The Smart Culture

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Published by NYU Press

Hayman, Jr., Robert L.
The Smart Culture: Society, Intelligence, and Law.
Project MUSE. muse.jhu.edu/book/15780.

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The Constitution Is Powerless

Myths of Equality under Law

The "natural order" survives because of, rather than in spite of, American law. The law sanctifies the order in theory and secures it as a social fact. Neither the first nor the second Reconstructions has substantially altered this course: indeed, the arguments against both Reconstructions have seemed, in the end, to carry the day. Thus law continues to protect the advantages of some Americans while obscuring the disadvantages of others, all through a carefully crafted set of legal fictions that subvert the constitutional promise of "equality." That promise thus becomes, perversely, a guarantee of privilege for some; and it becomes, tragically, a lifeless abstraction for others. The bell curves of American social life are preserved by law. We cannot be made equal; we are not even permitted to try.

Prologue

Ask your own soul what it would say if the next census were to report that half of black America was dead and the other half dying.

— W. E. B. Du Bois, The Souls of White Folks

Black America, some people said, was dying. And they wondered what they would hear in the souls of white folk when white America heard the news.

Part of the story, perhaps, was told one recent June, by the Supreme Court of all America. The session of the Court had not been convened to determine the fate of black America—not explicitly, at any rate, and not exclusively. Still, it was clearly on the agenda, with
no less than three major race-related disputes on the High Court’s docket.

What the Court had to say on such matters did tend to matter. As the highest tribunal in the land, it possessed the power to shape the law and, as a consequence, the power to shape the larger society. This last point was the focus of some academic debate—some questioned the societal impact of the Court’s decisions—but this much remained fairly certain: the law could be expected to play at least some role in shaping the development of societal conventions, and on matters of law, the words of the Supreme Court tended to be the final ones.

More important, perhaps, the Court helped establish the parameters of cultural discourse. It was a major participant in the national political dialogue, and its voice carried a certain authority not often accorded its elected counterparts. Ironically, perhaps, the paradigms it helped shape were not only legal ones: some were epistemological, some quite political, some downright moral. In reinforcing popular attitudes and beliefs, or in challenging them through new perspectives and dissonant information, it helped establish a national mood. It confirmed or denied the citizenry’s sense of what is real and what is right. Over time, it transformed their sense of both the possible and probable, and forever changed the way the people saw one another and saw themselves. Yes, the Court’s words mattered.

What the justices of the High Court had to say on this occasion, in the closing weeks of their judicial term, might have mattered more than usual. Their words, after all, were addressed to the most intractable of national problems: the enduring dilemma of racial inequality. For a waiting nation—for judges, lawyers, lawmakers and their constituents, for teachers and students, parents and children, for the American people of every station and every hue—the High Court would do no less than newly define the meaning of racial equality.

It would be a progress report of sorts: how equal was America? But more important, it would set the agenda for the millennium. In this struggle for racial equality, what should be the goals, and how should they be achieved? Whose struggle was it, and when should it end?

Underlying it all was this fundamental question: in the struggle for racial equality, what could be done—what equality, and how much, was possible? Only recently, some writers had revived the long-discredited myth of a natural racial order: they had written—or merely hinted, when they knew merely hinting would suffice—that some races were
inherently more intelligent than others. The struggle for equality, they concluded, was hopeless in the face of the natural order; worse, the egalitarian effort was unfair to those who were superior, and degrading to the culture the superior race had tried to elevate.

The High Court itself had embraced this view, but over a century ago. Certainly they knew better now; certainly they would teach the nation better now.

There were nine of them—one was black and eight were white—and they would need to explain what their souls had to say when they pondered the fate of black America.

They had chosen three specific issues to address: the racial desegregation of America’s public schools; the national government’s use of preferences or presumptions to benefit racial minorities; and the explicit reliance on "race" in the creation of electoral districts as a device to ensure minority representation in the federal legislature.

The Desegregation Story

It was William H. Rehnquist, the chief justice himself, who began the address to the nation. He selected the desegregation case from the Kansas City, Missouri, School District (the KCMSD) as the basis for his story.¹

"As this school desegregation litigation enters its 18th year, we are called upon again to review the decisions of the lower courts."

The crowd was still settling into the large chamber. A reporter covering the session noted that the chief justice had barely begun his tale, and already a certain weariness weighed heavily in his voice.

"This case," the chief justice continued, "has been before the same United States District Judge since 1977."

His voice grew heavier.

"After a trial that lasted 7 1/2 months . . ."

Heavier still. The crowd, the reporter thought, sank with it.

"As of 1990, the District Court had ordered $260 million in capital improvements."

And the weariness seemed to give way to frustration.

"Since then, the total cost of capital improvements ordered has soared to over $540 million."

And the frustration yielded to disdain.
"The District Court's desegregation plan has been described as the most ambitious and expensive remedial program in the history of school desegregation. . . . As a result, the desegregation costs have escalated and now are approaching an annual cost of $200 million. These massive expenditures have financed . . ."

It was obvious where this story was going.

The problem, it evolved, was that the district court had done too much to encourage the desegregation of the Kansas City schools. As the chief justice put it, "Proper analysis of the District Court's orders challenged here . . . must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct."

But the judge in Kansas City had apparently done more than simply "restore[e] the victims" of segregation to their proper place; his remedy for the racial segregation of the Kansas City schools, according to the chief justice, "included an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district."

And still worse, the judge's goal had been to counteract the increasing segregation of the majority black metropolitan schools from the majority white suburban schools. As the chief justice saw it, the judge's plan was "not designed solely to redistribute the students within the KCMSD in order to eliminate racially identifiable schools within the KCMSD. Instead, its purpose is to attract nonminority students from outside the KCMSD schools. But this interdistrict goal is beyond the scope of the intradistrict violation identified by the District Court."

It was axiomatic: "The proper response to an intradistrict violation is an intradistrict remedy."

Associate Justice Sandra Day O'Connor agreed. "Neither the legal responsibility for nor the causal effects of KCMSD's racial segregation transgressed its boundaries, and absent such interdistrict violation or segregative effects, [our decisions] do not permit a regional remedial plan."

But perhaps the effects of the long history of official racial segregation could not be so easily cabined; perhaps disadvantage, oppression, and hostility did not respect "district" lines. Perhaps the KCMSD was largely black, and surrounding districts largely white, precisely because
the people of Missouri—indeed, most Americans—had been taught for centuries that racial segregation was both natural and desirable. That, in fact, was the position of the trial court, that the interdistrict segregation it was forced to overcome, the immediate product of the so-called white flight from the city district, was ultimately traceable to the segregative policies of the state. Perhaps it was fair to suppose that the state was responsible for the continuing segregation.

No, said the chief justice: "The lower courts' 'findings' as to 'white flight' are both inconsistent internally, and inconsistent with the typical supposition, bolstered here by the record evidence, that 'white flight' may result from desegregation, not *de jure* segregation."

Again, Justice O'Connor agreed. "What the District Court did in this case . . . and how it transgressed the constitutional bounds of its remedial powers, is to make desegregative attractiveness the underlying goal of its remedy for the specific purpose of reversing the trend of white flight. However troubling that trend may be, remedying it is within the District Court's authority only if it is 'directly caused by the constitutional violation.'"

What had "directly caused" the demographic separation of black and white citizens? O'Connor was not certain, but she leaned in favor of the "typical supposition."

"Whether the white exodus that has resulted in a school district that is 68% black was caused by the District Court's remedial orders or by natural, if unfortunate, demographic forces, we have it directly from the District Court that the segregative effects of KCMSD's constitutional violation did not transcend its geographical boundaries."

The segregation, apparently, was caused by the Kansas City judge's own efforts. Or perhaps it was just natural. As O'Connor explained, "In this case, it may be the 'myriad factors of human existence,' that have prompted the white exodus from KCMSD, and the District Court cannot justify its transgression of the above constitutional principles simply by invoking desegregative attractiveness."

"The unfortunate fact of racial imbalance and bias in our society," she continued, "however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation."

The reporter now thought he recognized the genre of the tale: it was tragedy.

The apparent deficits in minority achievement were also insufficient to justify the trial court's plan. "Just as demographic changes
independent of *de jure* segregation will affect the racial composition of student assignments," the chief justice continued, "so too will numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. . . . So long as these external factors are not the result of segregation, they do not figure in the remedial calculus."

"External factors"—the reporter briefly wondered what those might be. He waited for the chief justice to elaborate, but there was to be no clarification. Just "external factors"; the details were left to the imagination.

The chief justice continued, "The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable."

The Kansas City judge had not done his job. "Although the District Court has determined that '[s]egregation has caused a system wide reduction in achievement in the schools of the KCMSD,' it never has identified the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs."

But the reporter knew that identifying the "incremental effect" of centuries of educational inequity would be no easy task. Presumably, the chief justice knew it too.

"Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own." After all, the chief justice noted, "our cases recognize that local autonomy of school districts is a vital national tradition."

But then, racial segregation was a part of that tradition, and so too was resistance to the desegregation effort. So, for that matter, were pervasive educational inequities—racial disparities in funding, in physical resources, in the curriculum itself—inequities that persist to this day, crystallized in the often absurd differences between urban and suburban schools. Would the end of the segregation effort signal a return to these traditions?

The chief justice took a surprising tack. Those awful traditions, he suggested, were already no more; the unfortunate students who labored under them had long since graduated. "Minority students in kindergarten through grade 7 in the KCMSD always have attended AAA-rated
schools; minority students in the KCMSD that previously attended schools rated below AAA have since received remedial education programs for a period of up to seven years."

The implications were clear: centuries of racial deprivation caused no lingering racial harms. Depressed academic achievement was due to, well, "external factors." It was not the responsibility of the state; it was not the responsibility of the schools. There was, accordingly, no need for racial redress.

"It may be that in education, just as it may be in economics, a 'rising tide lifts all boats,' but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior de jure segregation."

It was time for each individual to sink or swim.

Associate Justice Clarence Thomas echoed the chief justice's sentiments: "To ensure that district courts do not embark on such broad initiatives in the future, we should demand that remedial decrees be more precisely designed to benefit only those who have been victims of segregation." The reporter could not help but wonder: how and why would we benefit "only those who have been victims of segregation"?

"The mere fact that a school is black does not mean that it is the product of a constitutional violation."

What, then, did it mean? The justice explained, "The continuing 'racial isolation' of schools after de jure segregation has ended may well reflect voluntary housing choices or other private decisions." "The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race."

There was something else on Thomas's mind. "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior." He spoke, according to some, with special authority: he was, after all, "black."

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

The crowd stirred. It was, the reporter knew, an extraordinary moment: Thomas was turning a half century of constitutional jurisprudence on its head. Fully five decades ago, in *Brown v. Board of Education*, the Supreme Court had held that racially segregated schools were inherently unequal. In a culture marked by an entrenched racial hierarchy, a hierarchy mutually dependent upon notions of natural racial superiority, the bare fact of state-sponsored separation perpetuated racial supremacy, both as a scientific myth and as a social fact.

Now, remarkably, Thomas was suggesting that it was not segregation but the effort to desegregate that perpetuated the malevolent myths of black inferiority and white superiority. "Two threads in our jurisprudence have produced this unfortunate situation, in which a District Court has taken it upon itself to experiment with the education of the KCMSD’s black youth." The reporter winced at the harshness of the metaphor.

"First, the court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."

"Such assumptions," Thomas concluded, "and any social science research upon which they rely certainly cannot form the basis upon which we decide matters of constitutional principle."

Thomas accused the Kansas City judge of "misreading" *Brown* and the early desegregation decisions. Some members of the assembled audience were shaking their heads. Was it disagreement? Dismay? Something worse? Those familiar with the desegregation cases knew that the social science evidence offered to the Court in *Brown*—evidence on which the Court had expressly relied—described a vicious cycle of racism in which racial prejudice generated racial segregation, which in turn generated racial differences in self-concept and achievement, which in turn seemed to legitimize and heighten the prejudice. *Brown* attacked the link in the chain that appeared most vulnerable to law; the segregation it outlawed was, the Court knew, both a cause and an effect of racial inequality.
But Thomas saw it differently. "The lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle."

"Psychological injury or benefit," Thomas continued, "is irrelevant to the question whether state actors have engaged in intentional discrimination: the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences."

The reporter was not sure just what Thomas was saying. That there had been no official segregation? That it had caused no harm? That it no longer caused harm? If he was saying the first, then he was clearly mistaken. If he was saying either of the last two, then how did he purport to know?

Ironically, for all of his dismissals of social science, the justice seemed quite willing to draw some social science conclusions of his own. "Given that desegregation has not produced the predicted leaps forward in black educational achievement," he asserted, "there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment." It was both empirical and theoretical, and as the reporter listened to the obligatory citation of authority, he could not help but think that the justice's selective citation belied his every claim.

