the university’s educational goals for its (mostly) white students.” (alteration in original) (footnote omitted)); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 213 (2004) (“In *Grutter*, the compelling government interest that the Court uses to justify race-conscious admissions preferences is neither remedying past discrimination nor reducing societal discrimination, nor even benefitting the small numbers of students who are admitted via diversity programs. Rather, the Court finds a compelling interest in diversifying the classroom for the benefit of white students.”). As Daria Roithmayr expounds,

*Grutter* affirmatively privileges white interests, for three reasons. First, the diversity rationale itself tends to prioritize white interests, because the rationale focuses on the value that students of color add to the existing merit-admitted (and predominantly white) classroom. Second, the *Grutter* opinion endorses the kind of “meritocratic” decisionmaking that privileges the admission of white



also influenced *Brown v. Board of Education*. As Derrick Bell famously posited with his interest convergence theory, a majority race will generally support equality for minorities *only* when doing so advances its own interests.<sup>165</sup> Bell's key example in support of his proposition was the strategic and symbolic value that *Brown* provided to the White majority and the United States government in waging the Cold War.<sup>166</sup>

In second-order equal-protection jurisprudence, courts either eschew mention of hierarchy altogether or issue some general platitudes regarding equality without taking on the fundamental injustice of subordination practices. So long as such practices continue in society, however, the absence of any overt discussion about hierarchy, including the failure to disavow it, constitutes an effective reaffirmance of it.<sup>167</sup> Indeed, the limited intolerance for race discrimination demonstrated by Harlan's *Plessy* dissent extended to the heralded *Brown* decision more than a half century later, when the Supreme Court finally struck down segregation (at least in public education) as unconstitutional.<sup>168</sup> Even in *Brown*, which rested largely on the psychological harm that segregation caused African American students, the Court came up short in its approach to equality by only embracing a second-order tolerance.<sup>169</sup>

#### A. *The Denouement of 'Deliberate Speed': Brown and Its Discontents*

*Brown* was, no doubt, a critical victory in the ongoing fight for civil rights in our country. But it was not without its problems. For

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applicants and excludes people of color. Finally, as is made clear by the Court's legitimacy rationale, diversity-oriented programs make it easier for institutions to conceal the discriminatory impact of conventional admissions standards, to the benefit of white students.

*Id.* at 211.

165. See Derrick A. Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91, 94-96 (Derrick A. Bell ed., 1980).

166. See *id.* at 96.

167. Cf. Zanita E. Fenton, *Disabling Racial Repetition*, 31 *LAW & INEQ.* 77, 83-85 (2012) (discussing social hierarchies and noting that "the structure of any given hierarchy is invested in its own affirmation and continuation").

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

169. See *id.* at 494 & n.11.



example, although *Brown* eschewed the language of White supremacy, it notably declined to reject the idea. While one might argue that White supremacy was not the legal issue at hand in *Brown* (and therefore any commentary related to it would be beyond the proper scope of the opinion), given the context of the decision and the fact that prior cases upholding segregation were very much grounded in a legacy (and reaffirmation) of White supremacy,<sup>170</sup> it seems entirely reasonable to expect the Court to address this issue. After all, White supremacy is relevant to any sober assessment of American history and race relations.

Admittedly, inclusion of language condemning White supremacy may have destroyed the valuable ability to make the decision per curiam and unanimous.<sup>171</sup> Yet even if political realities within the Court did not allow for the express adoption of such a sentiment, it is notable that the Court did not even go so far as to celebrate the virtues of tolerance and diversity, and it did not provide any paean to the contributions of non-White people to American society.<sup>172</sup> While it rightfully condemned the badge of inferiority that educational segregation placed on African Americans (and its subsequent impact on “educational and mental development”<sup>173</sup>), it did not take any time to talk about why such feelings of inferiority were wholly unwarranted.<sup>174</sup>

All the while, despite the good this decision accomplished, it took a devastating toll on a significant constituency in the African American community: the entire class of African American professionals who were employed as teachers in segregated schools. While Black students were integrated in White schools, discrimination still reigned, and in the newly integrated public schools, White parents

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170. See O'Brien, *supra* note 44, at 755.

171. See, e.g., Kathleen A. Bergin, *Authenticating American Democracy*, 26 PACE L. REV. 397, 411 (2006) (“The Justices in the majority [for the Court’s initial internal vote on *Brown*] understood that even a single dissent could ignite ‘racial warfare’ by injecting a measure of legitimacy to [the segregationist] cause. To succeed, desegregation required more than majority support. It required unanimity.” (footnote omitted)).

172. See *Brown*, 347 U.S. at 489-90.

173. *Id.* at 494.

174. The closest the Court came to affirmatively rebuking the idea of inferiority was its comment that “many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world.” *Id.* at 490.

would not accept Black teachers instructing their White children.<sup>175</sup> Without the option of working at Black-only schools anymore, these teachers simply lost their jobs en masse. In the decade following *Brown*, the number of African American teachers fell by almost 50 percent<sup>176</sup> and the number of African American principals in southern states fell by 90 percent.<sup>177</sup> It is not only the Black professional class that suffered from this state of affairs; it left an entire generation of African American students entirely without African American teachers as role models and guides in their educational development. It is not much of a stretch to conclude that running “a public school system without [B]lack teachers is [akin] to teach[ing] [W]hite supremacy without saying a word.”<sup>178</sup> Unfortunately, such conditions have continued to plague our educational system. As of 2000, a stunning 38 percent of public schools in the United States lacked a single teacher of color.<sup>179</sup>

One could argue that this particular harm came about from the Court’s intentionally piecemeal approach to civil rights—as desegregation itself was ordered to be conducted with “all deliberate speed”<sup>180</sup>—that focused not on the absolute wrong of discrimination

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175. Linda C. Tillman, *(Un)Intended Consequences?: The Impact of the Brown v. Board of Education Decision on the Employment Status of Black Educators*, 36 EDUC. & URB. SOC’Y 280, 280-81 (2004) (quoting a March 13, 1953, letter from Wendell Godwin, the superintendent of public schools in Topeka, Kansas, to an African American elementary school teacher, Darla Buchanan, nonchalantly informing her, “If the Supreme Court should rule that segregation in the elementary grades is unconstitutional our Board will proceed on the assumption that the majority of people in Topeka will not want to employ negro teachers next year for White children”).

176. Mildred J. Hudson & Barbara J. Holmes, *Missing Teachers, Impaired Communities: The Unanticipated Consequences of Brown v. Board of Education on the African American Teaching Force at the Precollegiate Level*, 63 J. NEGRO EDUC. 388, 388 (1994) (noting that, in the year before *Brown*, about 82,000 African American teachers instructed the nation’s two million African American students, and over the course of the next decade, “more than 38,000 Black teachers and administrators lost their positions”).

177. Gregory C. Coffin, *The Black Administrator and How He’s Being Pushed to Extinction*, 159 AM. SCH. BD. J. 33, 33-34 (1972).

178. Walter A. Mercer & Mary M. Mercer, *Standardized Testing: Its Impact on Blacks in Florida’s Educational Systems*, 8 URB. EDUCATOR 105, 117 (1986).

179. Greg Toppo, *Thousands of Black Teachers Lost Jobs*, USA TODAY (Apr. 28, 2004, 1:44 AM), [http://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2\\_x.htm](http://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2_x.htm) [<https://perma.cc/DM7C-6ZJ8>].

180. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (“[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-

but rather the narrow psychological injury to African American students in segregated educational institutions.<sup>181</sup> After all, because the ruling was issued prior to the passage of the 1964 Civil Rights Act,<sup>182</sup> the Court's *Brown* decision came at a time when discrimination against African Americans was perfectly legal in many places, and the Justices knew this.<sup>183</sup>

By declining to outlaw all racial discrimination (even if solely in the public sector), the Court's decision had some profoundly pernicious and underappreciated consequences. Specifically, while the Court ended discrimination in one form (against African American students), it unleashed its unremitting tide in another form (against African American teachers). In other words, by failing to reflect more fully on the subordination practices reflected in the segregation of students, the Court ultimately reaffirmed racial hierarchies by decimating an entire class of African American professionals and leaving the education of all students firmly in the hands of White teachers. In the end, this move—which effectively perfected White monopolization of the education system—would bolster, rather than subvert, the cause of White supremacy for several generations to come.

*B. Assimilation and Interest Convergence: The Measure of Mendez I*

*Brown* was not alone in its circumscribed conception of racial equality. For all of its merit, the decision's spiritual predecessor, *Mendez I*, also succumbed to an implicit reaffirmation of racial

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discriminatory basis with all deliberate speed the parties to these cases.”).

181. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954).

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

183. For example, it was not until the passage of the Civil Rights Act of 1964 and the Supreme Court's affirmance of its constitutionality in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), that federal law broadly prohibited discrimination in public accommodations and in employment. See Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?*, 100 MINN. L. REV. 2103, 2143 (2016); Kirsten L. McCaw, Comment, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions*, 7 SETON HALL CONST. L.J. 195, 208-09 (1996).

hierarchy and a limited, if not conditional, view of the right to be free from discrimination. In *Mendez I*—the long-underappreciated forebearer to *Brown*, which has begun to receive its due recognition only in recent years<sup>184</sup>—a federal court in California ruled that a school district’s segregation of Mexican Americans in classrooms in the city of Westminister violated the Fourteenth Amendment’s guarantee of equal protection under the law.<sup>185</sup> Decided nearly a decade before *Brown*, at a time when future Chief Justice and *Brown* author Earl Warren served as Governor of California,<sup>186</sup> *Mendez I* represented the first successful challenge to segregation on constitutional grounds.<sup>187</sup>

Not surprisingly, there is much to celebrate in the district court decision.<sup>188</sup> Picking up on the badge of inferiority language first

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184. See, e.g., Thomas A. Saenz, Commentary, *Mendez and the Legacy of Brown: A Latino Civil Rights Lawyer’s Assessment*, 6 AFR.-AM.L. & POL’Y REP. 194, 194-95 (2004) (“*Mendez* was in many ways an important, albeit unrecognized, precursor to *Brown*.”).

