The Equal Protection Clause – An Individual Right To Equal Protection of the Law

A Review of the Law of Racial Preferences in Employment
Affirmative Action and Disparate Impact

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Abstract


The 14th Amendment to the United States Constitution provides an individual right for each person to equal treatment by state and local governments without regard to race. Programs such as affirmative action and theories of liability such as disparate impact violate that protection by permitting or requiring state and local governments to take race into account as a basis for differential treatment. Past and present efforts by the Supreme Court to circumvent the Equal Protection Clause, whether in the name of segregation or affirmative action and disparate impact, have impeded racial progress and often made the nation’s race relations much worse. The Supreme Court should remove itself from approving any racial preferences or penalties, other than those necessary to enforce the federal guarantee of actual racial neutrality that is required by the Equal Protection Clause. History informs us that this was the actual intent of the Equal Protection Clause and that intent should be honored, validated and enforced.
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I. INTRODUCTION

The Equal Protection Clause of the 14th Amendment to the United States Constitution was born out a great and horrible Civil War. Along with the rest of the Reconstruction Amendments, the Equal Protection Clause evidenced a fundamental change in the structure of the American nation and in the scope of American law. This change began with the 13th Amendment’s unambiguous end to the institution of slavery and continued through the 14th Amendment’s recognition of the common humanity of all persons regardless of race and the 15th Amendment’s guarantee of the right of newly freed slaves and other blacks to vote.

The Equal Protection Clause was adopted as part of the 14th Amendment by the political representatives of the victors in the Civil War and they intended these amendments to mean something profound, to reflect the reality of the new nation, where the common humanity of black and white over which the war was fought would be realized forever.¹

Because the Equal Protection Clause is part of the Constitution, the Supreme Court must, by definition, be the ultimate arbiter of the precise nature of and extent of the rights created and protected under the Clause. In this necessary and vital role, the Court has been called upon to apply and interpret the Equal Protection Clause for over one hundred and fifty years. During this long history, the Court has not been able to shape and apply a consistent, logical and workable legal approach to apply and enforce this deceptively simple, yet grand language:

Section 1. … No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. …

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. The Supreme Court’s application of the Equal Protection Clause over time can best be described as a contest between two competing visions of the nature of the legal rights protected by the constitution generally and by the Equal Protection Clause specifically. These two visions of the constitution will be generally referred to herein as an individual rights view and the group based rights view. These two theories encompass complex ideas, many of which are outside the legal realm and are, therefore, beyond the scope of this work. However, as legal theories, these two competing views are fundamentally irreconcilable because they arise from two irreconcilable ways of viewing the function of law in the political world.

The individual rights view is defined herein as one which sees the individual person as essentially sovereign and, as such, the possessor of unalienable personal rights. This view, which was generally held by the founders of our nation, caused the American founders to create a government of checks and balances as a mechanism to restrain the power of the federal government to impinge upon the rights of the person.

From the individual rights perspective, the Equal Protection Clause was seen by its drafters as the means by which the victors in the Civil War extended these inalienable individual rights to the newly freed slaves and others, including previously freed blacks.

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2 Of course, these definitions are necessarily simplified and under inclusive. However, it is believed that such simplification and level of inclusiveness is necessary to focus the analysis to the legal issues discussed herein rather than a book length analysis of the various political stratifications that exist within these broad categories.

3 See, American Declaration of Independence, July 4, 1776.

4 Ibid.

5 Madison, James. The Federalist Papers # 51 February 6, 1788.
The group rights view is defined herein as a more collectivist approach that sees the law as more of an instrument of social change than as a protector of individual legal rights. These views are defined herein as including those referred to in the political realm as progressive, leftist, or socialistic. As contrasted to the individual rights perspective, group rights advocates generally see the individual as less than fully sovereign but instead as members of one or more racial, ethnic, class or political groups. The fundamental function of government is seen not as a protection of the individual person from the government but instead as managing the competing claims of various government designated groups to the services and bounty of the state. Under this view, the Equal Protection Clause is understood as a means to achieving equality in outcomes for historically disadvantaged groups, increased racial justice and more economic power.

In the legal realm, the battle between these two general world views occurs primarily in the United States Supreme Court, which is charged under our system of government with determining the meaning of our Constitution, including its amendments. This paper will review the history of this battle of ideas as it was made through the decisions of the Supreme Court on the issue of racial discrimination, generally and in the employment discrimination law context, specifically. This review will begin with a discussion of the political history of that period in American history beginning with the rise of the abolitionist movement through the adoption and ratification of the 13th, 14th and 15th Amendments. It will continue with a discussion and analysis of

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the early case law where the Court initially applied the new Reconstruction Amendments to actual cases.