Compared to the roaring indictment of desegregation's unprincipled failures, Brown's successes—in reducing the gap between black and white achievement, in reducing negative racial attitudes by virtually every conventional measure—became mumbled asides.

"Although the gap between black and white test scores has narrowed over the past two decades,"—Thomas's grudging acknowledgment was barely audible—"it appears that this has resulted more from gains in the socioeconomic status of black families than from desegregation."

Those gains, presumably, were unrelated to the dismantling of segregation.

"It is clear that the District Court misunderstood the meaning of Brown I." Thomas was in full voice again.
"Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources—making blacks 'feel' superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed."

The reporter was stunned by this revision of constitutional history. Thomas seemed to be saying that racially separate schools would have been constitutional, provided neither the "black" nor "white" schools were provided "superior" resources. Separate, in other words, was not inherently unequal. But then the justice retreated.

"Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race."

But was it correct, the reporter wondered, that the bare fact of classification was unconstitutional? How was classification alone not "equal"? Was it unequal regardless of the purpose? Regardless of the effect? Regardless of the context? Thomas did not explain.

"Of course, segregation additionally harmed black students by relegating them to schools with substandard facilities and resources."

The reporter scribbled furiously; he was losing the story.

"But neutral policies, such as local school assignments, do not offend the Constitution when individual private choices concerning work or residence produce schools with high black populations."

Now, at last, the tale was vaguely familiar. In the aftermath of Brown, District Court Judge John Parker had insisted that the Constitution did not require desegregation, but merely an end to segregation—the formal disestablishment, that is, of official segregative policies. In 1968 the so-called Parker doctrine had been unanimously rejected by the Supreme Court.

But not by Thomas. "The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color."

Yes, that was it: formal equality. "Perfect equality," the opponents of the first Reconstruction had called it; "legal equality," or "no social equality," according to the opponents of the second. In this abstract, legalistic view, real inequalities—the inequities perpetuated by centuries of official oppression—were irrelevant; the responsibility of the state
was merely to pretend that race did not exist. Any lingering racial disparities were outside the realm of official power: they were social, private, natural.

Thomas concluded with a critique of the second flaw in desegregation jurisprudence: "Although I do not doubt that all KCMSD students benefit from many of the initiatives ordered by the court below, it is for the democratically accountable state and local officials to decide whether they are to be made available even to those who were never harmed by segregation."

Justice O'Connor concurred. Those "myriad factors" that caused segregation "are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice."

There was, then, always the political process. It was ironic, in light of what was soon to come.

The "Affirmative Action" Story

It was Justice O'Connor who took the lead in telling the Court's next tale. This one concerned a federal "affirmative action" law that was designed to increase the participation of economically disadvantaged entrepreneurs in federal contracting; it included a statutory presumption that minority contractors were economically disadvantaged. It was, on the one hand, simply a recognition of an economic reality: statistically, minority contractors were likely to be disadvantaged in a way that white contractors were not. On the other hand, the statute used the "r" word: "race."

The Court had told many stories about "race." Justice O'Connor's story, she said, would be an attempt to reconcile the earlier tales, an attempt to make of them some coherent whole.2

"Despite lingering uncertainty in the details," she began, "the Court's cases . . . had established three general propositions with respect to governmental racial classifications." The first of these, she announced, was "skepticism": "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.3" It was a relatively uncontroversial start.
With her second proposition, however, the tale took on a sharper edge. "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." "Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."

Justice John Paul Stevens, second on the Court in seniority, and Justice Ruth Bader Ginsburg, the second most junior member of the Court, had suggested that the Court's earlier cases told at least two different tales: one when government used "race" to further the oppression of politically vulnerable minorities, the other when government used "race" to assist those minorities in overcoming the disadvantages created by a history of oppression. But for O'Connor, there was just one story.

Thomas agreed with O'Connor, and he took the occasion to express his disagreement with the underlying premise of Stevens's and Ginsburg's positions "that there is a racial paternalism exception to the principle of equal protection." Stevens had questioned whether the different uses of "race" were morally and constitutionally equivalent. "I believe," Thomas responded, "that there is a 'moral [and] constitutional equivalence,' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . . That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."

It was, the reporter thought, an easy argument to comprehend: it offered simplicity, elegance, symmetry. But the Court—Thomas included—was adamant that the only discrimination that mattered was "intentional" discrimination; so why was the character of that "intent" irrelevant? If the constitutional guarantee of equality was implicated only by "purposeful" official action, why should it not matter whether the purposes were benign or malevolent?

Thomas attempted to explain. "There can be no doubt that the paternalism that appears to lie at the heart of this program is at war
with the principle of inherent equality that underlies and infuses our Constitution."

The reporter remained perplexed. How did the presumption of economic disadvantage compromise the principle of "inherent equality"? Was it really "paternalistic" to acknowledge the truth of economic inequity and try to offer some redress? Thomas sounded almost, well, Darwinian.

The reporter had barely begun to crystallize this thought when O'Connor abruptly moved on. Her third proposition, she said, was "congruence." It did not matter whether the discrimination was by a federal actor or a state actor, "'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" Stevens, she noted, "claims that we have ignored any difference between federal and state legislatures. . . . It is true that various Members of this Court have taken different views of the authority §5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. We need not, and do not, address these differences today. For now, it is enough to observe that Justice Stevens' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, is incorrect."

The reporter smiled. Not that long ago, O'Connor had insisted that the historical truth of national Reconstruction meant that the federal government was entitled to a deference in dealing with "race" that was not applicable to the states. The reporter was glad to hear that she had not repudiated that view. However, precisely what she had done remained something of a mystery.

"Taken together," O'Connor continued, "these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." "The three propositions . . . all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."

She had found her unifying theme: only individuals have a right to constitutional protection and governmental redress. Groups, as groups, had no cognizable claims. It was catchy, and Justice Scalia was quick
to join in. Individuals, he declared, "who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual. . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American."

It was stirring language. The reporter surveyed the crowd; he wondered how many were convinced. He himself found the rhetoric oddly unsatisfying. It seemed—he searched for the word—detached. After centuries of discrimination against "individuals" because of their "race," it seemed almost absurd to insist that "individuals" would not receive redress because of their "race." And in a socioeconomic hierarchy rooted deeply in "race," it seemed wholly unrealistic to suggest that the harm could be undone without reference to "race."

How else would "individuals" of any oppressed "race" be made truly equal?

"Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."

It was Thomas again. The reporter shook his head. Precisely how did Thomas imagine we were made unequal in the first place?

"[T]here can be no doubt," he continued, "that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."

Was it really true, the reporter wondered, that affirmative action was as "poisonous and pernicious" as, for example, compulsory segregation? Thomas explained:

"So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."
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As Thomas concluded his tale, four of his colleagues nodded their approval. Yet none of them, the reporter noted, chose to echo his sentiments.

The reporter, meanwhile, had more questions than answers. Was this "badge of inferiority" the same one that Thomas had so casually dismissed in his desegregation story? Why were "attitudes" so central to this story but so irrelevant in the desegregation tale? Just where, the reporter wondered, was the line between "social science" and "constitutional principle"?

Above all, what possible conception of the relationship between race and ability informed this attitude? It was hard to see how a presumption of economic disadvantage connoted inferiority unless all of the operative variables were assumed to be somehow natural. Was that, the reporter wondered, the premise here? Was Thomas—and the bare majority with whom he concurred—still conceiving "race" as something natural, and "ability" or "merit" or "achievement" as equally natural, such that any effort to bridge the racial gap implied the natural inability of the benefitted group? Did he—did they—not grasp the simple premise of this law: that "races" of people are equal, except to the extent that they have been disparately advantaged—made unequal? Precisely who, the reporter wondered, was really embracing the myth of inferiority? He wished there was time to ask, but a new story was already starting.

The Redistricting Story

It was Justice Anthony Kennedy who told the final tale of the session. It was to be a short story.\(^1\)

The U.S. Voting Rights Act required states with a history of racial discrimination in elections to obtain federal approval for any changes in their election schemes. The state of Georgia, with a 27 percent black population, had sought approval for a congressional redistricting plan; the federal government refused until Georgia provided that three of its eleven districts would be majority black. One of the majority black districts was the Eleventh District. White voters in the Eleventh sued; perhaps they did not like being in the minority.

The central mandate of the equality guarantee, Kennedy began, "is racial neutrality in governmental decisionmaking." To support his
simple assertion, Kennedy reviewed the history of racial segregation. It was not the history of exclusion; it was not the history of oppression; it was instead the history of "race." Segregation and redistricting were, like affirmative action, all part of the same story: the story of "race."

And the reporter knew the end of this story long before Kennedy finished telling it.

"When the State assigns voters on the basis of race," Kennedy said, "it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"

The Eleventh District, he continued, belied this assumption. The district included "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community."

The reporter failed to see Kennedy’s point: why was it that "community" and "disparity" were incompatible? Within any community there were differences; why could that not be true of the "black" community? What was wrong with the simple recognition that among many demographic variables, "race" tended to be prominent, but not exclusive, in defining political communities?

"It is true," Kennedy acknowledged, "that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is 'based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens,' the precise use of race as a proxy the Constitution prohibits."

The reporter strained to understand: precisely when did it become demeaning to suggest that racial communities might be united by some political interests? Was that not, after all, substantiated by voting patterns and opinion surveys? Was that not, after all, the precise reason racial minorities were systematically excluded from the polls in the first place? For that matter, was it not the underlying premise of the "white" voters’ lawsuit? Why else would they have objected? What else could they point to as their constitutional harm?
The state, Kennedy continued, acts in a presumptively unconstitutional manner whenever the complaining party can prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." The same would be true whenever "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."

Race as a proxy? For what? Race for its own sake? As opposed to what? The reporter's head was spinning. He could barely hear Kennedy as he approached the end of his story.

"A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."

Just what was Kennedy saying? That there were no communities of race? Or that racial communities had no "common thread" of interests? Or was it that their common interests were not "relevant"?

Kennedy ended with one final observation. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."

With that, the session ended. The justices left the bench and retired to their offices and, eventually, to their homes. The assembled crowd of media and curious citizenry filed out of the historic chamber and into the hot, humid air of the summer afternoon. A hundred or so schoolchildren raced down the steps of the great building, briefly mingled on the sidewalks below, then scattered into small groups and scrambled onto the buses that carried them on their field trip to the nation's capital. The reporter noted this curious phenomenon: the black students and white students did not ride the same buses.

The reporter managed a smile at the memories of his own field trip to the capital. His schools, he recalled, were racially segregated, but de jure or de facto, he hadn't a clue which. Frankly, his family had moved so much, and he'd been to so many different schools, it was nearly certain that he'd grown up with both kinds of segregation, and maybe a few other types besides.
The reporter watched the schoolchildren as they scrambled to their seats on the buses, laughing and playing, without, it seemed, a care in the world. His mind wandered back again to his own school days, to a day he had nearly forgotten.

He was just six years old, barely beginning the second grade, but already attending his third school. The students were reporting to the rest of the class on their "Most Exciting Day of the Summer," and the reports were filled with gleeful tales of trips to the beach, days at amusement parks, adventurous rides on new bicycles with old friends. When it was his turn, he wasn't sure what to say. "I didn't really do anything," he had said, earnestly hoping that would be the end of the matter. But the teacher was not so easily satisfied, and the ominous silence of the other kids in the class had convinced him that he had better offer something.

So he had spun a magnificent yarn about the day his family went to the farm. Yes, they had driven to a farm in the country, his uncle's farm, where they went every summer. His mother went, and his grandparents, and also his kid sister, who was only three years old and who was afraid of all the animals, especially the pigs. He had been allowed to ride the horses, and feed the pigs and goats, and go swimming with the ducks. And he had become friends with one of the little ducks, a duck named Donald, and when they went to leave at the end of the day, Donald had followed him into the car, and he didn't know what to say or do, with this little duck hiding under his seat, and so Donald had gone home with him, and nobody knew until they got back to his house and Donald waddled up the steps and onto the porch and into the house. And then Donald saw the reporter's kid sister, and started to chase after her to play, because, after all, she walked like a duck, and everybody else started chasing Donald, and feathers were flying everywhere, and they finally caught Donald and took him back to the farm, but he's allowed to come visit now nearly all the time. His voice had grown more and more animated as he told the story, and the laughter of the other kids had grown louder and louder. And when he finished, the kids in the class had clapped, and he, in return, had smiled.

At recess that day, the other kids had all come up to him, wanting to hear more about the farm, the ducks, and even his kid sister. He ended up talking with them about pets, and families, and his one real passion, baseball. And he was feeling really quite good when the
teacher found him and said that she wanted to talk to him. He remembered her saying something about "needing to fit in," and something else about "playing by the rules," and when she told him that he was going to get a D on the assignment because he had made the story up, he felt like crying, and maybe he even did. When they got back from recess he had to tell the class another story, a "true story," and he could not think of one, and his grade fell from a D to an F.