185. *Mendez I*, 64 F. Supp. 544, 546-49, 551 (S.D. Cal. 1946).

186. Interestingly, *Brown* avoids all mention of the *Mendez I* case. This fact is particularly curious because Earl Warren knew of the decision and appreciated its ramifications. Among other things, as Governor of California when the *Mendez* decision was handed down, Warren signed legislation shortly thereafter to repeal the remaining classroom segregation laws on the books—those that had authorized segregation efforts against Native Americans and those of Asian descent. See Charles Wollenberg, *Mendez v. Westminister: Race, Nationality and Segregation in California Schools*, 53 CAL. HIST. Q. 317, 329 (1974). In addition, as Judge Frederick P. Aguirre’s textual comparison of *Brown* and *Mendez I* points out, linguistic and tonal similarities between the opinions make it “clear that Warren read and thoroughly absorbed McCormick’s ruling in *Mendez* prior to authoring the *Brown* decision.” Frederick P. Aguirre, *Mendez v. Westminister School District: How It Affected Brown v. Board of Education*, 4 J. HISP. HIGHER EDUC. 321, 331 (2005).

187. See Philippa Strum, “*We Always Tell Our Children They Are Americans*”: *Mendez v. Westminister and the Beginning of the End of School Segregation*, 39 J. SUP. CT. HIST. 307, 308 (2014).

188. In retrospect, the decision represents a particularly proud moment for the United States District Court for the Central District of California (then known as the Southern District). In fact, the current official website of the District heralds the momentousness of the opinion in its section regarding the court’s history. See *Historical Decades: The 1940s*, U.S. DIST. CT. CENT. DIST. OF CAL., <https://www.cacd.uscourts.gov/newsworthy/historical-decades/1940s> [<https://perma.cc/3YE2-Q38E>] (discussing the *Mendez* case taking place at the Los Angeles Courthouse and finding that four school district’s policies of excluding Mexican American children from White classrooms constituted “a violation of state law and [were] unconstitutional under the Equal Protection Clause,” thereby predating *Brown v. Board of Education*). Interestingly, neither the court nor its website provides any acknowledgement of the fact that the main courthouse of the district sits on the grounds of the Los Angeles Slave Market—a market where, under the imprimatur of the State of California, Native Americans were enslaved and sold from 1850 until the 1870s—a long forgotten and oft

embraced by the Supreme Court in *Strauder*, *Mendez I* dealt a clear blow against the idea of inherent racial inferiority, stating “that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them *where none exists*.”<sup>189</sup> The unequivocal nature of this final phrase put an exclamation point on the decision’s laudable and unflinching commitment to resisting persistent notions of racial hierarchy.

At the same time, however, the court’s defiance of hierarchy only went so far. While the decision rejected the idea of racial superiority, it did so while strongly affirming the idea of cultural superiority.<sup>190</sup> The court grounded its justification for desegregation not on the rights of Mexican American children but, rather, on the basis of an assimilationist rationale that served the good of White Americans and the sustenance of Anglo-American cultural institutions and ideals. “The evidence clearly shows that Spanish-speaking children are retarded in learning English by lack of exposure to its use because of segregation,” the court explained, positing “that commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals.”<sup>191</sup> With these words, the court supported desegregation as a strategic policy initiative that would strengthen the assimilation of individuals of Mexican descent and inculcate them with a reverence for “American institutions and ideals.”<sup>192</sup>

Such language echoes the rationale of affirmative action jurisprudence a half century later, in which the Supreme Court would suffer the policy only to the extent that it promoted classroom diversity, enabling primarily White college students to prepare for (leading and managing?) a world full of non-White people.<sup>193</sup> Such a view of

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overlooked aspect of the sordid story of racial oppression in California. See Robert Petersen, *Los Angeles’ 1850s Slave Market Is Now the Site of a Federal Courthouse*, KCET: LOST LA (Sept. 2, 2016), <https://www.kcet.org/shows/lost-la/los-angeles-1850s-slave-market-is-now-the-site-of-a-federal-courthouse> [<https://perma.cc/7LPS-S3TU>].

189. *Mendez I*, 64 F. Supp. at 549 (emphasis added).

190. See *id.*

191. *Id.*

192. *Id.*

193. See *supra* notes 162-66 and accompanying text. Notably, the Supreme Court has rejected the idea that affirmative action can generally be used to make up for centuries of past

remedial race-based policies feeds cynicism that on controversial matters, equal protection and respect for civil rights arrive only when they serve the interests of the White majority.

When considered in a vacuum, the *Mendez I* court's interest in the maintenance of American institutions and ideals appears eminently legitimate and reasonable. But as the primary rationale for desegregation, it is deeply problematic, as it reflects two presumptions that betray a more fulsome embrace of equality. First, although the court was rejecting the notion of racial hierarchy, it was doing so while embracing the idea of cultural and ethnic superiority.<sup>194</sup> Apparently lacking an understanding—admittedly, a half century early—of the theory of intersectionality,<sup>195</sup> the court seemingly failed to consider any link between conceptions of racial and cultural hierarchy.

Second, the court rationalized the grant of civil rights to Mexican Americans with an appeal to the assimilatory interests of the majority<sup>196</sup>—interests that are grounded in perpetuating its power and values. In the process, the court forwent a valuable opportunity to ground norms of equal protection in a universal principle of inclusion or an appeal to the inherent equality of the disfavored group and its culture. Such a move not only gives further credence to Derrick Bell's interest convergence theory,<sup>197</sup> but it also dispels any illusion that the court had any intention or desire to undermine White (cultural?) supremacy. Rather, the court adopts a more

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discrimination or to temper the continuing effects thereof; instead, it insists that there be a clear nexus. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding “that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*,” and as such, even remedial race-based programs are always subject to strict scrutiny, which requires a tight fit between the particular goal of the program and the people or entities impacted (in that the discrimination was caused by the very entity adopting the program, and the individuals benefitting from the program were victims of said discrimination)); *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”), *cited with approval in Adarand*, 515 U.S. at 229; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification.”).

194. *See Mendez I*, 64 F. Supp. at 549.

195. *See* Ahir Gopaldas, *Intersectionality 101*, 32 J. PUB. POL'Y & MKTG. 90, 91 (2013) (explaining the theory of intersectionality).

196. *See Mendez I*, 64 F. Supp. at 549.

197. *See* Bell, *supra* note 165, at 94-95.



enlightened view of equality—one of tolerance rather than paternalism—in order to advance continued Anglo-American supremacy.

To be sure, there were many American institutions and ideals to love at the time. But it is also worth noting that many aspects of American society, which were wholly embraced by the schools and their curricula, were less than savory.<sup>198</sup> As such, the goal that Mexican Americans should simply adopt Anglo-American identity writ large ignores the many shortcomings of American institutions and ideals at the time. Moreover, the posture reflects the court's oblivion to the possibility that Mexican Americans might make their own contributions—perhaps even grounded in their own cultural values—to better the noble, but imperfect, experiment of American democracy.

For all its flaws, the district court's decision in *Mendez I* at least exhibited a firm commitment to resisting the concept of racial inferiority in a way that first-order equal protection opinions, such as *Cumming*, *Strauder*, and Harlan's dissent in *Plessy*, never did. By contrast, the Ninth Circuit's decision in *Mendez II*<sup>199</sup> was far more disappointing. While it ultimately affirmed the striking of Westminster's segregation policy,<sup>200</sup> it declined to pick up the most meaningful portion of the lower court decision—Judge McCormick's powerful rejection of the idea that inherent racial differences exist.<sup>201</sup> Instead, the Ninth Circuit wholly elided core constitutional issues (and the bigger questions of race and equality that such issues raised) by grounding its decision in process rather than substance.<sup>202</sup> Proudly boasting that “[w]e are not tempted by the siren,” the court obliquely rejected the call to “strike out independently on the whole question of segregation, on the ground that recent world stirring

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198. See, e.g., MELISSA F. WEINER, POWER, PROTEST, AND THE PUBLIC SCHOOLS: JEWISH AND AFRICAN AMERICAN STRUGGLES IN NEW YORK CITY 157-58 (2010) (arguing and detailing how the erecting of racial barriers and the use of racial stereotypes were an express design element of public schools historically in New York City).

199. *Westminster Sch. Dist. v. Mendez (Mendez II)*, 161 F.2d 774 (9th Cir. 1947).

200. *Id.* at 781.

201. See *Mendez I*, 64 F. Supp. at 549.

202. See *Mendez II*, 161 F.2d at 781.

events have set men to the reexamination of concepts considered fixed.”<sup>203</sup>

The court then recast the case at hand from one involving complex issues of interpretation related to the Fourteenth Amendment (and seemingly controlling precedent upholding the practice of educational segregation) into one involving rogue school district officials acting “without legislative support” in wild contravention of state law.<sup>204</sup> As the court set out, “there is no dispute that the law of California does not authorize the segregation practiced” in the case.<sup>205</sup> Specifically, the court noted that the legislature’s segregation bill had authorized only the separation of children of “Indians under certain conditions and children of Chinese, Japanese or Mongolian parentage.”<sup>206</sup> With segregation seemingly confined by state law to “Indians and certain named Asiatics,”<sup>207</sup> the court concluded that Westminster officials had acted in violation of state law by segregating school children of Mexican descent—a violation that constituted a deprivation of due process and equal protection.<sup>208</sup>

While the ultimate outcome of the Ninth Circuit opinion was notable, the court’s interpretation of state law was certainly strained. It nakedly assumed that, by empowering the segregation of children of certain ancestries, the state expressly forbade local officials from expanding the segregation policies to children of other ancestries, and so the court evaded any pronouncement on the actual constitutionality of segregation.<sup>209</sup> As such, it entirely circumvented questions about race and discrimination that it

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203. *Id.* at 780.