The analysis will then address the fundamental change in equal protection jurisprudence that began with the Court’s infamous decision in the case of *Plessy v Ferguson*[^10] and which continued as the Court decided a series of cases that fundamentally changed the law of equal protection away from the original individual rights focus toward a group based rights approach. The analysis will conclude with a discussion of the modern Court’s return to a modified form of the original individual rights approach, a discussion of the larger lessons to be learned from these changes and suggestions for the Court to consider in the future. While the legal concepts of equal protection apply to many areas of the law, for purposes of this paper the analysis will be limited to the area of employment discrimination law, with a special emphasis on the employment law aspects of affirmative action policies and disparate impact employment discrimination theory.

The discussion will be further limited to the issue of race, as opposed to other group classifications recognized under equal protection law such as sex or national origin. I do this for three main reasons: 1) the Equal Protection Clause was drafted, adopted and ratified to address issues of race, racism and racial discrimination; 2) the case law addressing the issue of race is more amenable to analysis than other group categories; and, 3) race is the most divisive and difficult political and legal issue facing our nation in its internal political development. A settled jurisprudence on the issue of race would do more to advance the health of the nation and would contribute more to a

[^10]: 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).
productive American future than one that involves any of the other group based identity issues.

It is now 144 years since the Equal Protection Clause was ratified, 148 years after the Emancipation Proclamation and 146 years after the end of slavery through the ratification of the 13th Amendment. In spite of the passage of so much time, the American nation continues to struggle with, and to be held back by, the issue of race. One of the answers sought by this work is to the question, what accounts for the seeming permanence of the racial divide in our nation?

Many argue that racism is solely responsible for the persistence of the racial divide in our nation.11 There is much support for this position in sociological literature and research.12 Racism does still exist in America, in many places at an unacceptably high level. This paper is limited to a discussion of the way in which the legal community, generally and the Supreme Court, specifically have added to the divisive effects of racism. My argument will be that, while the legal system cannot end racism, it does have the power and the obligation to stop making it worse and to start making it better. The legal community has a responsibility to refrain from making these societal problems worse and to do what it can do move the nation forward toward a post racial nation.

My research and analysis will show that it is the Supreme Court, as an institution, that bears much of the responsibility for the stubborn continued existence of racism in America. There are numerous examples where the Court has made things much worse for our nation. The Court has done much of this damage by repeatedly injecting itself into

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12 Ibid.
areas that it is not competent to act and by distorting the Equal Protection Clause away from its original intent. The Court has, through its decisions, made the racial reality in our country much worse than it would have otherwise been and it is the Court which is keeping racial healing and reconciliation from occurring more rapidly.

When the Supreme Court has applied the Equal Protection Clause as it was intended to be applied by those who drafted it, it has increased protection of individual liberty from racially discriminatory treatment by the government; it has advanced the cause of racial reconciliation and allowed for positive social change. When the Supreme Court has interpreted the Equal Protection Clause as a source of group based legal rights, it has fostered racial discord and hindered reconciliation, encouraging a mindset of racial identity politics leading to great injustice and frustrating the development of a shared, non-racial national culture and identity.

More than any other factor, it has been the Court’s unwillingness, as an institution, to abandon its obsession with race that has impeded the nation’s progress to move beyond race, leading to generations of Americans who have been unable to move past race. The nation would be better served if the Court would return to the vision of the original drafters of the 14th Amendment, to create an America that exists as one nation, under law, where each person is equal, under law. The Court can lead by having the courage to let go of race so that the nation may let go of race.

II. POLITICAL HISTORY OF THE EQUAL PROTECTION CLAUSE

A new individual constitutional right to equal protection of the law without regard to race

From the ratification of the Constitution to the outbreak of the Civil War, the nation was, in many respects, concerned with two great overriding domestic issues:
western expansion and slavery. These two issues were intertwined and led to deep divisions between the northern states, which were generally industrial and increasingly anti-slavery, and the Southern states, which were generally agricultural and increasingly economically dependent upon slave labor.\textsuperscript{13}

This general history is well known and need not be repeated here.\textsuperscript{14} The South became convinced that slavery of blacks was necessary to its economic survival and the North became, over time, less and less able to accept the continued existence of the immorality of human slavery. These political forces eventually led to the creation, in the 1830’s, of a new political party, the Republican Party. The Republican Party was primarily dedicated to the elimination of slavery, the provision of equal civil rights for all regardless of race and the preservation of the Union.\textsuperscript{15} In 1860, President Abraham Lincoln was elected as the first Republican President of the United States. Southern secession and the Civil War followed.