That night, the teacher had called his mom, and he had anxiously watched his mother's face as she talked on the phone. When she hung up, she beckoned him to her, smiled, and hugged him. "Well," she had said, "you do have quite an imagination, don't you?" She was not mad at all, she said, but she did hope quite sincerely that he did not plan on bringing any ducks into the house. He promised that he would not, asked if he could have a puppy, and was gently told not to press his luck.

He told a different story to the class the next day, a story about the day he and his friend Huey rode their bikes all day long and into the night and, to their great surprise, did not get punished for missing dinner. It was an okay story, and the kids were attentive, though they did not clap when he finished. The teacher, on the other hand, seemed quite pleased. He got an A this time, which was pretty good, seeing as how he'd never even been on a bike.

A siren wailed in the distance. Police? Ambulance? The reporter had forgotten how to tell them apart.

He was still standing on the hot sidewalk outside the Supreme Court, and the voices of the Justices, still fresh in his ears, began to blend with his distant childhood memories.

He shook his head reflexively, as if to disentangle the past from the present, the memories from the realities, the stories from the truth. But they did not separate. He found himself thinking that it must be the heat.

_The White Man's Government_

In June 1862, Samuel S. Cox, a Democratic congressman from Ohio, explained his opposition to the receipt of diplomats from Hayti and Liberia; those representatives, Cox explained, would invariably be
"negro ministers." Republican William B. Fessenden of Maine interrupted: "What objection," he asked, "can the gentleman have to such a representative?" Cox was incredulous. "Objection? Gracious Heavens! what innocence! Objection to receiving a black man on an equality with the white men of this country? Every objection which instinct, race, prejudice, and institutions make." Cox calmed himself enough to offer his Republican colleague a lesson in civics, one that Democrats would repeat many times in the coming years.

I have been taught in the history of this country that these Common-wealths and this Union were made for white men; that this Government is a Government of white men; that the men who made it never intended, by anything they did, to place the black race upon an equality with the white. The reasons for these wise precautions I have not the time to discuss. They are climatic, ethnological, economical, and social. It may be, the gentlemen on the other side intend to carry out their schemes of emancipation to that extent that they will raise the blacks to an equality in every respect with the white men of this country. . . Do you want to begin by giving national equality to the black republics? After having obtained the equality of black nations with white nations, do you not propose to carry the equality a little further, and so make individual, political and social equality?

The notion that ours is a "white man's government"—of the white man, by and for the white man—provided the cornerstone for opposition to Reconstruction. It was at the heart of nearly every theoretical objection and provided the rhetorical foundation for complaints about each specific measure.

In January 1865, Kentucky congressman Robert Mallory insisted that emancipation must be accompanied by a plan for colonization; opposition to the latter, Mallory insisted, simply reflected Republican desires to employ the freedmen as political pawns. "I have no doubt that that is their leading motive," Mallory insisted. "And in the name of God, is it not a motive for me, and every man who loves the institutions of his country, for every man who wants to see this a great free Government, controlled by the white men during all time, to oppose it?"

A year later, Republican senator William Stewart of Nevada joined the Democratic opposition to black suffrage in the District of Columbia. "I believe the Anglo-Saxon race can govern this country,"
Stewart professed. "I believe it because it has governed it. I believe it because it is the only race that has ever founded such institutions as ours. . . . I believe the white man can govern it without the aid of the negro; and I do not believe that it is necessary for the white man that the negro should vote." "If he ever does vote," Stewart concluded, "it will simply be as a boon to him. I think we can carry on the Government without him." Pennsylvania Democrat John L. Dawson concurred: "We have, then, to insist upon it that this Government was made for the white race. It is our mission to maintain it. Negro suffrage and equality are incompatible with that mission. We must make our own laws and shape our own destiny."

Democratic congressman Andrew J. Rogers of New Jersey was a member of the Joint Committee on Reconstruction, the "Committee of Fifteen." In May 1866, Rogers explained his opposition to the proposed Fourteenth Amendment: "Sir, I want it distinctly understood that the American people believe that this Government was made for white men and white women. They do not believe nor can you make them believe—the edict of God almighty is stamped against it—that there is social equality between the black race and the white." "I have no fault to find with the colored race," Rogers added. "I have not the slightest antipathy to them. I wish them well, and if I were in a State where they exist in large numbers I would vote to give them every right enjoyed by the white people, except the right of a negro man to marry a white woman and the right to vote."

The adoption of the amendment did not end the commitment to a "white man's government." House Democrat James Brooks of New York insisted that "we intend to carry on these reactionary proceedings to the legitimate end." "We don't intend," Brooks conceded, to deprive the negro of his liberty or of his civil rights. We do intend to allow them three-fifths representation in Congress in lieu of the three-fifths in the Constitution before it was amended, and we intend to give the negro in the South every right and privilege that the negro has in the North. But we do not intend to let the people of the North be brought into a negro copartnership and be ruled by rotten borough negro communities in the South. We do not intend to sacrifice our white man's government and make it a government of black men, South or North. We intend, in short, to undo all your radical, revolutionary proceedings here, not by force, but by the might and majesty of the people operating through the ballot-box.
In February 1870, Garrett Davis was leading the opposition to the seating of Mississippi senator-elect Hiram Rhoades Revels. Revels was "black"; therefore he was not, Davis insisted, an American citizen. In support of his proposition, Davis cited the Supreme Court's decision in *Dred Scott v. Sandford*, "one of the most learned, argumentative, powerful, and conclusive opinions that was ever written upon that bench." Thus fully two years after the ratification of the Fourteenth Amendment—which, in its opening sentence, explicitly overruled the *Dred Scott* decision—Davis was contending that citizenship of the United States extended only to the "white" race.

The assorted successes of congressional Reconstruction could not all be undone or overtly denied; maintaining the "white man's government" required some limited ingenuity. For the most part, advocates of the old order simply followed the intellectual traditions of the past four score and assorted years—each progressive step toward equality would be tempered by distinctions, disclaimers, and diversions.

The abolition of slavery, for example, was an indisputable fact: the Thirteenth Amendment was explicit on this score. But the end of slavery did not necessarily bring all the concomitants of freedom, or so the opponents of Reconstruction argued. Thus in December 1865, Delaware senator Willard Saulsbury maintained that Congress remained powerless to advance the civil rights of the freedmen. "Slavery is a status, a condition," he insisted. "Cannot that status or condition be abolished without attempting to confer on all former slaves all the civil or political rights that white people have? Certainly. Your 'appropriate legislation' is confined to the subject matter of your amendment, and extends to nothing else." Republican senator Edgar Cowan of Pennsylvania agreed, and opposed the civil rights bill on that basis. The Thirteenth Amendment, he conceded, "deprived the master of the right" to the proceeds of the slave's labor, "and conferred it upon the negro," but it did no more than that. This led to an interesting distinction: Congress possessed a limited authority to ensure that the freedmen were not returned to slavery, but there "can be no pretense in the world" that Congress had any authority "to legislate in regard to free negroes and mulattoes." Meanwhile, Senator Thomas A. Hendricks of Indiana found another distinction: slavery, he insisted, "is not a relation between the slave and the state; it is not a public relation . . . . It is purely and entirely a domestic relation." The Thirteenth Amendment, Hendricks conceded, "broke asunder this
private relation between the master and his slave," but by that amendment no public or civil rights "are conferred upon the freedman."

The adoption of the Civil Rights Act of 1866, and its subsequent constitutionalization as the Fourteenth Amendment, required some new mental gymnastics, ones that would protect the white man's government from the guarantee of the "equal protection of the law." Reconstruction's opponents were up to the task; they had, after all, some rather obvious precedent. In 1868 Democrat James A. Johnson of California noted that the Declaration of Independence proclaimed that "all men are created equal." But, of course, there was more here—or less—than meets the eye:

This is the iteration of abstract political principles, applicable alone, governmentally, to those who made it and those who inherit their institutions. That all men are created equal in a general sense is not true, as everyone knows. But it is equally as well known that all are equal before the law. Then, by a fair construction, this means that all men subject to the jurisprudence of the State shall receive protection according to his status as fixed by law, and shall receive it according to law. It was not intended to destroy distinctions in society. No change was made or contemplated in the fixed status of the inhabitants of the several States.

That "fixed status," of course, was divided along racial lines: "white men for white men's State governments made the Declaration of Independence," Johnson noted, and so even under that egalitarian charter, "the rights and liberties of the white men of this country are greater than can ever legally be accorded to the inferior races"—thus his objection to those Reconstruction measures that make "citizens not only of the pet negro but of the filthy Chinese."

One tack, then, was to insist that the equality ensured by the Fourteenth Amendment was the same as the equality proclaimed by the great Declaration: it was merely an "abstract . . . principle": "legal," not "social"; formal, not real. They consistently referred to it as "perfect equality," and any departure from it was an unwarranted effort to confer "special" privileges on the "negro."

Back in 1864, Senator Waitman T. Willey, Republican from West Virginia, had protested Charles Sumner's efforts to prohibit discrimina-
tion in railcars. The effort, Willey insisted, was both unnecessary and unfair:

The proposition before the committee was to consider whether it was necessary to make special provisions for colored persons in order to secure them equal privileges with other members of the community. The law is as open to a colored person as it is to a white person. So far as that matter is concerned, all members of the community stand, as I conceive it, upon a perfect equality. I do not suppose that it was the object of the honorable Senator from Massachusetts to make a distinction in favor of colored persons over white persons; but any special enactment in regard to their privileges on this road certainly would be a distinction against white passengers, while it would not enlarge under the law, in any respect whatever, the privileges and remedies of colored persons. What, then, is the necessity for any action on this subject on the part of the Senate or on the part of Congress?

Delaware's Saulsbury agreed, and he was certain that it was not "equality" that was at issue: "When these negroes go about sticking their heads into railroad cars, and among white people . . . I think an officer is perfectly right in telling them that they have no business there; because it is evident that the reason they do so is simply to gain notoriety, and to see if they cannot bring themselves into conflict with the officers of the railroad cars."

The "white man's government" was thus more than a historical fact, it was a natural mandate; there could be, then, no equality, unless the white race was to be reduced to the debased level of the black. The three-year debate over Sumner's last civil rights bill—eventually to become the ill-fated Civil Rights Act of 1875—is illustrative. In 1874 the bill was the object of assault by Delaware's Eli Saulsbury, older brother of the former senator; the bill, Eli Saulsbury complained, "proposes the degradation of the white men and white women of the country, and seeks to place them upon an equality socially and in every other respect with a race their inferiors by nature as well as by instinct and civilization."

It was an odd conception of "equality" that they professed, one that could neither disrupt their hypothesized natural order nor intrude into the ever shifting terrain of the "social" order. "Following the great law of association," Missouri's Francis P. Blair proclaimed in opposition to Sumner's bill, "I shall cling to my race in preference to any and all
others; and never will submit to have it humiliated and degraded that I may possess the friendship of the negro or any other race, or that I may hold office by his suffrage and at his sufferance. 'Equality before the law' is my motto, but not 'equality before conscience,' nor 'forced social equality.'

Kentucky congressman Henry D. McHenry championed a similar vision of equality, and opposed Sumner's civil rights bill as a consequence:

The law can only prevent prejudice from interfering with the legal rights of others; but social prejudice is a social liberty that the law has no right to disturb. Whether it is a prejudice against the negro or a partiality for the whites, it is based upon a manifest and acknowledged superiority of class and race. I certainly have no sort of hostility to the negroes. I want them protected in all their just rights. But I do claim for my race a superiority over them in intelligence, morality, and in all the virtues of true manhood, and I can never consent to have it dragged down to their level; and it is in this view that I speak and protest against the great wrong and outrage this bill attempts against the white people.

They could hardly understand the necessity for the bill, especially the provisions calling for "mixed" schools. Georgia congressman Hiram P. Bell was sure that black Georgians were already well served by the separate schools:

As to the right to participate in the benefits of our system of public education, they stand upon a footing of perfect equality in every respect with us; they have precisely the kind of schools that we have. . . . This bill does not give them a single right in reference to their education that they do not now possess and enjoy upon terms of perfect equality with us. Except that this bill seeks to coerce an unnatural alliance between the races, unpleasant to them and disgusting to us, in our social relationships; it cannot be disguised that the object of this measure is to enforce social equality between the races.

Even Lyman Trumbull, nearing the end of his eighteen-year career in the Senate, yielded to the formalistic worldview. Civil rights, he insisted, were already secured; the "social equality" bill was unauthorized and unnecessary. Ever the lawyer, Trumbull joined the Demo-
ocratic opposition in asserting the almost unimaginable: "There is," Trumbull insisted, "perfect equality now."

There was, of course, no refuting such an abstract claim, for it rendered irrelevant even the most grotesque real-world disparities. Separated schools, threatened by the initial versions of the bill, found a similar refuge: in the abstract, they were not demonstrably unequal. "Will it be said the negro child has not the right to go to a white school?" asked North Carolina senator Augustus S. Merrimon. "Then I answer, the white child has no right to go to the negro school." "Like equal legal provisions must be made for each race," Merrimon explained, "and this is the equality of right and protection required by the Constitution."