204. *Id.*

205. *Id.* at 778.

206. *Id.* at 780 (citing CAL. EDUC. CODE §§ 8003, 8004 (repealed 1947)).

207. *Id.*

208. *Id.* at 781.

209. Of course, the Ninth Circuit may have adopted its logic to intentionally avert the constitutional question—both to serve interests of judicial restraint and to avoid a direct clash with the binding authority of *Plessy*. In this sense, it may have mimicked a similar approach taken in an earlier case in 1931, when a San Diego Superior Court struck down as impermissible the segregation of Mexican Americans in the Lemon Grove School District. See Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1770-71, 1803-05 (2001) (discussing and reprinting *Alvarez v. Owen*, No. 66-625 (Cal. App. Dep’t Super. Ct., Apr. 26, 1931), which struck down segregation of Mexican Americans, but only on the grounds that they, unlike African American or Indian children, were not specifically mentioned as subject to segregation in the Education Code).



apparently preferred not to tackle. If anything, the Ninth Circuit actually cast some doubt on the viability of the bolder portions of the lower court's equal-protection analysis. As Juan Perea points out, the Ninth Circuit declined to "discuss the substantive scope of equal protection" in its decision and even went so far as to "contradict[ ] the district court's equal-protection holding by saying, 'for the argument,' that California could legally enact a statute authorizing the segregation of Mexican-American children."<sup>210</sup> The holding therefore left open the possibility that if the legislature were to expressly authorize (or even require) the segregation of Mexican Americans, there may be no constitutional barrier to such a move.<sup>211</sup>

Not only did *Mendez II* relegate the civil rights of Mexican Americans to the potential whimsies of the legislature, even *Mendez I* rationalized desegregation on the basis of policy goals serving White interests rather than a firm philosophical commitment to nondiscrimination. Thus, while the *Mendez* decisions certainly achieved the right result and paved the way for *Brown*'s rejection of the constitutionality of segregation throughout the land, their diluted vision of equal protection ultimately reflected tolerance, rather than acceptance, of Mexican Americans. Though *Mendez I* formally rejected White supremacy—a significant improvement from the "progressive" jurisprudence of the late nineteenth and early twentieth century—*Mendez II* notably contained no such language, and even *Mendez I* subordinated any potential recognition of equality or any universal embrace of rights to more parochial ideals of assimilation.

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210. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1245 n.157, 10 LA RAZA L.J. 127, 159 n.157 (1998) (citing *Mendez II*, 161 F.2d at 774, 781).

211. It is also notable that, despite the symbolic value of the decision, it ultimately accomplished little by way of alleviating de facto segregation. As Charles Wollenberg notes, studies suggest that a quarter century later effective rates of Mexican American segregation in California were actually higher than they were at the time of the *Mendez II* decision. See Wollenberg, *supra* note 186, at 329-30 (first citing CALIFORNIA STATE DEP'T OF EDUC., RACIAL AND ETHNIC SURVEY OF CAL. PUBLIC SCHOOLS, PART ONE: DISTRIBUTION OF PUPILS FALL 1966, at 11 (1967); and then citing JOHN CAUGHEY, TO KILL A CHILD'S SPIRIT: THE TRAGEDY OF SCHOOL SEGREGATION IN LOS ANGELES 11 (1973)).

*C. Second-Order Protection Beyond Race: Sexual Orientation and the Laissez-Faire Limits of Lawrence*

The diluted power of second-order protection, which is characterized by measured tolerance of subordinated groups without wholesale embrace of their dignitary interests, replicates itself outside of the context of race as well. Consider *Lawrence*, which resoundingly overturned *Bowers v. Hardwick*<sup>212</sup> and recognized the constitutional right to consensual sexual intimacy.<sup>213</sup> With its synergetic interaction between the Equal Protection Clause and the liberty component of substantive due process,<sup>214</sup> *Lawrence* constituted a meaningful but limited advance in the rights of gays in what Bill Eskridge has dubbed “a conservative jurisprudence of tolerance”—a second-order form of respect for civil rights.<sup>215</sup> When Laurence Tribe suggested that “*Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America,”<sup>216</sup> he meant his words to praise the historical significance of the decision. But his statement may also be correct in a less savory sense: *Lawrence*, like *Brown*, had similar shortcomings as far as making meaningful strides on the issue of equality.

As Eskridge has argued, *Lawrence* merely required that states “treat homosexuality as a *tolerable variation*,” not that they “treat homosexuality as equivalent to heterosexuality.”<sup>217</sup> As such, it embraced only a libertarian version of tolerance, which in the spirit of “Jeremy Bentham through H.L.A. Hart and Richard Posner, ha[s] traditionally distanced the protected conduct from standards of

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212. 478 U.S. 186 (1986).

213. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

214. Eskridge, *supra* note 161, at 1025 (arguing that forces of equal protection and liberty combined together to create the “jurisprudence of tolerance” advanced by the *Lawrence* holding); Symposium, *Panel Two: Living with Lawrence*, 7 GEO. J. GENDER & L. 299, 314 (2006) (“[A] number of people have started to write about *Lawrence* as being an ‘equal liberty’ decision, that doctrinally is grounded both in substantive due process and in equal protection. I think of substantive due process as being the major chord in the decision and equal protection being the minor chord or the melody, because there is so much equality language. What gives the opinion in *Lawrence* a lot of its magisterial quality is the resonance with civil rights rhetoric.”).

215. Eskridge, *supra* note 161, at 1064-65.

216. Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004).

217. Eskridge, *supra* note 161, at 1065.

morality.”<sup>218</sup> Thus, while it prohibited the effective criminalization of homosexuality, it showed no acceptance for homosexuality. In short, *Lawrence* achieved second-order tolerance, at best.

In a sequence of sentences that capture the tone of the entire decision, the conclusion to Justice Kennedy’s majority decision tells us:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.<sup>219</sup>

This framing language directly signals the problematic assumptions and limitations undergirding the Court’s recognition of gay rights. First, whatever respect the opinion grants homosexuality, it is ultimately replete with a heavy air of “moral distance.”<sup>220</sup> To illustrate this point, Eskridge compares the “lavish ode to heterosexual marriage” that concluded Justice Douglas’s opinion in *Griswold v. Connecticut*, with Justice Kennedy’s circumspect comments telling us that *Lawrence* is not a case involving minors, lack of consent, public conduct, or prostitution but rather “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”<sup>221</sup> The tone of the former is celebratory and affirming—a quintessential example of third-order protection—by referring to heterosexual marriage as both sacred and noble.<sup>222</sup> The tone of the latter is more libertarian and indifferent, even clumsy (if not offensive) in its reference to the “homosexual lifestyle.”<sup>223</sup> The decision’s restraint and aloof language are especially strange because Justice Kennedy, much to the consternation of his critics<sup>224</sup> and glee of his admirers, has

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218. *Id.*

219. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

220. Eskridge, *supra* note 161, at 1065.

221. *Id.* at 1065-66 (first citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); and then quoting *Lawrence*, 539 U.S. at 578).

222. See *Griswold*, 381 U.S. at 485-86.

223. See *Lawrence*, 539 U.S. at 578.

224. See, e.g., *id.* at 588 (Scalia, J., dissenting) (mocking Justice Kennedy’s language from

never shied away from waxing philosophical with grandiloquent, soaring language in his opinions.<sup>225</sup>

Second, the majority opinion's concluding language shows the pains taken by the Court to rationalize its decision in a carefully circumscribed manner. Thus, the holding is buttressed not by an affirmative recognition of the positive attributes of sexual liberty but rather by what this particular instance of sexual liberty is *not* (that is, not a case involving minors, lack of consent, public conduct, or prostitution).<sup>226</sup> Thus, the Court's recognition of the right to be free from unwanted government intrusion into intimate affairs comes in a manner that is reactive rather than proactive. In the end, therefore, the Court does not positively embrace protection for the rights of adults, particularly same-sex couples, to engage in consensual sexual relations; instead, it begrudgingly adopts a position of noninterference with sexual relations when they do not create other independent harms (for example, by involving children or money, occurring in public or without consent, or suggesting the endorsement of the state).<sup>227</sup> In sum, *Lawrence* represents a decision *not to punish*—not a decision *to accept*.

All told, therefore, *Lawrence* epitomizes the limitations of second-order protection. It is laissez-faire at best, and it does not put forward a positive case for the right of autonomy and nondiscrimination. It fails to take on tropes of heteronormativity and, instead, views homosexuality as a deviation from the norm that should be tolerated but not accepted. And while it does not espouse the express language of supremacy, it fails to attack and undo subordination.

### III. ENVISIONING THIRD-ORDER PROTECTION

As *Brown*, *Mendez I* and *II*, and *Lawrence* demonstrate, even decisions that hold a secure place in the civil rights firmament suffer from shortcomings that limit the potential protections afforded

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*Casey* as the “famed sweet-mystery-of-life passage”).

225. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

226. *Lawrence*, 539 U.S. at 578.

227. See *id.*

under the Fourteenth Amendment. After all, the greatest jurisprudential triumphs are frequently adulterated by internal compromises, political and practical considerations, and the law's natural bent towards restraint.<sup>228</sup> But even if we do not live in an ideal world characterized by optimal proclamations of equality under the law, that should not prevent us from imagining what shape such decisions might take. To that end, it is worth considering what a jurisprudence of acceptance, rather than mere tolerance, might look like. Unlike second-order protection, third-order protection would be proactive, rather than reactive; it would commend, rather than countenance, marginalized groups; and it would renounce, rather than stay silent on, supremacy and hierarchy. In short, under a third-order version of protection, the machinery of the state would actually celebrate the dignity of those with targeted traits and affirmatively decry, and push back against, the subordination of such groups.

The evolution of Justice Kennedy's jurisprudence on sexual orientation, as reflected by his majority opinions in *Lawrence*,<sup>229</sup> *Windsor*,<sup>230</sup> and *Obergefell*,<sup>231</sup> traces a path toward third-order protection of sexual orientation. But, as a close reading of this jurisprudence reflects, it is a path still impeded by, among other things, the continued obeisance of the courts to the immutability requirement and a conditionality that rewards sameness or verisimilitude (but not necessarily difference) with protection.

#### *A. Third-Order Protection and the Evolution of Sexual-Orientation Jurisprudence*

As we have seen, despite the vigor of its ultimate holding, *Lawrence* failed to embrace more than a laissez-faire, diluted version of second-order equal protection.<sup>232</sup> However, Justice

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228. See, e.g., William J. Haun, *The Virtues of Judicial Self-Restraint*, NAT'L AFFS., Fall 2018, at 60 ("By confining judicial analysis to what the American people adopted in text when they originally made law ... , judicial self-restraint ensures that courts cannot invalidate or impose upon the liberty to make laws.").

229. See *Lawrence*, 539 U.S. at 562.

230. See *United States v. Windsor*, 570 U.S. 744 (2013).

231. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

232. See *supra* Part II.C.

Kennedy and the Court's majority went further and did better a decade later. With *Windsor* and *Obergefell*, the Court came closer to embracing third-order protection and actively celebrating diverse sexual identities.

In *Windsor*, the Court deemed the federal government's refusal to acknowledge same-sex marriages as a direct blow to the "dignity" that certain states had conferred upon such relationships.<sup>233</sup> Nevertheless, the tenor of the opinion still reflects a certain remoteness and unease. Instead of praising the actual dignity of same-sex marriage (as the Supreme Court did a half century earlier with respect to heterosexual marriage),<sup>234</sup> the Court's language is far more circumspect in recognizing, on federalism grounds, the need to respect "a status *the State* finds to be dignified and proper."<sup>235</sup> The opinion therefore employs extensive use of the passive voice to steer clear of any normative judgment about the value of same-sex marriage. For example, noting recent recognition of same-sex marriages by some states, the Court observes that "[t]he limitation of lawful marriage to heterosexual couples, which for centuries *had been deemed* both necessary and fundamental, *came to be seen* in New York and certain other States as an unjust exclusion."<sup>236</sup> The Court is careful to separate its judgment (which is ostensibly neutral) on the recognition of same-sex marriage from the judgment of the states that had embraced it.

Justice Kennedy and the Court finally broke through in *Obergefell*, however, proclaiming that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices"<sup>237</sup> and concluding that any refusal to legally sanctify same-sex marriage would constitute "[t]he imposition of [a] disability on gays and lesbians [that] serves to disrespect and subordinate them."<sup>238</sup> Gone is the hopelessly passé language about the "homosexual lifestyle."<sup>239</sup> In its place, a suddenly woke Court is taking a page from the Foucault playbook and talking

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233. *Windsor*, 570 U.S. at 768-69.

234. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

235. *Windsor*, 570 U.S. at 775 (emphasis added).

236. *Id.* at 763 (emphasis added).

237. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (citing *Loving*, 388 U.S. at 12).

238. *Id.* at 675.

239. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

about subordination.<sup>240</sup> Thus, *Obergefell* came close to embracing a third-order vision of respect, promoting acceptance, and denouncing hierarchy. Yet even *Obergefell* suffers from critical limitations in its rationale that preclude its embrace of a more capacious notion of equal protection.

*B. From Tolerance to Acceptance: Equal Protection and the Constricting Nature of the Immutability Factor*

First, *Obergefell*'s grounding of rights in the purported immutability of sexual orientation critically limits the decision's scope and power. Indeed, the continued fetishization of immutability in Fourteenth Amendment jurisprudence has played a key role in stymieing judicial embrace of third-order protection.<sup>241</sup> Historically, of course, equal protection scrutiny has relied on a suspect-category heuristic that determines the level of scrutiny applied to any given governmental classification.<sup>242</sup> Among other things, for reasons that are understandable, accidental, and illogical,<sup>243</sup> the perceived immutability of a trait is a key factor in this heuristic.<sup>244</sup> Yet, as Jessica Clarke has posited, an excessive emphasis on immutability can undermine the main goals of antidiscrimination laws, which seek "to disrupt the stereotypes, stigmatizing practices, and superficial

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240. See *supra* note 1.

241. John Tehranian, *Changing Race: Fluidity, Immutability, and the Evolution of Equal-Protection Jurisprudence*, 22 U. PA. J. CONST. L. 1, 79 (2019).

242. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

243. See Tehranian, *supra* note 241, at 41-46 (discussing the accidental, but understandable, elevation of immutability into the equal protection calculus and critiquing its dangerous consequences).

244. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (noting that "the most stringent level of [judicial] review" is applied to governmental distinctions drawn on the basis of immutable traits, as "immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision"); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) ("[T]he [ordinary] presumption of statutory validity may also be undermined [on equal protection grounds] when a State has enacted legislation creating classes based upon certain ... immutable human attributes."). Courts also consider a history of discrimination against the group, the lack of any link between the group's trait and ability to perform or contribute to society, and political powerlessness of the group in determining whether a trait qualifies as suspect. See, e.g., *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 426-30 (M.D. Pa. 2014) (summarizing the extant jurisprudence establishing the four factors to determine heightened scrutiny).



judgments that contribute to systems of inequality.”<sup>245</sup> After all, if immutability becomes the sine qua non of juridical determinations on suspect, as opposed to fair, classifications, unreasonable forms of bias and laws borne of irrational prejudice can easily escape judicial scrutiny so long as those traits are formally mutable. Thus, as I have argued in my prior scholarship,

use of immutability as an attempted proxy for fairness comes with significant problems. It may be true that, as a normative matter, we should not allow, or at least should strictly scrutinize, laws differentiating amongst people on the basis of traits which they cannot control. But our entire society is based on precisely that kind of differentiation.<sup>246</sup>

After all, we consider many accidents of birth, such as mental aptitude or physical ability, to constitute perfectly reasonable grounds upon which to base public policy or draw legal distinctions.<sup>247</sup> As I have previously asserted,

it is not really immutable traits that equal protection seems to protect. Rather, it is distinctions that lack (or almost always lack) merit (of which certain accidents of birth are a subspecies). Thus, it is fairness that actually lies at the heart of equal protection, and heightened scrutiny therefore attaches when there is good reason to suspect that a particular classification arises not from sound public policy but, rather, from irrational prejudice, bias, or even animus.<sup>248</sup>

If equal protection is not about protecting us from discrimination on the basis of birth traits, it is about the protection of suspect-

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245. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 102 (2015).

246. Tehranian, *supra* note 241, at 49; *see also id.* at 49-50 (“Whether rightfully or not, the post-Westphalian notion of the nation-state and the meaningful enforcement of borders and immigration laws seem to require disparate treatment of people on the basis of whether they happened, by the lottery of birth, to be born to a family with citizenship or on domestic soil. Meanwhile, the entire premise of capitalism is based upon solicitude to economic productivity and efficiency, thereby mandating discrimination on the basis of mental and physical abilities in many contexts, regardless of whether these characteristics are immutable (and, in at least some cases, they indisputably are).”); *see, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889).

247. Tehranian, *supra* note 241, at 50.

248. *Id.*

class-related identity traits (whether the product of birth or otherwise) that have no link to merit but have been the subject of historical targeting as a result of animus or bias.<sup>249</sup>

Because many of our most rigorously scrutinized suspect categories (such as race and gender) “ha[ve] strong performative elements and [identities] can change (sometimes with individual choice, sometimes without), the decisions associated with that change should properly come under the scope of equal protection.”<sup>250</sup> However, “our equal-protection jurisprudence has rarely been read so capaciously,” as courts have typically ignored the possibility of either individual or societal agency in the construction of identities.<sup>251</sup>

Immutability’s starring role in the suspect-classification analysis has therefore limited the ability of equal protection doctrine to advance a jurisprudence of acceptance rather than mere tolerance. If we removed or relaxed immutability considerations from the equal protection calculus, we would “open up heightened scrutiny for characteristics that are inextricably related to” key identity traits that “constitute choices rather than ‘accidents of birth,’” but against which irrational prejudice is systemic.<sup>252</sup> In the process, we would achieve more than just vindication “of the right to be free of discrimination from traits over which we have no control”; we would also extend protection to traits over which we might have control but which are essential to our personhood and sense of identity.<sup>253</sup> Putting aside the extent to which such a reconstituted vision of equal protection would expand the areas of protection provided by the Fourteenth Amendment, it would undoubtedly elevate the theoretical underpinnings of areas in which protection is currently extended, as scrutiny would no longer be conditioned (at least partially) on evidence over whether a trait constitutes an accident of birth or choice. For too long, equal protection norms have relied on the assumption that a trait must be protected because those with

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249. *Id.* at 51.

250. *Id.*

251. *Id.* For example, see the jurisprudence denying protection to characteristics such as hairstyle and language because such attributes are mutable. *See id.* at 51-57 (discussing and critiquing said jurisprudence).

252. *Id.* at 59.