Such logic permitted Virginia senator John W. Johnston to insist "that in the State of Virginia there is no discrimination at all; that precisely equal privileges are given to the colored people with those given to the white people." Educational inequalities, Johnston commented, are "only apparent, not real."

This logic also permitted the competing vision of equality to be pursued to its absurd conclusion. If "perfect equality" already obtained, then the "negro" would be satisfied only with "perfect social equality." As Kentucky congressman William B. Read explained, Sumner’s bill was merely the first step: "the next step will be that they will demand a law allowing them, without restraint, to visit the parlors and drawing rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters."

One consistent character of this formal conception of equality was its demand for symmetry: any measure that, in motive or effect, targeted the condition of the black race was certain to be condemned as unfair to the white. In 1864 Willard Saulsbury denounced a Sumner bill that prohibited racial discrimination in the District of Columbia’s streetcars: "Poor, helpless, and despised inferior race of white men, you have very little interest in this Government; you are not worth consideration in the legislation of the country; but let your superior, Sambo’s interests come in question, and you will find the most tender solicitude in his behalf." "What a pity it is," Saulsbury concluded, "that there is not somebody to lampblack white men so that their rights could be secured."

Within a year of Appomattox, former slaves and virtual slaves were already being denounced as the "special favorites" of Republican law.
In early 1866 Democratic congressman John Hogan of Missouri protested against the Freedmen's Bureau: "white soldiers, disabled in the service of the Union, unable to find work, are left to beg upon the streets. What a fault for them to have been born white! Had they been colored, Government would have had an agent to look after them." Garrett Davis made the argument in more personal terms, in opposition to a bill outlawing debt peonage: "I have owed considerable debts and I have worked mighty hard to pay them. All the proceeds of my labor went to the payment of my debts, and I had not the advantage which the peon has; the creditor was not supporting me during the time I was laboring to discharge my debts."

Andrew Johnson sounded the same theme in his message to Congress of March 27, 1866, explaining his veto of the first civil rights bill. The bill establishes, Johnson complained,

for the security of the colored race, safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is, by the bill, made to operate in favor of the colored and against the white race. . . . The tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace.

Of course, in the zero-sum game that was the struggle for racial dominance, every effort to assist the freedmen was bound to hurt the white man. In 1869 Wisconsin Democrat Charles A. Eldridge explained his opposition to the Fifteenth Amendment as follows:

It is at the demand of party and in its interest alone that power is sought to be taken from the intelligent and cultivated white man and given to the ignorant, uneducated, and servile negro. It is the inexorable demand of party that is bringing the white and black races in this country in fatal antagonism and conflict, which must end in the utter extermination of the weaker race or in the degradation of the other.

And they were willing to do their part to make certain that the effort to assist the black race did in fact inure to the detriment of the white. Eli Saulsbury was one of many who opposed the desegregation of public or "common" schools, even if it meant an end to public education: "For one, I should regard it as a far less evil to see the
common schools in my State abandoned than to see them converted into mixed schools for white and colored children."

Ironically, or perhaps fittingly, "perfect equality" for the white man or white woman occasionally required some obvious inequities. Garrett Davis insisted of black Kentuckians that, "[w]ith a few exceptions, they have all the civil rights that any white man has."

Davis explained:

They are subject to some severer penalties: for instance, rape committed by a white man is punishable by confinement in the penitentiary; when perpetrated by a negro upon a white woman, it is punishable by death, and it will be so punishable until the last trump blows. All the legislation that may be devised by Congress, and all the oppressive and unjust discriminations sought to be introduced against the white man, and to stifle the reserved rights of the States, to overthrow their governments and their independence of legislation—all these measures will never drive the State of Kentucky from a modification of that law.

As this diatribe suggests, the argument on behalf of the white man and the white man's government typically went hand-in-hand with another claim, one on behalf of the sovereignty of the state. At the state level of government, after all, the white man's dominion was generally secure. But federal power, once actively enlisted to support the interests of the slave states, was now decidedly a threat. The expansive conception of federal authority that justified the fugitive slave laws thus underwent a quite magical transformation: grants of federal power were to be strictly construed, strictly limited, and, when literal interpretations were inconvenient, strictly ignored.

Samuel Cox opposed the Thirteenth Amendment because it threatened the integrity of the state governments—the white state governments. "Is your proposition," he asked of Thaddeus Stevens,

simply to abolish slavery? Or is it a measure to invest the Federal Government with authority to enslave the local white citizen, hold him in vassalage to a central power, and assume the right to dictate to the States what their home policy shall be on home affairs? In fine, is it not an abstract scheme to enfranchise the black, who is really being freed by war, by a total change in the very genius, soul, and body of our Government?
Cox called on Stevens to "[g]ive up his doctrine of negro equality," and "[g]ive up his idea of breaking down State institutions by Federal law." "I ask the gentleman," Cox pleaded, "to give up his idea of the equality of the black and white races before the law." Stevens's reply was brief: "I won't do it."

State sovereignty was invoked in opposition to each act of Reconstruction. Willard Saulsbury insisted that under the original civil rights bill, the states would be "invaded and defrauded of the right of determining who shall hold property"; the bill, he contended, "positively deprives the State of its police power of government." Garrett Davis was convinced the bill would void Kentucky's antimescegenation and discriminatory rape laws, an unthinkable result under the federal constitutional scheme. "The result," he maintained, "would be to utterly subvert our Government; it would be wholly incompatible with its principles, with its provisions, or with its spirits. . . . It would produce a perfect and despotic central consolidated Government. All the State governments and State constitutions would be brought in ruins prostrate to the feet of the oligarchy of Congress."

Indiana Democrat Michael C. Kerr derided the "inherent viciousness" of the civil rights bill: "It takes," he claimed, "a long and fearful step toward the complete obliteration of State authority and the reserved and original rights of the States." Andrew Rogers concurred: "it cannot be pretended . . . that there is any authority in the Congress of the United States to enter the domain of a State and interfere with its internal police, statutes, and domestic regulations." The bill, he concluded, is "odious": it will "destroy the foundations of the Government as they were laid and established by our fathers."

Rogers lodged the same complaint against the initial iteration of the Fourteenth Amendment: "This is but another attempt to consolidate the powers of the States in the Federal Government. It is another step to an imperial despotism." His substantive concerns were not unlike Davis's: "under this amendment a negro might be allowed to marry a white woman." Equally disastrous, "Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all people in the several states shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several states." Davis joined the assault: "the distinguishing feature in our Government is this: the Federal Government has its peculiar and
restrictive duties. It is a Government of limited power and authority."
The proposed amendment, he warned, "is a grant for original legislation in Congress . . . Congress may arrogate those powers of legislation which are the peculiar muniments of State organizations."

The proposal was redrafted, but Rogers found the same defect in the reiteration: the amendment "saps the foundation of the Government; destroys the elementary principles of the States; it consolidates everything into one imperial despotism." Democrat Samuel J. Randall of Pennsylvania concurred: the revised amendment "proposes to make an equality between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue."

The division of governmental authority was at the root of another nascent distinction, one eventually to predominate in constitutional law and theory. The proposed Enforcement Act of 1871 was known also as the Ku Klux Klan Act, for it largely targeted the oppressive activities of that organization. But the federal bill, Indiana congressman Michael Kerr complained, criminalized activities that were done not "under color of state law," but merely by "private" individuals; thus "jurisdiction is snatched from the State, and the work of centralization or anarchy goes on." Illinois congressman Jesse H. Moore was among the Republicans who concurred: "If Congress has the power thus to prescribe a criminal code for the punishment and redress of private wrongs in the several States, it does seem to me that the whole machinery of State government is superseded, that there is no power reserved to the several States, and that there is an end of the division of powers between the General and State governments."

Sumner's public accommodations bill, its opponents insisted, went farther still. It was, Delaware's Thomas F. Bayard claimed, "the quickest and longest stride toward centralized power which has been presented to our people." Kentucky congressman Milton J. Durham insisted that the bill "interferes with State-rights and State sovereignty." "Social relations," after all, were a matter of "local legislation or of private contract,"—and, importantly, "local" legislatures knew when not to interfere:

when you undertake to legislate as to the civil and social relations of the races, then you will have aroused and embittered the feelings of the Anglo-Saxon race to such an extent that it will be hard to control them.
The poorest and humblest white person in my district feels and knows that he or she belongs to a superior race morally and intellectually, and nothing is so revolting to them as social equality with this inferior race.

By the end of Reconstruction, another defense of the old order was reemerging. Emancipation had long been challenged as an affront to property; now, so too was antidiscrimination. Sumner’s "social equality bill," it evolved, abridged not merely the individual right to choose one’s social relations, but also the right to control one’s property. Congressman John A. Smith represented the Old Dominion: as he explained, his right to discriminate was a natural property right; even state law—and ipso facto federal—was powerless against it. "[W]here is the boasted right of property," he asked,

what becomes of its sanctity, if any human power, even that of my own State, can prescribe to me whom I shall admit to my hotel and whom I shall exclude? . . . Sir, I hold that the right of property is so sacred that the Legislature of my State itself cannot dare to say to me, though one of her citizens, that I shall not decide for myself whom I shall admit to and whom I shall exclude from my hotel. . . . And so, sir, of my stage-coach, my steamboat, my theater—they are my property. (Emphasis in original)

The essence of each complaint, in sum, was that it represented a radical departure from some immutable principle of government. Natural rights in property, the inexorable division of federal and state powers, and an immutable social and natural order all kept intact the white man’s government. All were deeply rooted in the national tradition, and all, in spite of Reconstruction, remained permanently enshrined in the constitutional scheme. "I believe," said West Virginia senator Peter G. Van Winkle, "the constitution of society was given to man by the Creator at the time it was instituted, and that whatever conditions were imposed at that time are those to which men should endeavor to live up." New York congressman Robert S. Hale thus complained that the Fourteenth Amendment "is an utter departure from every principle ever dreamed of by the men who framed our Constitution," while Delaware senator Thomas F. Bayard lamented that "the founders of this Government would have shuddered at such propositions as we now see." When John B. Henderson of Missouri proposed the Fifteenth Amendment, Delaware’s elder Saulsbury
sarcastically raised a point of order: "It is that it is not in order now to attempt to amend the Constitution, that instrument having been blotted out of existence long ago."

Maryland Democratic senator George Vickers explained his party’s opposition to the Fifteenth Amendment this way:

[it] is said that the Democratic party is not a progressive party . . . the Democratic party is not a progressive party because the Constitution is not progressive; the principles of the Constitution are now just as they were when they came from the hands of our fathers; they are plain, explicit, and well defined; and a party which stands upon the Constitution cannot, in relation to constitutional questions, be a progressive party.

Not everyone was interested in preserving the "white man’s government." Some, in fact, were certain that there was no such thing. In 1866 Republican senator Daniel Clark of New Hampshire explained his support for black suffrage:

Mr. President, I am not one of those who believe or assent to the declaration that this is the Government of the white man, and then offer it as an excuse for neglecting or ostracizing the black man; but I hold it to be the government of all men, and for all men and all classes of men. It is its crowning glory that no citizen or person living under it is so high or so powerful that he can refuse or deny its obligation; and none so low that its protection cannot reach him. Its great strength is in its universality of its principles, and its chief danger in attempts to narrow, contract, crib, and confine their application.

In the House, John H. Broomall of Pennsylvania explained that the "white man’s government" was a Democratic myth of recent vintage:

[Modern Democratic political science discovered and promulgated the dogma that this is the country of the white man, and that no other man has rights here which the white man is bound to respect. When, therefore, this peculiar science culminated in an attempt to overthrow the Government, and was itself overthrown, it is as well that a return to the principles of the founders of the Government should be made manifest to future generations by a declaration upon the statute-books.]
Broomall had one final challenge: "Let those who say with the air of such omnipotent authority that this is the country of the white man, explain how it happened that the Ruler of the universe suffered it to be occupied by the red man for countless ages of the past." "No, our country is the country of its inhabitants," Broomall concluded. "Our Government the Government of the governed."

That the Democrats should seek to vindicate their white man's government through continued reliance on the Supreme Court's decision in *Dred Scott*—"that masterpiece of elaborate inhumanity"—left Charles Sumner incredulous: the decision had been wrong when it was first announced, and it had been undone by constitutional Reconstruction. "Is this a white man's Government," Sumner asked, "or is it a Government of 'all men,' as declared by our fathers? Is it a Republic of equal laws, or an oligarchy of the skin?" Sumner was sure that the Fourteenth Amendment offered the conclusive response. Senator Lot M. Morrill of Maine insisted that "this idea of race in the Government of the United States is an absurdity. There is no such thing. Is there any race or color in the Declaration of Independence? Is there any race or color in the Constitution of the United States?" Jacob Benton of New Hampshire demanded, "Away with that dogma—a white man's government; it was born of slavery, let it be entombed with it. As a principle it is narrow, illiberal, anti-republican, unconstitutional, and all unworthy of a liberal and progressive age, in the high noon of the nineteenth century."

And it was, Republicans insisted, a progressive age. If the original construction of the nation had permitted the myth of the white man's government, then a reconstruction was clearly in order. Frederick E. Woodbridge of Vermont supported the Fourteenth Amendment to the Constitution:

I have the highest opinion of that great charter which was founded by our fathers. But, sir, the age is an age of progress. The conditions of society are different from what the fathers anticipated; and I fully believe that if we meet the obligations which we owe to the country, we must pass an amendment of this or a similar character.

Hiram Price of Iowa also supported the amendment and was growing weary of the appeals to the sacred intent of the "founding fathers." "[G]entlemen rise here and talk about the Constitution of our fathers,"
Price commented, "and I have heard them talk about it here until if I had been a believer in ghosts I would have supposed that our fathers who have been invoked so loudly would have come from the grave to see what was wanted of them." The "fathers," Price observed, may well have thought their charter sufficient to protect the rights of all citizens. "But experience, though it may be a dear school, is one of the best that any man, whether he be foolish or wise, was ever taught in, and the experience of the last quarter of a century ought to have satisfied any gentlemen that the Constitution has not afforded that protection." "I am not one of those," Price concluded, "who believe that we are not to learn anything as we pass through this world."

John Bingham insisted in support of his proposed Fourteenth Amendment that the generation that abolished slavery should not itself be slaves to the past. "I believe," he said, "that the people of the United States have intrusted to the present Congress in some sense the care of the Republic, not only for the present, but for all the hereafter."

If they were willing in some sense to reject the heritage of the founders, it was only because they were certain that they were realizing the nobler aspects of that same heritage. In January 1866 Bingham had insisted that "[t]he spirit, the intent, the purpose of our Constitution is to secure equal and exact justice to all men"; the Fourteenth Amendment merely made this explicit. George F. Miller of Pennsylvania contended of the guarantees contained in the first section of the Fourteenth Amendment that "it is so just, that no State shall deprive life, liberty, or property without due process of law, nor deny the equal protection of the laws, and so clearly within the spirit of the Declaration of Independence of July 4, 1776, that no member of this House can seriously object to it." Luke P. Poland of Vermont insisted that the same guarantees were "essentially declared in the Declaration of Independence and in all the provisions of the Constitution." William Higby of California maintained that the Fourteenth Amendment "will only have the effect of giving vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality, but which have received such a construction that they have been entirely ignored and have become as dead matter in that instrument."

As Higby suggested, the framers of Reconstruction were determined to at long last resolve the "constitutional contradiction." Principle this
time would not yield to slavery; slavery—and its incidents—would yield to principle. William Windom of Minnesota stood in support of the civil rights bill of 1866. "A true republic," he maintained, "rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black. Upon this, the only foundation which can permanently endure, we professed to build our Republic; but at the same time we not only denied to a large portion of the people equality of rights, but we robbed them of every right known to human nature." The civil rights bill, Windom contended, was one of the first efforts "to grasp as a vital reality and embody in the forms of law the great truth that all men are created equal." "Sir, our duty is clear," he concluded; "let no man falter in its performance."

Thaddeus Stevens introduced the Fourteenth Amendment for debate in the House on May 8, 1866. The Joint Committee, he noted, "expected to suggest a plan for rebuilding a shattered nation." It necessitated a genuine reconstruction:

It cannot be denied that this terrible struggle sprang from the vicious principles incorporated into the institutions of our country. Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now. But the public mind has been educated in error for a century. How difficult in a day to unlearn it. In rebuilding, it is necessary to clear away the rotten and defective portions of the old foundations, and to sink deep and found the repaired edifice upon the firm foundation of eternal justice.

They were not dissuaded in their efforts by the too-convenient complaints about federal power. Where were those complaints, they asked, when Congress was passing fugitive slave laws? "States' rights," a "central despotism"—it was all mere verbiage. As Lyman Trumbull responded to Garrett Davis, "The Senator chooses to regard everything to be outside the power of Congress by denouncing it as such."

They insisted as well that the conception of federal power that inhered in the public-private distinction was simply outdated. Opposing Reconstruction's last civil rights bill in 1871, Congressman Kerr of Indiana had denied Congress's power to regulate "private" individuals; that, he had insisted, was the exclusive province of the states. "My honorable friend," Bingham responded, "discussed this question, upon the Constitution as it was and not upon the Constitu-
tion as it is." "The powers of the States have been limited by the last three amendments to the Constitution, and the powers of Congress extended by the last three amendments to the Constitution." Among Congress's powers, Bingham insisted, was "a power to protect the rights of citizens against States, and individuals in States, never before granted."

They disputed all the various fictions. It would no longer suffice, they insisted, merely to declare equality, they needed to realize it. Initially, this meant a refusal to accept the Democratic proposition that slavery had ended with its formal abolition. Practically, they noted, slavery endured. The "Report on the Condition of the South," submitted to Congress by Major General Carl Schurz on December 19, 1865, documented the persistence of the old order and the need for congressional action. "[W]hile accepting the 'abolition of slavery,'" the report concluded, the old masters "think that some species of serfdom, peonage, or some other form of compulsory labor is not slavery, and may be introduced without a violation of their pledge." "There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose," the report continued. "Even the mere reorganization of the militia upon the old footing will go far towards accomplishing the object."

Massachusetts senator Henry Wilson observed that "the law of Mississippi makes every one of these men whom we have made free practically a slave, and he is in a worse condition today than he was when he was a slave, because his master had some interest in protecting and caring for him." Ignatius Donnelly of Minnesota reviewed the "black codes" of Alabama, Mississippi, South Carolina, Tennessee, and Virginia, and concluded that "this means simply the reestablishment of slavery." The Democrats argued that under the Constitution, Congress could do no more than proclaim slavery's demise, merely terminate the "status" of slavery. Lyman Trumbull, Chair of the Judiciary Committee, saw it differently; if the Democratic construction was correct, and we have merely taken from the master the power to control the slave and left him at the mercy of the State to be deprived of his civil rights, the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound," and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the
amendment itself. With the destruction of slavery necessarily follows
the destruction of the incidents to slavery. When slavery was abolished,
slave codes in its support were abolished also.

"Those laws," Trumbull explained, "that prevented the colored man
going from home, that did not allow him to buy or sell, or to make
contracts; that did not allow him to own property; that did not allow
him to enforce rights; that did not allow him to be educated, were all
badges of servitude made in the interest of slavery and as a part of
slavery." "They never would have been thought of or enacted
anywhere but for slavery," he concluded, "and when slavery falls they
fall also."

So the Republicans offered the first civil rights bill. Pennsylvania's
Martin R. Thayer explained that the bill "is intended only to carry
into practical effect the amendment of the Constitution. Its object is
to declare not only that slavery shall be abolished upon the pages of
our Constitution, but that it shall be abolished in fact and in deed."
The bill simply had to be authorized by the amendment ending
slavery; "[t]o put any other construction upon this great amendment
of the Constitution is to deprive it of its vital force, of its effective
value. It is to cheat the world by sounding phrases; and while you
pretend to give liberty to those who were in bondage, to leave them
in reality in a condition of modified slavery."

The Fourteenth Amendment secured the promise. On January 9,
1866, Bingham had announced,

I propose, with the help of this Congress and of the American people,
that hereafter there shall not be any disregard of that essential guarantee
of your Constitution in any State of the Union. And how? By simply
adding an amendment to the Constitution to operate on all the States
of this Union alike, giving to Congress the power to pass all laws
necessary and proper to secure to all persons—which includes every
citizen of every State—their equal personal rights.

William P. Fessenden, Senate chair of the Committee of Fifteen, was
in ill health on May 23, so it was Jacob M. Howard of Michigan who
addressed the Senate. The members of the committee, Howard
informed the Senate, "have instituted an inquiry, so far as it was
practicable for them to do so, into the political and social condition of
the South." "One result of their investigations" was the proposed Fourteenth Amendment.

As Howard suggested, the amendment was moved by practical concerns, by the very real conditions of "political and social" life that obtained in the South. Its advocates, accordingly, championed a very practical conception of equality, one designed to meet the real needs of the freedmen, one that could not be cabined by the neat rhetorical distinctions offered by Reconstruction's opponents.

It manifestly did not distinguish between "private" and "public" life, if only because the inequalities forced on black Americans did not respect the distinction. Schurz's report observed that "'[a] spirit of bitterness and persecution manifests itself towards the negroes. They are shot and abused outside the immediate protection of our forces by men who announce their determination to take the law into their own hands, in defiance of our authority'" (emphasis in original). Planters, the report noted, were enforcing sharecropping contracts that required virtual "peonage"; law, custom, and practice blended to prevent the freedmen from buying or renting property or residing in the community unless employed by a white person; one Louisiana law provided that "it shall be the duty of every citizen to act as a police officer for the detection of offenses and the apprehension of offenders" (emphasis in original). The House Committee on Freedmen's Affairs "Report No. 30 on Bureau of Freedmen and Refugees" documented the scope and intensity of white hostility—the threats, violence, and murders. Local sheriffs were routinely among the conspirators; judges and justices of the peace were largely indifferent. It noted ominously the reports "of a secret organization named the 'Ku-klux Klan,' the object of which is believed by the negroes to be their extermination or expulsion."

So much of the "private" oppression of the freedmen was done with the acquiescence or assistance of "public" authority that the distinction was in reality meaningless. It did not matter, the Republicans insisted, whether the state perpetrated the harm on its own or tolerated harm done by others: its duty was to afford "equal protection."

"It is said," observed Kansas congressman David P. Lowe, "that the States are not doing the objectionable acts. This argument is more
specious than real. Constitutions and laws are made for practical operation and effect." In practice, Lowe observed, the states had denied equal protection by permitting the harms against the freedmen; such wrongs simply had to be within the meaning of the equal protection guarantee. "What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?" After all, as Senator Oliver H. P. T. Morton observed, "[a] criminal law cannot be made against a State. A State cannot be indicted and punished as such. The legislation which Congress is authorized to enact must operate, if at all, upon individuals."

New Jersey senator Frederick T. Frelinghuysen explained that "A state denies equal protection where it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making laws." Indiana senator Daniel D. Pratt concurred: "when the equal protection is withheld, when it is not afforded, it is denied." Indiana congressman John Coburn insisted that "The failure to afford protection equally to all is a denial of it." And Henry Wilson insisted that "whether that failure is the result of inaction or inability on the part of one or the other of the coördinate branches of the State government, the remedy lies with Congress."

They also refused to accept the bizarre logic by which the remedy for inequality could somehow be an inequity in its own right. The effort to realize equality, they insisted, meant neither that the black race was to be the "special favorite" nor that the white race was to be degraded. Henry Wilson explained the concept of equality behind the Freedmen's Bureau bill: "the poorest man, be he black or white . . . is as much entitled to the protection of the law as the richest . . . is as much entitled to have [his wife] protected by equal law as is the rich man . . . the poor man's cabin . . . is entitled to the protection of the same law that protects the palace." "[W]e have advocated the rights of the black man," Wilson explained, "because the black man was the oppressed type of the toiling men of this country." But, he continued, "[t]he same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man." Responding to Edgar Cowan of Pennsylvania, Wilson continued:
The Senator tells us that if all men were equal and all men were learned, we could not get our boots blacked. I believe Henry Clay uttered that folly upon one occasion, and I am not surprised that the Senator should repeat it. It has been the language of the negro drivers in this country for sixty years—of the men who had just as much contempt for the toiling white millions of the country as they had for their own black slaves.

In similar fashion, the Republican Congress rejected Andrew Johnson's veto of the civil rights bill. Trumbull questioned whether it was true, as Johnson had claimed, that the bill "discriminate[s] in favor of the colored person." "Why, sir," he exclaimed,

the very object and effect of the section is to prevent discrimination, and language, it seems to me, could not more plainly express that object and effect. It may be said that it is for the benefit of the black man because he is in some instances discriminated against by State laws; but that is the case with all remedial statutes. They are for the relief of the persons who need the relief, not for the relief of those who have the right already; and when those needing the relief obtain it, they stand upon the precise footing of those who do not need the benefit of the law.

Then there was the inevitable complaint about the inevitably vague "social equality." "The bugbear of 'social equality,'" observed South Carolina congressman Alonzo Ransier, "is used by the enemies of political and civil equality for the colored man in place of argument." Even some Republicans had criticized the public accommodations bill as a "social equality" bill. Charles Sumner responded that "This is no question of society; no question of social life; no question of social equality, if anyone knows what this means. The object is simply Equality before the law."