253. *Id.*

it cannot control it. Such a constrained view of equal protection breeds reluctant tolerance while eschewing real acceptance and celebration of identities, fixed or chosen.<sup>254</sup>

Thus, “the continuing fetishization of immutability in the equal-protection calculus has impeded the realization of a jurisprudence of acceptance (rather than one of just mere tolerance)” to categorizations that, although partially or wholly chosen, “have little to no link to merit and have a long history of being targeted on the basis of animus and bias.”<sup>255</sup> *Obergefell* epitomizes the dangerous consequences of this dynamic through its consideration of discrimination on the basis of sexual orientation and the debate over whether sexual orientation is a mutable trait.<sup>256</sup> With its decision in the case, the Supreme Court famously recognized the constitutional right to same sex marriage.<sup>257</sup> In the process, as I have argued in another article, the Court took

critical steps towards celebrating the dignitary interests of gays and affirmatively renounc[ing], and push[ing] back against, all discrimination against individuals on the basis of sexual orientation. But an exegesis of Justice Kennedy’s majority opinion [in *Obergefell*] suggests that the Court’s continued need to grapple with the issue of immutability (as compelled[, in part,] by the extant jurisprudence) ultimately diminished the force of *Obergefell*’s blow against subordination practices and its celebration of diverse sexualities.<sup>258</sup>

To begin, Justice Kennedy’s decision unnecessarily, and harmfully, goes out of its way to assert the immutability of sexual orientation.<sup>259</sup> Because “the Court ultimately did not [expressly] grant heightened scrutiny to sexual orientation, the decision did not need to deal with the issue of immutability.”<sup>260</sup> Nevertheless, in a remarkable line, Justice Kennedy bluntly states, “[I]n more recent years[,] ... psychiatrists and others [have] recognized that sexual

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254. *See id.* at 67.

255. *Id.* at 60.

256. *See Obergefell v. Hodges*, 576 U.S. 644, 661-62 (2015).

257. *Id.* at 675.

258. Tehranian, *supra* note 241, at 60.

259. These reasons first appeared in *id.* at 61-62.

260. *Id.* at 61 (footnote omitted).

orientation is both a normal expression of human sexuality and immutable.”<sup>261</sup> This reasoning “signal[ed] a change in [the Court’s] prior position, which viewed homosexuality as a ‘lifestyle’ and, implicitly, a choice.”<sup>262</sup> In making this change, Kennedy relied on evidence from an American Psychological Association (APA) amicus brief.<sup>263</sup> But as I have previously noted, this source never made a claim of immutability:

[T]he APA carefully eschewed taking an absolute position on orientation fluidity and, in fact, expressly avoided use of the word “immutable.” In tempered language, the APA Brief concluded that sexual orientation... “[i]s [g]enerally [n]ot chosen, and [i]s [h]ighly [r]esistant to [c]hange.” To support this statement, the APA Brief noted that 88% of gay men and 68% of lesbians reported that they had ‘no choice at all’ in their orientation—meaning that 12% of gay men and 32% of lesbians suggested they may have had some level of choice. To wit, the APA brief recounted that 5% of gay men and 16% of lesbians reported feeling that they had ‘a fair amount’ or ‘a great deal’ of choice regarding their sexual orientation. In short, Kennedy’s citation to the APA Brief to establish the purported immutability of sexual orientation was, at best, disingenuous.<sup>264</sup>

In light of these facts, Justice Kennedy’s curious insistence on asserting the immutability of sexual orientation begs further examination. Given the historical linkage between immutability and heightened scrutiny, Justice Kennedy may have sought to lay the groundwork for the Court, in a future decision, to finally embrace intermediate or strict scrutiny for classifications pertaining to sexual orientation.<sup>265</sup> The failure of the Court to do so in *Obergefell* may have reflected a gradualist approach to give time for the vox populi to reach greater consensus on the matter. Such a stratagem is not without its dangers, however. As I have argued elsewhere,

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261. *Obergefell*, 576 U.S. at 661.

262. Tehranian, *supra* note 241, at 61 (footnote omitted).

263. *Obergefell*, 576 U.S. at 661.

264. Tehranian, *supra* note 241, at 61-62 (alteration in original) (footnotes omitted).

265. *See id.* at 62.

such a tactic takes a backwards approach to the constitutional protection of civil rights because the need for heightened judicial scrutiny—and a check on majoritarianism—is at its greatest when there is widespread animus against a “discreet and insular minority,” not when public acceptance of that minority has finally been achieved.<sup>266</sup>

*Obergefell*'s appeal to conceptions of immutability does not end with same-sex couples themselves; it also extends to the (potential) children raised in such relationships. Specifically, the decision expresses great concern for the dignitary interests of same-sex offspring, who will suffer harm and humiliation, through no choice of their own, so long as the law expressly embraces a heteronormative view of what constitutes family.<sup>267</sup> Curiously, the link between recognition of same-sex marriage and the protection of children reflects a trend found in other Western courts. As Debora Spar has argued, it was not until significant advances in reproductive technology that enabled same-sex couples to have children who were biologically related to at least one parent that courts in countries like Spain and Sweden began to accept same-sex unions by invoking the state's interest in protecting children with a durable and recognized family structure.<sup>268</sup> Similarly, the *Obergefell* Court expresses acute concern over the shame that children of same-sex relationships might face, arguing that “[w]ithout the recognition, stability, and predictability marriage offers, [the] children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser.... The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”<sup>269</sup> This striking language, which passionately references the *humiliation* of the children of same-sex couples, stands in stark contrast to the Court's more reserved and clinical language regarding the impact that failure to recognize same-sex marriage has on same-sex partners themselves—that it “disrespect[s] and subordinate[s] them.”<sup>270</sup> These

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266. *Id.* (footnotes omitted).

267. *See Obergefell*, 576 U.S. at 667-69.

268. DEBORA L. SPAR, WORK MATE MARRY LOVE: HOW MACHINES SHAPE OUR HUMAN DESTINY 114-15 (2020).

269. *Obergefell*, 576 U.S. at 667-69.

270. *Id.* at 675.

rhetorical flourishes make it only fair to ask why the Court seems to emphasize the dignitary harms endured by the (potential) children of same-sex couples over those suffered by heterosexual couples. “After all, no matter how badly societal stigmas might hurt the children of such couples, they will impact the couples themselves most immediately and for their entire lives.”<sup>271</sup> In the end, therefore, one could argue that *Obergefell* is ultimately attempting “to reconcile the decision on the grounds of someone’s immutability. Unable to definitively establish the immutability of the same-sex parents’ sexual orientation, the Court points to the protection of their children, who possess the immutable [that is, faultless] status of being born to same-sex parents.”<sup>272</sup>

As Justice Kennedy is quick to remind us, the children of same-sex couples “suffer the significant material costs of being raised by unmarried parents, relegated *through no fault of their own* to a more difficult and uncertain family life.”<sup>273</sup> With these words, Justice Kennedy enables those who might still cast moral opprobrium on same-sex intimacy to nonetheless support recognition of same-sex marriage.<sup>274</sup> As a result, his apophasic flourish here may evince

an argumentative strategy, employed to persuade those who may believe that homosexuality is a chosen lifestyle (and an immoral one at that, not entitled to constitutional protection) but who might soften their position to protect children of homosexuals who cannot and should not be forced to answer for the perceived sins of their parents.<sup>275</sup>

Cast in such a strategic, rather than moralistic, light, use of such a rhetorical device is not without precedent. In fact, it mirrors the rationale in *Plyler v. Doe* when the Supreme Court invalidated, on equal protection grounds, a Texas law denying public education to the children of undocumented aliens.<sup>276</sup> While the *Plyler* Court

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271. Tehranian, *supra* note 241, at 62.

272. *Id.* at 63.

273. *Obergefell*, 576 U.S. at 668 (emphasis added).

274. See Tehranian, *supra* note 241, at 64.

275. *Id.* at 63.

276. 457 U.S. 202, 230 (1982); see also Tehranian, *supra* note 241, at 63.

acknowledged that immigration status technically constituted a mutable characteristic generally subject only to rational-basis review, it raised an analytical distinction between undocumented adults and their children, in that a law specifically targeting the rights of the latter rather than just the former would constitute an attack against those who have a status they have acquired “through no fault of their own”<sup>277</sup>—the exact same phrase used by the *Obergefell* Court in discussing the need to protect the dignitary interests of the children of same-sex couples.<sup>278</sup> As the *Plyler* Court explained,

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.<sup>279</sup>

Of course, when the government denies benefits to undocumented adults, the consequences quickly flow to their undocumented children.<sup>280</sup> But the basic laws of fungibility did not stop the Court from applying a more searching form of rational basis review in *Plyler* given the undocumented children’s “accident of birth.”<sup>281</sup>

Just as *Plyler* left room for future courts to accept laws targeting undocumented adults (rather than those merely targeting their children), *Obergefell* did not entirely foreclose the viability of future legislation drawing distinctions on the basis of sexual orientation. Perhaps most significantly, the Court declined the opportunity to deem sexual orientation a suspect classification,<sup>282</sup> thereby leaving

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277. *Plyler*, 457 U.S. at 226.

278. *Obergefell*, 576 U.S. at 668.

279. *Plyler*, 457 U.S. at 219-20. The Court added that, because the Texas law was “directed against children, and impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control,” it could not survive an equal protection challenge. *Id.* at 220.

280. See generally *Immigrants and Public Benefits: What Does the Research Say?*, BIPARTISAN POL’Y CTR. (2018), <https://www.immigrationresearch.org/system/files/Immigrants-and-Public-Benefits-What-Does-the-Research-Say.pdf> [<https://perma.cc/EDE7-7LGB>].

281. See Tehranian, *supra* note 241, at 63-64.

282. *Id.* at 64 & n.232 (citing Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117 (2016) (referencing *Obergefell*’s



its victory for gay rights on fragile grounds and subject to the whims of future jurists who may be less inclined to apply a particularly searching form of rational basis to laws related to sexual orientation.<sup>283</sup> As a result, *Obergefell* did not constitute quite as complete a triumph against subordination on the basis of sexual orientation as it might have seemed at first blush.<sup>284</sup>

All the while, the analytical importance that *Obergefell* continued to assign to the trope of immutability in the equal-protection calculus raises additional concerns.<sup>285</sup> Based largely on the template employed in the fight for gender equality and the immutability language adopted by *Frontiero* and its progeny, gay rights activists have, for many years, focused their litigation strategies on presenting sexual orientation as an immutable trait that is therefore subject to heightened scrutiny.<sup>286</sup> As a result of these efforts, several circuits have applied heightened scrutiny to laws distinguishing on the basis of sexual orientation.<sup>287</sup> Of course, to date, the Supreme Court has declined to follow suit.<sup>288</sup> Nevertheless, the Court has applied an especially rigorous type of rational basis review to such laws.<sup>289</sup>

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lack of “discussion of tiers of review, suspect classes, strict scrutiny, or narrow tailoring”).

283. *See id.* at 64.

284. *See id.* at 64-65.

285. *See id.* at 65.

286. *Id.* at 65 & n.234 (citing *Singer v. Hara*, 522 P.2d 1187, 1196 n.12 (Wash. Ct. App. 1974) (considering (and rejecting) a same-sex couple’s claim that discrimination on the basis of sexual orientation should be given heightened scrutiny on the grounds that “homosexuals constitute ‘a politically voiceless and invisible minority’[;] that being homosexual, generally speaking, is an immutable characteristic[;] and that homosexuals are a group with a long history of discrimination subject to myths and stereotypes” (citations omitted))).

287. *Id.* at 65 & n.235 (citing *SmithKline Beecham Corp. v. Abbott Lab’s*, 740 F.3d 471, 480-81 (9th Cir. 2014) (interpreting *United States v. Windsor*, 570 U.S. 744 (2013), as dictating the application of heightened scrutiny to classifications based on sexual orientation even though *Windsor* was silent on the issue of standard of review)); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) (weighing the extant Supreme Court factors on whether a classification is suspect to ultimately hold that laws distinguishing on the basis of sexual orientation are subject to heightened scrutiny), *aff’d on other grounds sub nom.* *United States v. Windsor*, 570 U.S. 744 (2013).

288. “Though the Court described sexual orientation as ‘immutable’ in [the] *Obergefell* [majority decision,] it did not hold that sexual orientation was a suspect classification entitled to heightened scrutiny.” Tehranian, *supra* note 241, at 65 n.236 (citing *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015)).

289. *Id.* at 65 & n.237 (citing William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 523 (2005) (describing the purported

These decisions have ultimately advanced protection for gay rights, but their reliance on notions of immutability have left some activists nervous—and with good reason.<sup>290</sup> After all, if the protection of sexual orientation rests on a belief in its immutability, it is fair to wonder what happens if, in the future, a scientific consensus determines that it is the product of both nature and nurture, thereby putting at risk extant protections.<sup>291</sup> By grounding suspect-class status in immutability, the Court's jurisprudence suggests that traits that are the product of choice should not enjoy the same legal protections as those that truly cannot be altered.<sup>292</sup> But such a quixotic quest to segregate the immutable from the chosen (and the ensuing hierarchy of protection for traits immutable versus traits chosen) ensures less than full recognition of dignitary interests.<sup>293</sup> In the same manner, the primacy of immutability in the broader equal-protection framework has also suppressed the advancement of protection for traits, such as ethnic hairstyles and language, that are intricately related to race but, in the most formalistic conception

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application of rational basis review in recent sexual orientation as, in fact, “rational basis plus”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011) (describing the purported application of rational basis in recent sexual-orientation cases as, in fact, “rational basis with bite”).

290. *Id.* at 65-66 & 66 n.238 (citing Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 921 (1989)); cf. Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RSCH. 363 (2016) (arguing against reliance on immutability).

291. See Tehranian, *supra* note 241, at 66 & n. 239 (citing *Sexual Orientation & Homosexuality*, AM. PSYCH. ASS'N (2008), <https://www.apa.org/topics/lgbtq/orientation> [<https://perma.cc/M4AZ-CX9H>] (“There is no consensus among scientists about the exact reasons that an individual develops ... [their] orientation” and that “[m]any think that nature and nurture both play complex roles; most people experience little or no sense of choice about their sexual orientation.”)).

292. *Id.* at 66-67 (“Such a view troublingly replicates certain [disavowed] institutional positions that have effectively treated gays as second-class citizens while paying lip service to tolerance. For almost two decades [(1994-2010)], of course, the American military carried out the inordinately tortured ‘Don’t Ask, Don’t Tell’ policy that enabled gay men and women to serve in the military but forced them to suppress entire parts of their identities that their heterosexual colleagues were able to enjoy openly. Similarly, numerous churches have taken the position of allowing gay parishioners into their community so long as those individuals do not engage in same-sex relations. Such equivocal regimes implicitly draw a distinction between what individuals purportedly cannot control (being ‘born gay’) and what they purportedly can (acting upon their sexual attraction).” (footnotes omitted)).

293. *Id.* at 67.

of the word, remain technically mutable and therefore evade heightened constitutional scrutiny.<sup>294</sup>

By conditioning the extension of rights on immutability, such practices “effectively exclude[] the volitional components of one’s sexual identity [or other identity-related traits] from protection and, in the process, impede[] a complete acceptance (let alone celebration) of diverse [identities].”<sup>295</sup> By contrast, if heightened scrutiny applied “to a trait regardless of its mutability,” such a tact would “send[] a far more powerful message of inclusion from the judiciary than a reluctant tolerance grounded in immutability.”<sup>296</sup> While the *Obergefell* decision failed to recognize this point, it did acknowledge the importance that judicial recognition of rights can have in terms of leading, rather than merely reflecting, societal advances in tolerance and acceptance of historically marginalized groups.<sup>297</sup> With this fact in mind, it is worth noting that “[w]hen legal protection becomes available to individuals whether they are acting on the basis of immutable biology or volitional choice (such as the very *decision* to marry), the message of respect becomes all the more powerful since it reflects affirmative acceptance, rather than passive tolerance.”<sup>298</sup> All told, the fetishization of immutability has limited the potential and potency of our equal-protection jurisprudence.

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294. *See, e.g., id.* at 51 (“Courts have consistently embraced the immutability factor as a mechanism to deny protection to such traits as hairstyle and language on the grounds that such characteristics are mutable; but, in fact, such characteristics are part and parcel of the performance of race. An exegesis of relevant case jurisprudence on matters such as language and hairstyle demonstrates the way in which the continued use of the immutability factor has actively impeded the development of a jurisprudence of acceptance and has prevented the Equal Protection Clause from achieving its full potential in putting an end to government action that unfairly targets racial groups on the basis of irrational bias.”).

295. *Id.* at 67.

296. *Id.*

297. *Id.* at 67 & n.245 (first citing *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (closing its penultimate paragraph by stating the following: “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”); and then citing Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HOUS. L. REV.: OFF RECORD 157, 161 (2015) (“The expressive function of U.S. Supreme Court opinions is particularly powerful because most Americans take note of the decisions. The Court’s opinions take on a symbolic character because they are seen as ‘speaking on behalf of the nation’s basic principles and commitments.’”)).

298. *Id.* at 67.

*C. Acceptance and the Problem of “Like-Straight” and Assimilatory Logic*

The shortcomings of our extant equal-protection jurisprudence, as illustrated by *Obergefell*, also extend beyond its embrace of immutability. *Obergefell* ultimately rests its extension of rights to a minority group (gay people) based on that group’s putative similarity to a majority group (straight people).<sup>299</sup> In the process, it embraces a limited notion of equal protection that elides acceptance of lifestyles beyond the heteronormative.<sup>300</sup> As such, the decision effectively reinforces extant hierarchies based on the values of the majority and conditions the extension of rights to groups that will most closely hue to majoritarian norms. After all, as Justice Kennedy himself tells us, his *Obergefell* opinion is fundamentally premised on the idea that “[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.”<sup>301</sup> While the universalism of such rhetoric has humanistic appeal, it is worth stepping back and unpacking its logical implications: the extension of rights should be conditioned on a showing of sameness rather than an acceptance (or celebration) of difference.

In the process, *Obergefell* falls prey to broader systemic shortcomings in the development of modern equal protection jurisprudence, which has largely vindicated the idea of tolerance at the expense of acceptance. Such jurisprudence has therefore failed to celebrate difference or truly attack subordination practices that prioritize rights based on the extent to which majority interests and values are supported under the aegis of universalism. For example, in her book *From Disgust to Humanity: Sexual Orientation & Constitutional Law*, Martha Nussbaum charts how, over time, American constitutional jurisprudence has moved from a recognition of the “politics of disgust” to a “politics of humanity” in its approach to issues of sexual orientation.<sup>302</sup> Nussbaum’s narrative of progress

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299. See *Obergefell*, 576 U.S. at 665-67.

300. See *id.*

301. *Id.* at 2599.

302. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION &

praises how courts have evolved in their view of homosexuality.<sup>303</sup> But such a view of progress is not without its significant limitations and problems. Just as Justice Kennedy does in *Obergefell*, Nussbaum focuses support for the extension of rights on the “politics of similarity,” or a search to recognize the inherent humanity of people with different beliefs and practices than our own and to appreciate that such people are “like” us.<sup>304</sup>

However, as Courtney Cahill has powerfully retorted, a “politics of similarity” approach to civil rights has actually impoverished the evolution of sexual orientation jurisprudence because it has resulted in excessive reliance on argumentation that seeks to vindicate rights on the basis of replication of heteronormative conduct—“like-straight” reasoning.<sup>305</sup> Marriage equality proponents have advocated, and the Supreme Court ultimately adopted, justifications for marriage equality that rest on the seductive idea “that gays and straights are (virtually) the same.”<sup>306</sup> In the process, however, such arguments ultimately “reinforce[ ] the abstract logic that to be an equal one must be the same.”<sup>307</sup> The logic is dangerous in that it implicitly conditions the continued extension of rights on continued perceptions of sameness, rather than extending rights even if there are differences between the groups. Such a conditional view of equal protection seems to mimic the rationale of race-related equal protection cases, such as *Mendez II*, that struck segregation on the basis of assimilatory interests.<sup>308</sup> It also finds resonance in the realpolitik of Harlan’s *Plessy* dissent, which encouraged desegregation to reduce racial turmoil, particularly with White majoritarianism (and supremacy) secure.<sup>309</sup> In

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CONSTITUTIONAL LAW 50 (2010).