There was, in truth, a certain hypocrisy to the complaints about "social equality," as there was with its predictable corollaries, "amalgamation" and "miscegenation." Black Americans, after all, had never evidenced any great desire to enter the "drawing rooms" of white Americans; their desperate desire, on the contrary, had always been to keep their white oppressors out. Black legislators helped make this clear. Congressman Richard H. Cain of South Carolina had been among the leading figures at the 1864 National Convention of Colored
Citizens; a decade later, he assumed the House floor to explain to a Democratic colleague why black Americans were perfectly willing to forgo "social equality":

The gentleman harps upon the idea of social equality. Well, sir, he has not had so much experience of that as I have had, or as my race have had. We have some objections to social equality ourselves, very grave ones. For even now, though freedom has come, it is a hard matter, a very hard matter, to keep safely guarded the precincts of our sacred homes. But I will not dwell upon that. The gentleman knows more about that than I do.

Mississippi congressman John Roy Lynch concurred: "it is not social rights that we desire. We have enough of that already."

Finally, the advocates of Reconstruction refused to be deceived by the beguiling promise of "separate but equal." Nearly eighty years before Brown v. Board of Education, Lynch rose in support of Sumner's comprehensive public accommodations bill. The congressman, held in slavery at the time of the great emancipation, explained why "mixed" schools were needed, why separate schools were, in truth, not equal:

Above all, the framers of Reconstruction recognized the dangers that inhered in subservience to ideology or abstraction. As Henry Wilson put it, "In the present condition of the nation we must aim at practical results, not to establish political theories, however beautiful and alluring they may be." Too often, after all, the abstraction was merely a guise; as Pennsylvania congressman Martin R. Thayer noted of New Jersey's Andrew Rogers: "He is for the protection of these men, but he is against every earthly mode that can be devised for protecting them." Equally often, the legalisms obscured the more fundamental truths. Senator Richard Yates of Illinois, himself a
lawyer, observed that "the people do not understand that argument which says that Congress may confer upon a man his civil rights and not his political rights. It is the pleading of a lawyer; it is too narrow for statesmanship."

They were after something more, something that transcended ideology, that could not be contained by formalism, that could not be realized through any single canon of construction. William Lawrence of Ohio was also a lawyer: "if we shall give to the Constitution that interpretation which its language requires," he offered, "which is approved of justice, humanity, and God, then we may hope that the men of today and of all time will enjoy its benefits and blessings forever."

They were after something real. Because the end of the old "natural order" promised a better one. "Peace," Henry Wilson said, "can only come in all its power and beauty by the complete triumph of equality and justice."

**Legal Fiction**

The final Civil Rights Act of the first Reconstruction, Charles Sumner's public accommodations bill, was passed in 1875; eight years later the Supreme Court declared it unconstitutional. The arguments Justice Bradley used to discredit the law were largely those the Democrats had marshaled unsuccessfully against it: the Thirteenth Amendment prohibited slavery, not racial discrimination; the Fourteenth Amendment prohibited state action, not private acts of discrimination; Congress could remedy the wrongful acts of the states, not invade their domain to compensate for their inaction. Black Americans, Bradley insisted, must cease to be "the special favorites of the law." All the claims that the Reconstructor had struggled against—triumphant here in the end.4

Sumner was not alive to protest; he had died in the spring of 1874, pleading from his deathbed on behalf of his bill. Henry Wilson was gone too; serving as Grant's vice-president, Wilson had died in the Capitol Building in November 1875. Thaddeus Stevens, perhaps the most radical of Republicans, had died in the summer of 1868; William Fessenden, chair of the Joint Committee on Reconstruction, died in the summer of the following year. Reconstruction, for that matter,
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was dead too. The Compromise of 1877 killed it; the Supreme Court’s decision in the Civil Rights Cases was just an epitaph.5

The first Redemption was a near total victory for the old order, and it was very nearly a lasting one. Not till halfway through the next century would the nation try again. This time, the Supreme Court helped lead the way. The second Reconstruction desegregated the schools and outlawed racial discrimination not only by governmental actors, but also in public accommodations, housing, and employment. The contrary voices sounded familiar themes: "states’ rights," "private rights," "no social equality." Folks didn’t much argue on behalf of the "white man’s government"; they talked instead of "tradition" and "order." But we knew what they meant.

The second Reconstruction lasted about as long as the first. Within a generation, the contrary voices were carrying the day. Desegregation, it was said, compromised local autonomy: "neighborhood schools" easily triumphed over "forced busing," and desegregation ground to a halt. Racial minorities, it was said, were once again the "special favorites of the law": "color blindness" was an easy winner over "reverse discrimination," and affirmative action fell into disrepute. By the time the second Redemption was complete, writers were proclaiming the "end of racism," and the Supreme Court seemed eager to agree.

There was no denying, of course, that we were still far from equal. Some writers explained that it was only natural: the "bell curve" of intelligence was merely reflected in a "bell curve" of social success. Racial disparities in the latter, alas, reflected principally the racial disparities in the former. Even the corruption of the "white man’s government" would not deny the superior race its due: wrongheaded egalitarianism was helpless against the "natural order." Again, the Supreme Court seemed to agree. "Government," one of its members confidently proclaimed, "cannot make us equal."6

But he misspoke, just slightly. It is not so much that government can not make us equal: almost certainly it can—it made us, after all, unequal in the first place. It is rather that government may not make us equal—may not, because the law won’t let it.

This is the sad truth of American constitutional law in its current iteration: not only does it not require equality, it does not even permit the effort to attain it. The Supreme Court simply won’t allow it. It frustrates the effort with a familiar array of distinctions, disclaimers,
and diversions—the same legalisms that have sustained the "natural order" through each attempt at Reconstruction. It is law at its worst, divorced from reality, divorced from its moral foundation. Law as rhetorical device: legal fictions. Here, briefly, are just a few.

Federalism and Separated Powers

At some point in nearly every modern "race" case, the Supreme Court is likely to advise that the complaints of racial inequity are either: better addressed to the political branches; matters of state or local concern, or maybe matters of federal concern, but certainly not the business of whichever government has foolishly addressed the racial issue in the immediate case; or best left to the discretion of whichever public official has exercised it in a racially discriminatory matter. Thus the opinions include paean to local school board authority, to state legislative processes, to prosecutorial discretion, and, when convenient, to congressional expertise—in short, to the unique competence of every public institution in America except the federal courts.7

The problem here is not so much conceptual. Of course, the judiciary is not omnipotent: it must accord due deference to the political branches and political processes. It is equally true that the federal government does not have unlimited powers: those not delegated to it by the Constitution remain the reserve of the states. The difficulty is with the utterly arbitrary—and at times simply perverse—deployment of these concepts to frustrate the effort to realize equality.

Consider, first, the role of the courts. It is fairly well settled that in the ordinary course of events, the political branches, state or federal, are entitled to considerable deference when the judiciary reviews the constitutionality of their actions. Typically, this takes the form of a presumption that the acts are constitutional and a modest requirement that the political actor provide a de minimis explanation for its actions, that it explains, for example, why an act of discrimination seemed a "reasonable" way to achieve some "legitimate" end. As the Supreme Court’s decisions generally suggest, this showing is easily made: almost any logical nexus between the act of discrimination and some plausible purpose will suffice to justify the act.
It is equally well settled that somewhat different rules should obtain when a case implicates the unique functions of the judiciary in a constitutional democracy. The Constitution, after all, explicitly places some rights beyond the reach of the political process: thus a lesser presumption of constitutionality obtains when "fundamental rights" are implicated, and a more compelling justification must be offered when the state attempts to deprive them. Similarly, acts that discriminate against certain minority groups are suspect: groups that historically and in contemporary life are vulnerable to invidious discrimination may often need the special solicitude of the courts to protect them from the majoritarian processes. Accordingly, discrimination against these minority groups also requires a compelling justification.  

It rings a little hollow, then, when the Supreme Court responds to complaints from politically vulnerable groups, especially long-suffering racial minorities, that their grievances are best addressed to the political processes. Justice Thurgood Marshall dissented from the Supreme Court's decision to defer to a Texas school financing scheme that disadvantaged the schoolchildren—disproportionately racial and ethnic minorities—in relatively poor districts. The need for reform is apparent, Justice Powell had written for the Court, but "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." But as Marshall explained, "The disability of the disadvantaged class in this case extends as well into the political processes. . . . [L]egislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo." "The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts," Marshall concluded. "The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified discrimination."  

The Court's response to "affirmative action" provides an illustrative contrast. No deference at all was granted the Richmond City Council when it acted to benefit minority contractors; and now, after the Court's most recent decision on the matter, no deference is due Congress when it acts to benefit racial minorities. It is fair to ask precisely what vision of constitutional democracy compels the Court to view with heightened suspicion majoritarian actions designed to
redress the grievances of minorities. Stated in other words, why do white contractors need or deserve greater judicial protection than, for example, the children of Texas's poor school districts?

The concept of federalism evinced in the Court's decisions—in paens to "local control," "state authority," and the like—is, if anything, even more incoherent. The original Constitution, of course, did construct a central government of limited powers. But it is important to recall that the Philadelphia convention was called precisely because the initial Confederation had left too much power in the states. Thus Madison warned at the Philadelphia convention that the Constitution must explicate the supreme power of the federal government as a check on the "centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system."10

Madison, of course, abandoned his "high nationalism" shortly after the convention, but the work was already done. The Supreme Court, under John Marshall's stewardship, rejected the lingering claims of "states' rights" and "state sovereignty": the Constitution, Marshall noted, was ratified by conventions of the people, not by the states. That did not exactly end matters: in 1832, to cite the most famous example, the federal tariff prompted John Calhoun to argue quite unsuccessfully for South Carolina's power of nullification; but ten years later, when Justice Story sustained the constitutionality and supremacy of the federal Fugitive Slave Acts, there were very few complaints from the slave South. "States' rights" arguments arose only when the federal power was a threat to the peculiar institution, and after Lincoln's election, when that threat was great enough, the arguments culminated in secession.11

Reunion and Reconstruction should have ended the matter. But "states' rights," of course, remained a significant argument against each act of Reconstruction and, for that matter, of the second Reconstruction in the mid-twentieth century. The historical coincidence of "states' rights" arguments with pro-slavery, pro-discrimination, and pro-segregation politics is enough to make their revival in recent Supreme Court decisions at least a bit, well, unseemly. Context matters when Chief Justice Rehnquist insists that local schools must be saved from the "Draconian remedy" of "indefinite judicial tutelage" in a desegregation case, or when Justice Scalia, in another desegregation case, insists that "[w]e must soon revert to the ordinary principles of
... our democratic heritage"—"that public schooling, even in the South, should be controlled by locally elected authorities." Again, the principle is unobjectionable in the abstract: but law is not made in the abstract.\textsuperscript{12}

Frankly, it does not have much to do with principle anyway. Again, the affirmative action cases make this clear. In 1980 the Supreme Court upheld a federal set-aside program for minority contractors; under the Fourteenth Amendment, Chief Justice Burger said, Congress was entitled to considerable deference. But in 1989 the Supreme Court invalidated a similar program, this one enacted by the Richmond City Council. In explaining the distinction, Justice O'Connor relied upon a sort of reverse federalism:

Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.

"We simply note," O'Connor concluded, "what should be apparent to all—§1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; §5 is ... 'a positive grant of legislative power' to Congress." Indeed, it was "apparent" also to Justice Scalia: "A sound distinction," he wrote, "between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory."

The following year, Justice Brennan relied upon precisely this distinction to uphold another federal affirmative action plan. O'Connor and Scalia were among the dissenters. But in 1995 they had their majority again, and they overruled the Brennan decision. "Congruence," O'Connor wrote for the Court, requires that affirmative action plans enacted by the federal and state governments receive the same scrutiny. Neither she nor Scalia explained their apparent change of heart. "Ironically," Justice Stevens wrote in dissent, "after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today
virtually ignores the issue. It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases.\(^\text{13}\)

The prior opinions became like the Reconstructions themselves: it was as if they never were.

The Public/Private Dichotomy

There is a world imagined by American constitutional law. It is a world of free markets, unrestricted by the state; a world of free individuals, unencumbered by their government. It is a world in which the law plays no discernable role, a realm of social and economic life in which the people, freely, make their own way. The winners and losers in this world are not the "special favorites of the law"; they are the ones who deserve to win, naturally. Legal rules, egalitarian or otherwise, are powerless here, in the realm of the "private."