303. *See id.*

304. *Id.* at 48; Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943, 945 (2011) (reviewing NUSSBAUM, *supra* note 302).

305. Cahill, *supra* note 304, at 950-51.

306. *Id.*

307. *Id.* at 951 (quoting Marc Spindelman, Op-Ed, *Sodomy Politics in Lawrence v. Texas*, JURIST (June 12, 2003), <http://jurist.law.pitt.edu/forum/forumnew115.php>).

308. *See Mendez II*, 161 F.2d 774, 780-81 (9th Cir. 1947).

309. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (“Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The 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

the context of sexual orientation, such a view “arguably pushes marriage-equality advocates to turn to like-straight reasoning even more than they already do” and, in the process, forces groups to seek recognition of their civil rights “to sacrifice difference in order to be viewed by others as civilized human subjects” worthy of equal rights.<sup>310</sup> In short, such an approach to equal protection fails to envision the value and power of celebrating difference instead of fetishizing similarity.<sup>311</sup>

Consider, for example, the underappreciated extent to which the reasoning of *Obergefell* implicitly rests the protection of the fundamental right to marry on homosexual replication of traditional models of matrimony— notions that elevate societal interests in child-rearing above wholly individualistic notions of intimacy or broader ideas of self-fulfillment.<sup>312</sup> This is first expressed in the Court’s strong emphasis on the grave harm that denial of marriage equality inflicts on the children of same-sex couples, a move grounded in the assumption that marriage strongly benefits children.<sup>313</sup> Notably, this concept comes to the fore when the Court discusses its (purportedly progressive) rejection of the marriage-as-procreation trope.<sup>314</sup> Just after concluding the critical interest against stigmatizing the children of same-sex couples by denying the right to same-sex marriage, the Court cautions that its recognition of same-sex marriage is not solely justified by the need to protect the interests of children: “That is not to say the right to marry is less meaningful for those who do not or cannot have children.”<sup>315</sup> Yet this admonition is followed by a curious caveat:

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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?”).

310. Cahill, *supra* note 304, at 956.

311. *Id.* at 959. Cahill does note that Nussbaum has, elsewhere, championed a “deep respect for qualitative difference” that is an essential “part of the idea of [human] flourishing.” *Id.* at 950 (alteration in original) (emphasis omitted) (quoting MARTHA C. NUSSBAUM, POETIC JUSTICE 45 (1995)).

312. *See Obergefell v. Hodges*, 576 U.S. 644, 665-67 (2015).

313. *See id.* at 667-69.

314. *See id.* at 669.

315. *Id.*

An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.<sup>316</sup>

The phraseology of this language—which purports to embrace a more capacious notion of marriage than the historic vision grounded in procreation and perpetuation of the species—is worthy of further analysis. The Court expressly warns that neither *procreation* nor *childbearing* can serve as conditions of marriage.<sup>317</sup> But it makes no mention of *child-rearing*, which was the actual subject of the immediate predecessor paragraph to which these words serve as a *nota bene*.<sup>318</sup> In that prior paragraph, the Court took pains to highlight the devastating psychological toll that denial of same-sex marriage has on the children *raised* (but not necessarily *borne*) by such couples.<sup>319</sup>

Read carefully as if every word choice matters (which is certainly the case in a decision with as much anticipation and understood significance as *Obergefell*), the Court's failure to clarify that marriage protection is not conditioned on child-rearing activities (rather than procreation or child-bearing activities) is significant. The Court is implying, if not outright suggesting, that societal and legal interests in the recognition of same-sex marriage are at their apex when same-sex couples are mimicking the traditional heteronormative notions of marriage through child-rearing activities. The pregnant assumption is that without this important child-rearing function, same-sex coupling might not warrant the right to marriage. From the Court's perspective, recognition of same-sex marriage is therefore imbued with the understanding or hope that homosexual couples will replicate a model of marriage driven by child-rearing and conventional notions of family, with the only

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316. *Id.*

317. *Id.*

318. *Id.* at 668.

319. *See id.*



difference to a heterosexual marriage being the gender of the participants.

*Obergefell's* implicit conditioning of civil-rights protection on replicating majority culture and lifestyles is not an outlier. It finds strong echoes in Derrick Bell's interest-convergence critique of *Brown*<sup>320</sup> and in the *Mendez I* district court's appeal to Anglo-American cultural superiority and assimilation.<sup>321</sup> It also finds a voice in modern affirmative action jurisprudence, which rests the acceptability of remedial policies on their continued benefit to the White majority.<sup>322</sup> In the end, the ongoing grounding of conceptions of equality in such instrumentalist logic belies the purported security and inalienability of Fourteenth Amendment protections and weakens the value of our constitutional rights and the dignitary interests they are meant to protect.

#### IV. CALLING BALLS AND STRIKES: CAVEATS AND CONCLUSION

While we have moved, at certain moments, toward a third-order vision of equal protection, we have still not achieved it. While such a goal seems laudable to this observer, it is important to caution and understand that other jurists and scholars may not be so sanguine about courts entering such rhetorical and philosophical terrain. In particular, one might object that it would be inappropriate for courts to engage in acceptance and celebration and abandon their neutral role to just "call balls and strikes."<sup>323</sup> But, as even the most sincere advocates of the homespun balls-and-strike metaphor must ultimately admit, baseball's own strike zone is neither static nor neutral. Not only has it changed dramatically over time,<sup>324</sup> but there

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320. Bell, *supra* note 165, at 94-96.

321. See *Mendez I*, 64 F. Supp. 544, 549 (S.D. Cal. 1946).

322. See *supra* notes 163-64 and accompanying text.

323. See Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641 (2011) (examining the famous metaphor that Chief Justice John Roberts presented to the Senate Judiciary Committee during his confirmation hearings, and noting that Chief Justice Roberts "has been both praised and scorned" for it); see also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 1-2 (1994) ("[B]ecause of a need to limit the clash between public judgments and judicial judgments in so sensitive an area[,] I therefore argue for the narrowest and most incremental of the judicial possibilities.").

324. See *Strike Zone*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/rules/strike-zone> [<https://perma.cc/AH5H-DJ7M>] (documenting the numerous changes to the official definition

is a widely known and accepted discrepancy between its rule book definition and its application.<sup>325</sup> Perhaps most fundamentally of all, baseball's strike zone has always varied for each and every player. The very terms of the rules even dictate this:

The STRIKE ZONE is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap. The Strike Zone shall be determined from the batter's stance as the batter is prepared to swing at a pitched ball.<sup>326</sup>

Thus, the strike zone expressly takes account of a player's size (something outside of the player's control) and a player's particular stance (something within the player's control). In short, the strike zone is relative, contextual, and accounts for individual circumstances; it is neither uniform nor formally neutral.

More to the point, courts have never stood at arm's length from, or acted neutrally toward, civil rights matters. Putative neutrality, such as the doctrine of colorblindness,<sup>327</sup> buoys extant hierarchical practices and ossifies existing inequalities. In addition, courts have not hesitated to make value judgments in the opposite direction when, for centuries, they expressly and unapologetically embraced and spouted the rhetoric of White supremacy and heteronormativity—both in civil rights defeats<sup>328</sup> and even purported successes.<sup>329</sup> All the while, we have no shortage of flowery language in the annals of Supreme Court jurisprudence when the Court has

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of Major League Baseball's strike zone, including those from 1950, 1963, 1969, 1988, and 1996).

325. See, e.g., Douglas O. Linder, *Strict Constructionism and the Strike Zone*, 56 UMKC L. REV. 117 (1987) (noting the discrepancy between the strike zone detailed in the Major League Baseball rule book and how it is actually applied).

326. MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 153 (2019), [http://content.mlb.com/documents/2/2/4/305750224/2019\\_Official\\_Baseball\\_Rules\\_FINAL\\_.pdf](http://content.mlb.com/documents/2/2/4/305750224/2019_Official_Baseball_Rules_FINAL_.pdf) [<https://perma.cc/9CFT-UZQB>].

327. See *supra* Part I.B.2.

328. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

329. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

protected the rights of heterosexuals,<sup>330</sup> Christians,<sup>331</sup> or even Major League Baseball.<sup>332</sup> Given the gravitas of the Court's pronouncements, the ripple effects that its findings cause both legally and socially, and the importance of vindicating dignitary interests in matters of equal protection, it is reasonable to demand the same when the Court is called upon to protect the rights of racial and sexual minorities and other groups that have suffered from animus at the hands of the majority. It is high time for the Supreme Court to offer us a firm and unequivocal rejection of the oppressive doctrines of the past and an affirmative celebration of dignitary interests of individuals from targeted groups. And when such a moment occurs, it needs to happen in a more appropriate setting than a disaffirmance of past inhumanities while rendering new ones.

Second, one might criticize the linear view of progress implied by the taxonomy. The taxonomy is imbued with a normative vision of what constitutes evolution.<sup>333</sup> This position is eminently debatable and admittedly riddled with value judgments—judgments that are

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330. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (concluding the decision finding a constitutional right to contraceptive access for, of course, married heterosexual couples with what Bill Eskridge has called a “lavish ode to heterosexual marriage,” Eskridge, *supra* note 161, at 1065).

331. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) (asserting that “[w]e are a religious people whose institutions presuppose a Supreme Being,” and beginning its lengthy tracing of the role of religion (qua Christianity) in American life and institutions by stating that “[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders” in rejecting the separation of church and state doctrine and claims that a nativity scene in a city’s Christmas display violated the First Amendment’s Establishment Clause (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952))). For a critique of *Lynch*, see Janet L. Dolgin, *Religious Symbols and the Establishment of a National Religion*, 39 *MERCER L. REV.* 495, 502, 504 (1988) (“The majority opinion ... plays on the familiarity until it practically mandates the inclusion of Christianity in the definition of ‘American.’ ... [I]n *Lynch*, the Court at one point suggests that the crèche is not a religious object at all, but the representation of an historical event. By extension, Christianity becomes not one religion among many but a ‘national’ religion with a unique historical veracity.” (footnote omitted)).

332. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 260-64 (1972) (beginning its decision affirming baseball’s antitrust exemption with a grandiloquent, five-page ode to baseball history that is highlighted by a lengthy list of the game’s immortals). For a further analysis of the Supreme Court’s romanticism over baseball and its detrimental impact on the protection of civil rights, see generally John Tehranian, *It’ll Break Your Heart Every Time: Race, Romanticism and the Struggle for Civil Rights in Litigating Baseball’s Antitrust Exemption*, 46 *HOFSTRAL REV.* 947 (2018).

333. See *United States v. Windsor*, 570 U.S. 744, 769 (2013) (referring to an “evolving understanding of the meaning of equality”).

unabashedly reflected in the model's nomenclature of paternalism, tolerance, and acceptance, which implies a progression. But the taxonomy does not mean to suggest that achievement of its version of evolution occurs in a linear manner or that it is even achievable at all. For example, the colorblindness jurisprudence of the modern era—chiefly related to resistance to affirmative action and other remedial race-based policies—reflects a return to first-order, proto-tolerant values.<sup>334</sup>

Meanwhile, recent decisions, such as *Trump v. Hawaii*, make clear that movement along the orders of protection is certainly not unidirectional.<sup>335</sup> In *Trump*, the Supreme Court reversed the judgments of several lower courts that had consistently found that the Trump Administration's order barring entry of citizens from certain countries into the United States violated the Equal Protection Clause by primarily targeting Muslims.<sup>336</sup> Elevating facial "colorblindness" over impact and intent and echoing the superficial formalism of the proto-tolerant courts of the late eighteenth and early nineteenth centuries, the majority blithely pointed out that

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334. See *supra* Part I.B.2.

335. See 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting) (providing President Trump's campaign statements regarding the travel ban).

336. *Id.* at 2423. The first version of the ban, Executive Order 13769, issued on January 27, 2017, barred for ninety days entry into the United States for citizens from seven countries—Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen—all of which are Muslim majority. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); Alison Siskin, *President Trump's Executive Order on Suspending Entry of Select Foreign Nationals: The Seven Countries*, CRS INSIGHT (Feb. 1, 2017), <https://fas.org/spp/crs/homsec/IN10642.pdf> [<https://perma.cc/SQ7E-CBCB>] (listing the seven countries covered under the Order and how they were designated under the Immigration Nationality Act § 217(a)(12)); Louise Cainkar, *The Muslim Ban and Trump's War on Immigration*, MIDDLE E. REP. ONLINE (June 1, 2020), <https://merip.org/2020/06/the-muslim-ban-and-trumps-war-on-immigration/> [<https://perma.cc/3AZJ-UNQE>] ("This executive order and its later iterations are widely known as the Muslim ban because the countries selected are Muslim-majority."). The revised version of the ban, issued on March 6, 2017, as Executive Order 13780, continued to bar citizens of the same seven countries from entry into the country but created exemptions for permanent U.S. residents and current visa holders, and it dropped language in the previous Order offering preferential status to certain persecuted religious minorities. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The executive orders then gave way to the third and ultimate version of the ban, which ended up before the Supreme Court: Proclamation No. 9645 was issued on September 24, 2017, and added citizens of two non-Muslim majority countries (North Korea and certain Venezuelan government officials). See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

the ban “says nothing about religion” on its face.<sup>337</sup> Therefore, there was nothing constitutionally untoward going on.<sup>338</sup> Such a posture was remarkable enough given the undisputed reality that the policy resoundingly and disproportionately affected Muslim individuals.<sup>339</sup>

The facts were even more favorable for the plaintiffs than they were in *Cumming*. In *Cumming*, the pretext of fiscal economy, in the absence of any overt record of targeting African Americans, sustained the shuttering of the only African American high school in Richmond County.<sup>340</sup> In *Trump*, by sharp contrast, the Court had the benefit of cavalier statements from the architect of the policy, who had no compunction about making its discriminatory intent manifest.<sup>341</sup> As Donald Trump had unapologetically told the whole world, he was seeking “a total and complete shutdown of Muslims entering the United States.”<sup>342</sup> In an era when even the most noxious bigot is usually (legally) circumspect enough to conceal any animus driving a policy, Trump showed no such restraint. His intent could hardly be clearer. As the Supreme Court once concluded in a very different context, “[t]he unlawful objective” should have been “unmistakable.”<sup>343</sup> But despite the existence of this rare gift, which seemingly overcame even *Washington v. Davis*’s onerous intent requirement,<sup>344</sup> the Court held otherwise.<sup>345</sup>

In the process, the Court broke from its prior equal protection jurisprudence involving fundamental rights (such as the freedom of religion) and declined to apply anything more than rational basis review to the ban.<sup>346</sup> Meanwhile, ironically, there was nary a

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337. *Trump*, 138 S. Ct. at 2421.

338. *Id.* at 2423.

339. See Cainkar, *supra* note 336.

340. *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 545 (1899); see *supra* Part I.B.1.

341. *Trump*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting).

342. *Id.* (citing formal statement issued by Donald Trump on December 7, 2015, which remained on his campaign website until May 2017—several months into his presidency and during the time when the first two executive orders were issued).

343. *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 940 (2005).

344. See 426 U.S. 229 (1976) (holding that to subject a facially neutral law to heightened scrutiny under the Equal Protection Clause, the plaintiff must meet the burden of showing that the law has both a discriminatory intent and disparate impact).

345. *Trump*, 138 S. Ct. at 2423.

346. See *id.* at 2441 (Sotomayor, J., dissenting) (“[W]ithout explanation or precedential

whisper of the rich body of recent case law dictating absolute governmental “colorblindness”—at least when policies that adversely impact the White majority are concerned.<sup>347</sup>

Most disingenuously of all, the majority opinion took the *Trump* case (rather than any of the other myriad chances it had decided over the past seventy years) as an opportunity to grandstand by abrogating its infamous holding<sup>348</sup> in *Korematsu v. United States*, which had affirmed the internment of Japanese Americans during World War II.<sup>349</sup> By overruling *Korematsu* in a transparent attempt to lend an air of legitimacy to its actions banning Muslims, the Court diminished the (otherwise significant) act of finally relegating *Korematsu* to the dustbin of history. Ironically, in the process, the Court rendered a decision that may well be regarded by future observers as our own generation’s *Korematsu*—assuming nothing worse comes along.<sup>350</sup>

All the while, the Court’s ruling was wildly inconsistent with its holding on a related issue in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, an opinion that it had issued just days before.<sup>351</sup> In that case, the Court held that statements indicative of religious animus by a civil rights commission behind a facially neutral antidiscrimination law in Colorado would result in the striking of its application to a devout Christian baker who declined to make a

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support, [the majority] limits its review of the Proclamation to rational-basis scrutiny.... That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.” (citation omitted)); see also *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (noting that Supreme Court precedent has established that claims “involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause” (citations omitted)).

347. See *supra* Part I.B.2.

348. *Trump*, 138 S. Ct. at 2423 (“The dissent’s reference to *Korematsu* ... affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided [and] has been overruled in the court of history.”).

349. 323 U.S. 214 (1944).

350. This is not to suggest that the banning of certain noncitizen Muslims from our country constitutes anywhere near the injustice that was perpetrated through the forced internment of more than a hundred thousand individuals of Japanese descent, many of whom were American citizens. See *Japanese American Internment*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Japanese-American-internment> [<https://perma.cc/6XGA-4YFA>].

351. See 138 S. Ct. 1719 (2018).

wedding cake for a same-sex couple getting married.<sup>352</sup> In light of the logic of *Masterpiece Cakeshop*, it is difficult to explain how repeated statements by the President of the United States and those in the Administration implementing his policy indicating the naked religious animus behind the adoption of the “Muslim ban” would not have a similar effect.

As *Trump* indicates, although we have achieved great progress, we still have important strides to make. At the risk of being deemed uppity ingrates with respect to the kind drops of tolerance the Supreme Court has given us, we can and should ask for more.<sup>353</sup> While the civil rights decisions that we have lionized certainly deserve recognition for their value, they should not be so valorized and their shortcomings not so whitewashed that we immunize them from further scrutiny. We should instead acknowledge their limitations and recognize the ways in which they have continued to tolerate, if not prop up, inequality by failing to embrace a true vision of acceptance that undermines subordination practices and resists racial (and other forms of) hierarchy. Civil rights advocates may fear attacking these critical decisions, which ultimately went their way, lest they appear to be “nattering nabobs of negativ[ity].”<sup>354</sup> But, if we chose to simply say “thank you” and sit silent, we have far more to lose.

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352. *Id.* at 1729 (“The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”).

353. As Jack Chin has argued, the lionization of Harlan’s dissent may well flow from the fact that come *Brown*, “[e]mbarrassed whites could point out that even six decades earlier, at least one white authority figure had rejected what turned into the legal, moral, and political disaster of Jim Crow.... Harlan’s dissent may also look particularly attractive when compared to the meagerness of the majority opinion, rightly called one of the ‘outstanding failures of American law.’... After a hundred years, Harlan’s *Plessy* dissent should be overruled.” Chin, *supra* note 27, at 180, 182 (footnotes omitted). The same could be said of the other seemingly progressive decisions from the Jim Crow era, such as *Strauder*.

354. See Lance Morrow, *Naysayer to the Nattering Nabobs*, TIME MAG. (Sept. 30, 1996), <http://content.time.com/time/magazine/article/0,9171,985217,00.html> [<https://perma.cc/4M23-SHUH>] (quoting the famous line first uttered by former Vice President Spiro Agnew).