Such a world, of course, could hardly exist. As a general matter, there are no purely private choices and no truly free markets. There never were. The political Progressivism of the late nineteenth and early twentieth centuries forced perhaps the most coherent defense of the non-interventionist ideal, and for a while, social Darwinism and laissez-faire economics had their day. But as John Whiteclay Chambers notes, the defense of the self-regulating market at the dawn of the Progressive Era was already somewhat embarrassed by certain political truths: federal land grants to railroads, protective tariffs, the efforts to stabilize currency, and, as the labor movement grew, overt antiunion actions, including the deployment of federal troops to suppress strikes. Yes, there were "private" rights in free-market America, but they were created and carefully maintained by public action.\(^\text{14}\)

In the specific context of the struggle for equality, however, the "public-private" dichotomy does have a certain "textual" justification. The Fourteenth Amendment provides that no "State" shall deny the equal protection of the laws; the constitutional claim, then, is necessarily premised on some action or omission by the state that effectuates a denial of its duty to equally protect. There must be, then, some public action—or inaction—as a predicate to a constitutional complaint.
There was plenty of both in the postbellum South: the States enforced, encouraged, and acquiesced in a comprehensive scheme of social and economic oppression of the freedmen. It was neither purely "private" nor always overtly "public," but to the framers of Reconstruction, it hardly mattered: if the states weren't actually doing it, they were darned sure not doing enough about it. Either way, the framers deliberately explained, the states were denying the freedmen the "equal protection" of the law.

But Justice Bradley's opinion in the Civil Rights Cases rejected this understanding—an understanding he himself seemed to share both before and after the decision—and transformed the "State denial" requirement, by action or inaction, into one of "State action." The rigid public-private dichotomy that resulted had no foundation in the text or history of the Fourteenth Amendment, and it certainly had no experiential foundation; it was, however, a convenient fiction for preserving the principles of the Compromise of 1877. In the process, what was virtually a tautology—there was always some state action or inaction—became a hopeless abstraction and, ultimately, lifeless dogma. As long as "the state" was not guilty of overt formal discrimination, there was no inequality for purposes of the Constitution.

One of the most significant achievements of the second Reconstruction was in realizing the obvious influence of the state on what Justice Bradley—and the anti-Reconstruction Democrats who preceded him—had insisted was purely "private." Thus in 1948 the Supreme Court found "state action" where state courts enforce private discrimination through racially restrictive deed covenants; in 1958, where state officials encourage or cause private racial discrimination; and in 1961, where state agencies are integral participants with private actors in a scheme of racial discrimination, or where they fail to prevent or remedy that discrimination.15

Through it all, the Court avoided an outright repudiation of Bradley's public-private dichotomy: it just always found sufficient public action. But reconciling theory and practice is not easy when the theory has no practical integrity; the result was language like this, from a unanimous opinion of the 1983 Court:

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We
have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."16

In the past few decades it has become increasingly clear that the public-private dichotomy is very much alive in constitutional decision-making; indeed, the current Court has reasserted it with a vengeance. The recent trilogy of "race" cases is illustrative. Segregation now is not de jure—the product of public action—but de facto—the product of "private decision-making and economics": as such, it is beyond the reach of the federal courts. Economic inequities now are caused not by state actors, but by private decisions, either "societal discrimination" or idiosyncratic "entrepreneurial choices": as a consequence, there is no justification for racial preferences, set-asides, or other remedial legislation. Voting habits now reflect individual decisions, not the logical collective response to a shared experience of official suppression: as such, it is "demeaning" to suggest that there is a "black" political community.

The sub-text to the re-sanctification of the private realm—of private choices, private markets, private decisions—is the vindication of a social and economic order that exists independent of this state action: a natural meritocracy, a natural order. So, in desegregation cases like Missouri v. Jenkins, white students attend nearly all-white schools because their parents, after all, can afford to live in suburban (read "better") neighborhoods, and they outperform their minority counterparts in conventional measures of achievement because they are, after all, academically advanced (read "better"). In affirmative action cases like Adarand Constructors, Inc. v. Pena, white contractors routinely are awarded contracts because, after all, they submit the lower (read "better") bids. In voting rights cases like Miller v. Johnson, white candidates keep winning elections from white electoral majorities because they are, after all, the more popular (read "better") candidates. Socially, academically, economically, and politically, superior efforts and superior talents yield their just rewards.
Of course, there is another perspective, one that recognizes the long-standing role of public forces in shaping the racial hierarchy. It is not a matter of "merit": it is much more a matter of carefully cultivated advantage. Desegregation cases like *Jenkins* suddenly look quite different in this view: residential options, it emerges, have been shaped by generations of official and unofficial segregation, and academic achievement by generations of educational deprivation and cultural hegemony. Affirmative action cases like *Adarand* look different as well: bidding possibilities, it emerges, are limited by the economic realities of bonding requirements, insurance premiums, the economies of scale, and the pervasive network of business connections, realities forged in the long history of economic racial oppression. And new understandings inform voting rights cases like *Miller*: electoral success, it emerges, is fairly traceable not only to the carefully manufactured public obsession with race, but more specifically to well-documented official actions creating minority neighborhoods while simultaneously precluding the possibility of minority electoral districts. There is nothing natural or neutral about any of this: merit, in fact, is not merely contingent, it is racially biased. As the title character of Richard Delgado's *The Rodrigo Chronicles* exclaims, "Merit sounds like white people's affirmative action!"17

Delgado's work adds an important experiential element to the critique of "state action": as Delgado writes, "[w]e know, indeed we live, the bogus public-private distinction." Indeed, the sanctification of "private choices" looks particularly bogus from this perspective. Black schoolchildren, after all, do not choose to attend segregated schools; black contractors do not choose an economic scheme that gives their white counterparts seventy-five contracts for their every one; and black voters do not choose to share a common political interest forged by the history and contemporary reality of social and economic oppression. The world too often is not the world subordinated people choose to live in, but is instead the world chosen for them.18

Similar criticisms may be leveled against the doctrinal requirement that discrimination be "purposeful." The requirement mirrors the futile search for an individual with the true freedom to act in a truly free market. Quite aside from its failings either as an evidentiary requirement or as a policy tool, the intent requirement depicts a world far removed from the world in which the victims of racial discrimina-
tion live. Its focus on the state of mind of the discriminatory actor is, first, quite irrelevant to the experience of discrimination—and, as a consequence, to the fact of inequality—and, second, quite difficult to square with contemporary understandings of human behavior. As Charles Lawrence notes:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmakers' beliefs, desires, and wishes—nor unintentional . . . . We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation. 19

The cultural context in which these un- and subconscious beliefs and motivations are formed is, of course, significantly the product of official actions. Indeed, law, in all its forms, made "race."

The question begged by all these cases is essentially one of responsibility: when should "the state" be accountable either for the disparate impacts of its own actions (i.e., for discriminatory "effects," whatever the anthropomorphic "intent") or for discrimination not obviously its own (i.e., discrimination that might in part be characterized as "private" or "societal")? The two scenarios tend to collapse in practice: schools are in fact racially segregated, markets are in fact racially skewed, votes are in fact cast along racial lines, and the central question—whether it is conceived in terms of "intent" or "causation"—is whether the state is obliged or permitted to do something about it.

The difficulty with the Supreme Court's approach to these issues is that it has treated the question of "responsibility" as an empirical one: is there evidence of some intentional state action? But state action, even if it is not conceived of in the broad terms envisioned by the Fourteenth Amendment's framers, is everywhere; the question becomes, invariably, one of degree. Attempts to reframe the question in quantitative terms—how much state action is there? how intentional is it? how significant a causal factor is it?—inevitably fail. And they should, because, in the final analysis, the question is not an empirical one at all.
The question is not whether the state intentionally caused discriminatory behavior, or demographic changes, or racial disparities in hiring, firing, or voting: of course it did _not_—entirely—but of course it _did_—in some respects, to some extent. The question is whether, given the nature of the state participation, the severity of the harm, and the necessity and likelihood of redress, it is right and proper to demand or at least permit remedial action by the state. This is not empirical; it is political. It is maybe even moral. And the answers we have been giving are simply embarrassing.

**Tradition**

In 1896 the Supreme Court upheld Louisiana's "equal but separate" rail accommodations law. Justice Brown explained:

> the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.

Brown did not explain whose "traditions" he was upholding; it was clear, however, which groups constituted "the people" for purposes of his inquiry.20

Fast-forward a century. The Court has ruled that separate is inherently unequal, but its commitment to the desegregation effort appears in doubt. Concurring in a desegregation case, Justice Antonin Scalia writes,

> We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our education tradition: that plaintiffs alleging Equal Protection violations must prove intent and causation and not merely the existence of racial disparity; that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents; and that it is "desirable" to permit pupils to attend "schools nearest their homes."21
Again traditions: legal, political, and social. But whose are they, really? In what sense are they truly "ours"?

There is a danger that lurks behind these invocations of "our" traditions. Not all these traditions will well serve all the people all the time. Traditions nearly always exclude; traditions very often suppress; traditions sometimes subordinate. This is particularly true of our traditions relating to "race," which, perhaps more than most, have neatly divided us into a traditional majority and minority, encouraged each to develop its own traditions, and unfailingly incorporated the majoritarian traditions into meritocratic schemes that deepen the division and rigidify the hierarchy.

"Our" traditions have a color, and that color is usually white.

Even "good traditions" can exclude. When the demand for uniformity precludes the consideration of context and perspective, those traditions that once promised liberation from oppression can become its instruments. Nearly a century ago, the first Justice Harlan dissented from the decision in *Plessy v. Ferguson*; he proposed a countertradition, declaring the Constitution "color-blind." Taken in context, appearing, as it did, in the same paragraph as the otherwise oxymoronic declaration that "the humblest is the peer of the most powerful," Harlan's proclamation was nothing short of an act of existential rebellion: a recognition of the reality of racial subordination and a refusal to accept it. But the meanings of tradition's signs are unstable, and with the shift in cultural valences, "colorblindness" has become the guardian of the status quo. As Patricia Williams writes,

> When segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law was the presumed antidote for race bias in real life. With the entrenched notion of race-neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be hired based on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems.22

The unthinking invocation of tradition excludes too many truths. In its indifference to context, it distorts; in its indifference to perspective, it is biased. In its pretense that the dominant tradition is the one
tradition, it oppresses; and in its blindness to its own role in the construction of differences, it enlarges the spaces that separate us.

The claim here is not that "tradition" has no place in constitutional analysis, but only that the term is in need of some critical assessment and more meaningful explication. The caution, in short, is against the nonreflexive reliance on tradition, against the assumption that there is but one "tradition," and that it is unfailingly good. Traditions, after all, may not be universal, or at least not universally beneficial.

Consider the Supreme Court's current favorite tradition, "colorblindness." It finds expression in the contentions that racial classifications are inherently and uniformly suspect, and that, as a consequence, racial quotas, preferences, and gerrymands are presumptively unconstitutional. The tradition has both a normative and a positive dimension.

The former is manifest in an almost obsessive desire to exclude "race" from public discourse, as if, through our willful ignorance, we could make it simply vanish. But this view entails a series of assumptions that should not go unchallenged. One, more or less empirical, is that race will matter less if we consciously refuse to talk about it. But nothing in our history or contemporary reality suggests that the results of the coerced silence approach to public discourse—imposed here quite asymmetrically—will be anything less than perverse. Another is the implicit assumption, made explicit in another of Justice Scalia's concurring opinions, that "race" inherently devolves into questions of better or worse, that we cannot "classify" without "judging." But there is simply no reason that this must be the case, not, at least, if we truly understand "race." Finally, the normative commitment assumes, quite explicitly, that the costs of race-talk outweigh its benefits. Thus the affirmative action decisions, observe T. Alexander Aleinikoff and Samuel Issacharoff, ultimately manifest a program of "equality" "dedicated to the pursuit of social peace rather than social justice." But, perhaps, no justice, no peace.23

The positive dimension of the commitment to colorblindness, meanwhile, entails a literal inability or unwillingness to see color and its effects. For example, the Richmond affirmative action decision manifests what Patricia Williams has described as a "lawyerly language game of exclusion and omission," in which the city's evidence of racial discrimination is disaggregated and dismissed. White contractors, Justice O'Connor concedes, were getting over 99 percent of the city's contracts, but that might have been because the black citizens of
Richmond—half the population—didn’t really want them: they may have been making different "entrepreneurial choices." Thus, as Williams notes, "the social text, no matter how uniform and exclusive, could not be called exclusionary in the absence of proof that people of color even want to be recipients of municipal contracts." This forced separation of individual choice from social constraint is echoed in the opinion’s repetitive invocation of the standard dichotomies: public versus private, state versus federal, past versus present, fact versus opinion. "Societal discrimination" is converted into an amorphous claim by this relentless disaggregation of experience, leaving a fragmented landscape in which "racial power has been mediated out." 24

What emerges is an almost congenital blindness to the reality of racial hierarchy: "[w]hite folks," writes Richard Delgado, "never see their own racial and class advantage." Buttressed by the metaphysical pretenses of equal opportunity, white justice re-creates a world in which economic disparities reflect not racism, but differences in "special qualifications" and "entrepreneurial choices." In this white-washed tradition, the oppression and privileges of race are consigned to a distant place and time, yielding a myth of innocence and neutrality, "the product of the blissful, self-serving ignorance that comes from never having been on the wrong side of a hiring decision because of race or gender." 25

The conventional appeals to tradition—to "colorblindness," to "neighborhood schools," to "our democratic heritage"—manifest the desire to ensure that this reimagined past will somehow be the future. But it is a past sanitized by the myopia of colorblindness, cleansed of dissonant voices. What emerges is only a jurisprudence of nostalgia.

But to make a new future, we must come to terms with the past, and not be slaves to it. We must learn how, as Walter Lippman counseled in 1914, "to substitute purpose for tradition." 26

Formal Equality: Race

It was Justice Brown in Plessy v. Ferguson who offered the modern explication of the constitutional guarantee of equality:

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, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.27

To be sure, the specific holding in Plessy, that separation does not connote or constitute an inequality, was undone by Brown v. Board of Education. And the line of twentieth-century cases that includes Brown—Shelley v. Kraemer and Sweatt v. Painter preceding it; Cooper v. Aaron, Loving v. Virginia, and Green v. New Kent County School Board following it—seemed to reject Plessy's dubious premises and to obliterate its shallow logic.

But no victory in constitutional law is permanent, and so Plessy again lives. "Natural affinities" and "racial instincts" are reborn in a hypothesized de facto segregation that represents not centuries of official racism, but "private choices." Affirmative action legislation "is powerless . . . to abolish distinctions based upon physical differences, and the attempt to do so" both demean the beneficiaries and offends the disadvantaged minority, "accentuating the difficulties of the present situation." Even the formal symmetry of "separate but equal" is revived: "consistency" now requires that a presumption of minority business disadvantage be viewed with the same suspicion as Jim Crow legislation, rendering irrelevant both the context and content of the legislation. Above all, the Constitution secures only a "legal" or "civil" equality: if "one race be inferior to the other socially," the Constitution cannot put them on the same plane, because, well, "Government cannot make us equal."

It is all back: the naturalistic conception of "race" and "racism"; the natural or "social" order against which law is powerless; the empty, arid, isolated guarantee of formal legal equality indifferent to context, blind to all the realities of social life. There was no great outcry in early 1997 when Justice Scalia told a Columbia University audience that, yes, if it had been a case of first impression, he could well imagine voting against the plaintiffs in Brown v. Board of Education—no great outcry because, as Reconstruction's framers might have
it, his Court has already robbed us of the substance of that decision, and cheated us with the shadow.

Concurring in the Richmond affirmative action decision, Scalia offered this counsel:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. It was, of course, a political judgment, and aside from the apparent irony that it emanated from an avowedly apolitical justice, it seemed quite unexceptional. But one phrase makes it extraordinary, a coupling of terms that goes quite to the heart of the modern discussion of "race": "to classify and judge." It is indeed true that for centuries, to "classify" was to "judge." But is it invariably the case: must "race"—for all time, in all contexts—carry connotations of superior and inferior?

Scalia and a majority of his Court believe that it must. The story of "race" that they tell remains an essentialist one, a story that understands race as something innate and immutable. Within this story, it is impossible to distinguish between the social, economic, and political forces of racial exclusion, oppression, and disadvantage on the one hand, and the claims of innate inferiority on the other. Within such an understanding of race, the Court is able to suggest that the commitment to desegregation is insulting, that affirmative action is stigmatizing, and that racial bloc voting is oppressive.

It is only within such a story that the recognition of a minority perspective—a "black" voice, for example—is demeaning. But that is the error of essentialism, for there is no need to reduce individuals to "race" or reduce "race" to a single view. Too much, after all, is lost in the process: race is constructed at too many intersections and in too many contexts to permit the suppression of dissonance both within and between racial communities.

Such an untenable conception of "race"—as a natural, inherent, immutable characteristic—obscures the cultural processes of creating "race." It ignores the truth of "race" as a social construct, though perhaps, given the unique role of "race" in the constructions and
reconstructions of our official traditions, it is more accurate to speak of "race" as Cornel West does, as a "political and ethical" construct.²⁹

But to say that "race" is politically constructed is to assert rather than deny its real salience. It is only when "race" is absurdly divorced from its political meaning that "racism" magically fades from consciousness. Oppression and privilege then become distant memories; equality—formal, symmetrical, elegant, and empty—becomes "perfect." The racial hierarchy left in place by this desiccated vision of equality becomes inevitable, as natural as the "race" that defines it: we simply cannot be made equal. That is the great wrong that inheres in this supposed "color-blindness": that in denying the realities of "race," it simultaneously denies the possibility of a genuine equality.

By focusing on the process of constructing race—on, historically, "racism"—we recover the prospects for a genuinely reconstructed race, for a benign "race"-ism, for differences that are not hierarchical, for a world in which we can indeed "classify" yet not "judge." What, after all, will be left of "race" if the races are—socially, economically, politically, really—equal? The tragedy is that we may never find out.

It is simply not plausible that we will be able to reconstruct "race" without the benefit of "race"-conscious measures. Requiring "color-blind" decision making may eliminate the old overt forms of racial discrimination, but it leaves intact—and indeed legitimates—the deeply entrenched biases of American law and life. As Richard Delgado writes, "Facially neutral laws cannot redress most racism, because of the cultural background against which such laws operate. But even if we could somehow control for this, formally neutral rules would still fail to redress racism because of certain structural features of the phenomenon itself." Moreover, the attempt to expose the process is not welcomed: social science evidence is "misleading" and "unnecessary," statistics "inconclusive," context "irrelevant." Nothing matters but the letter of the law; but that law, as Jerome McCristal Culp, Jr., summarizes, "has strained and contorted itself under the constraints imposed by the history of racism."

Some of those who have led the struggle for racial justice are left now to struggle against despair. Derrick Bell now urges a "racial realism": America, he reluctantly concludes, offers no realistic hope of achieving equality through law. The Court's recent decisions are, in this view, not at all anomalous: American law was not designed to
ensure real equality. "So law works," Delgado concludes. "But it operates to preserve racial advantage, to maintain the status quo."

It is the worst part of our national heritage. John Hope Franklin writes,

Racial segregation, discrimination, and degradation are no unanticipated accidents in this nation's history. They stem logically and directly from the legacy that the founding fathers bestowed upon contemporary America. The denial of equality in the year of independence led directly to the denial of equality in the era of the bicentennial of independence. The so-called compromises in the Constitution of 1787 led directly to the arguments in our own time that we can compromise equality with impunity and somehow use the Constitution as an instrument to preserve privilege and to foster inequality. It has thus become easy to invoke the spirit of the founding fathers whenever we seek ideological support for the social, political, and economic inequities that have become a part of the American way.30

Formal Equality: Intelligence

"Smartness" provides one of the ways—perhaps now the primary way—that we preserve privilege, and so it should come as no surprise that the conception of "intelligence" in modern American constitutional law substantially mirrors the conception of "race": it too is something innate and immutable. Occasionally, in cases like Washington v. Davis, the concepts go hand in hand; in other cases, they are simply different aspects of the natural order. In all cases, essentialism prevails: to be "smart" or not is to be, as with "race," primarily or exclusively that, and uniformly that, for all time, and in all contexts.

The Supreme Court's best chance to clarify its conception of the "smart" person came in 1984, when it was called on to determine the status of people with mental retardation in the Court's complex hierarchy of judicial scrutiny. The case involved an effort to establish a group home for mentally retarded adults; a Texas city viewed the group home as a "hospital for the feebleminded" and denied the necessary permit. In the end, the Supreme Court found the city's decision unreasonable.

But it also concluded that mentally retarded people as a class neither needed nor deserved special judicial protection. Unlike discrimination
against white contractors, for example, discrimination against people with mental retardation could be justified by the same deferential standard applied in cases of economic distinctions, like the ones between opticians and optometrists, which the Court upheld in one case, or between the manufacturers of filled milk and margarine, which the Court upheld in another. Discrimination against people with mental retardation was no more suspicious than these business distinctions. This was so, Justice White explained, because mentally retarded people "have a reduced ability to cope with and function in the everyday world." "They are thus different," he offered, "immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one."

The meaning of "immutably so" was obvious, even if it was also obviously wrong. But what did White mean when he claimed that mentally retarded people were "different . . . in relevant respects"? Relevant how, and to what? White elaborated: "we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us"; and, he concluded, "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions" (emphasis added).

That the explanation seems on first impression so unobjectionable is a testament to the entrenched nature of the essentialist conception of intelligence generally, and of mental retardation—diminished intelligence—specifically. But Justice Marshall was not fooled. The way he saw it, White's assertion that mental retardation is generally relevant violated the most fundamental norm of the equal protection guarantee: it stereotyped. From some perceived difference, it induced a generalized disability, ignoring variations, first, among individuals, and second, among contexts.

Regarding the first, Marshall explained, "that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist." That someone may have an extremely low IQ may well be "relevant" to, for example, college admissions decisions; but that did not automatically mean that mild or moderate mental retardation was relevant to decisions involving the location of group homes, for example, or the rights to have and raise children.

As for the second:
The suggestion—that the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant—is similarly flawed. Certainly the assertion is not a logical one; that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not.

Marshall offered an example that clearly exposed the dangers of essentialist thought, and the pitfalls of ignoring the significance of context: "A sign that says 'men only' looks very different on a bathroom door than a courthouse door."31

But what is so patently clear in the case of gender is too easy to miss in the case of intelligence. It is far too easy to assume, as White did, that diminished intelligence—or, ipso facto, superior intelligence—is somehow "generally" relevant. Performance on an IQ test, however, should not have such an all-pervasive significance. We really should not make it that important.

For two centuries, defenders of the natural order have been certain that they were defending the truth, and equally certain that, in the process, they were defending our culture from the degrading effects of the egalitarian delusion. While they no longer speak overtly of a "white man's government," it is clear that both their truths and their fears have, in substance, remained constant right through this day.

In a recent essay, University of Delaware psychologist Linda S. Gottfredson offers to expose the "egalitarian fiction and collective fraud" that obscures the truth of racial inferiority. "While scientists have not yet determined their source," Gottfredson writes, "the existence of sometimes large group differences in intelligence is as well-established as any fact in the social sciences." In denying or concealing this well-established fact, we perpetuate a most harmful lie:

enforcement of the lie is gradually distorting and degrading all institutions and processes where intelligence is at least somewhat important. . . . Society is thus being shaped to meet the dictates of a collective fraud. The fiction is aiding and abetting bigots to a far greater degree than any truth could, because its specific side-effects—racial preferences, official mendacity, free-wielding accusations of racism, and falling
standards—are creating deep cynicism and broad resentment against minorities, blacks in particular, among the citizenry.32

All the old arguments are here. Egalitarianism is degrading; egalitarianism encourages racial conflict. Egalitarianism, not the history and reality of bias, is distorting our "[s]ociety"; egalitarianism, not the history and reality of racism, is stimulating "broad resentment against minorities, blacks in particular, among the citizenry," a citizenry, evidently, that does not embrace "minorities, blacks in particular." We have nothing to look forward to but continued decline, all because we won't acknowledge one simple truth: white people are smarter than black.

But this truth, on closer examination, is surprisingly equivocal, even as Gottfredson describes it: "While scientists have not yet determined their source, the existence of sometimes large group differences in intelligence is as well-established as any fact in the social sciences." But identifying the "source," it would seem, is a matter of some import; "sometimes large" differences are, presumably, matched by differences that are not so "large"; neither of the operative terms—neither the racial "group" nor the "intelligence" with which it is correlated—is itself "well-established," by Gottfredson or anybody else; and if the "social sciences" are not establishing "facts" any better than this, then "social science fact" is truly an oxymoron.

It is hard not to wonder: if the facts of superiority and inferiority are so well established, then why all the equivocation? And if the equivocation is merely an attempt to manifest good science, then why do all the conditions and qualifiers disappear when the claims shift, as inevitably they do, to the terrain of the political?

Here is a hypothesis: the "truth" of the natural order has to be described in tentative, ambiguous, equivocal terms, because stated directly, it is so obviously a lie. On the other hand, the concomitant political claims must be asserted in strong, clear, and unqualified terms, because only the force of political rhetoric can sustain the "truth" of the natural order: only appeals to the worst parts of our political heritage can obscure the real nature of inequality. The "truth," in short, needs powerful fictions to sustain it.

The net effect of these fictions, political and legal—there is rarely any difference here—is actually twofold: to preserve the concept of a natural order and to preserve in fact the hierarchies of social and
economic life, all in spite of, and sometimes even in the name of, the guarantee of the equal protection of the laws. It produces a certain self-perpetuating monotony: it is always the same people and groups of people who are "smart," who are "superior," who are "qualified," who should—and do—end up on top, and who are permitted, as a consequence, to constitute "society" and "the citizenry." The rules that replicate this pattern are "neutral"; the pattern itself—the order—is "natural." Any effort to pierce the veil of legalism is "misleading"; any effort to break the monotony is "distorting and degrading" and creates impermissible "special favorites of the law."

There is no escaping the bell curve, then, because we are not permitted to try. But if the bell curve is the truth, then we should at least abandon the fictions that sustain it.