Following the North’s victory in the Civil War, there were two major schools of thought within the now dominant Republican Party concerning the most effective means to reintegrate the former Confederate states into the union and to address the political status of the newly freed slaves and other blacks.\textsuperscript{16} President Lincoln, who led the “liberal” wing of his party, argued for relatively lenient terms for the readmission of the southern states to the union and for non-punitive conditions for the restoration of political rights to those who had fought for the Confederacy. Members of the Democrat party, who

\textsuperscript{14} Ibid.
\textsuperscript{16} The term “black” will be used herein because it is more historically accurate than the current term “African-American” and because the alternative historical term “Negro” has negative connotations that flow from its misuse in a derogatory way.
otherwise opposed President Lincoln, also favored lenient terms toward the former southern states and former Confederates.\(^{17}\)

Opposition to President Lincoln’s policies toward the south came mostly from within his own party. Those who opposed what they considered to be President Lincoln’s overly lenient terms of reconciliation were popularly referred to as the “Radical Republicans.”\(^{18}\) The Radical Republican political leaders favored policies that were designed to punish the south for its insurrection and for its mistreatment of slaves and freed blacks. Radical Republicans generally favored a longer and more punitive military occupation of the south, immediate political and civil rights for blacks, especially voting rights, and harsh terms for the future re-admission of the southern states to the union.\(^{19}\)

As the war was ending, the civil governments of the southern states were still within the control of the white confederates. The legislatures in these states quickly began a process to adopt invidious statutes to control and disenfranchise the newly freed black slaves. These statutes, which varied from state to state, became known generally as the “Black Codes.”\(^{20}\) The Black Codes were often facially neutral laws which had the effect of denying or grossly infringing the civil rights of the newly freed slaves including the right to vote, to contract, to own real estate or to have a chance to escape from a condition

\(^{17}\) Foner, Eric. *A Short History of Reconstruction, 1863-1877* HarperCollins, 1990. President Lincoln advocated what was then commonly referred to as the 10% solution which would allow states to return to the union with full political rights after 10% of the population signed loyalty oaths to the union. His policy would have placed few restrictions on the political rights of former leaders of the Confederacy and would have strictly limited the military occupation of the south by the Union Army.


\(^{19}\) Indeed, many radical Republicans argued for the abolition of the southern states as states and that their legal status be changed to territories. Eric Foner. *A Short History of Reconstruction, 1863-1877* (1990).

of actual, if not legal, servitude to white landowners.\textsuperscript{21} Examples of the Black Codes included highly punitive vagrancy laws, laws favoring employers over employees in the payment of wages, laws requiring property ownership or taxpayer status to vote, and laws imposing conditions on jury service so that juries were almost always composed of whites. Other examples included laws denying blacks the right to own weapons, even for self defense on their own property.\textsuperscript{22}

Following President Lincoln’s assassination, President Andrew Johnson attempted to faithfully implement President Lincoln’s liberal reconstruction policies.\textsuperscript{23} He immediately reduced the number of federal troops occupying the south, believing that the nation would be best served by the quick assimilation of the former Confederate States back into the union.\textsuperscript{24} The response of the northern electorate to the policies of President Johnson, the liberal terms of Reconstruction and the existence of the Black Codes in the southern states was the landslide election of 1866, which gave the Radical Republicans large majorities in both houses of Congress.\textsuperscript{25} The new Radical Republican Congress acted quickly to overturn the liberal reconstruction policies of the Johnson administration. Congress ordered a large increase in the military occupation of the South. Martial law was imposed on the South and federal legislation was adopted to prohibit most former confederates from holding political or legal office.\textsuperscript{26}

The Radical Republican Congress and its veto-proof super majorities possessed great political power and it used that power to achieve its goals and to impose its political

\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{26} Ibid.
will on the former Confederate states and the larger nation.\textsuperscript{27} The 14\textsuperscript{th} Amendment was approved by Congress over the veto of President Johnson and was ratified by the states during a period of high moral excitement and national political purpose.\textsuperscript{28} The Radical Republicans made very clear what they intended by the placement of the 14\textsuperscript{th} Amendment into the Constitution. They intended to empower the federal government to eliminate racial discrimination by state and local governments and to place that power beyond even the reach of the Supreme Court. The new powers given to the federal government vis-à-vis the states would allow for the federal enforcement of the non-discrimination principles of the 1866 Civil Rights Act and to thereby overrule the Black Codes.\textsuperscript{29}

The Equal Protection Clause was advanced by its proponents as a way to make sure that the newly freed blacks would have the same civil rights as then held by whites and that these rights could not be taken away by the states.\textsuperscript{30} Radical Republican politicians in the newly victorious northern states were strongly motivated by abolitionist sentiment and they desired to punish the confederates for their immoral defense of slavery.\textsuperscript{31} They were determined to prevent the southern states from enacting or continuing to enforce any state laws or local regulations that would place blacks into second class citizenship.\textsuperscript{32}

\textsuperscript{27} Ibid.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
There were many leaders of the Radical Republican movement who together conceived of, drafted and adopted the 13th, 14th and 15th Amendments. These statesmen left a clear historical record of their intentions. What they intended to accomplish by these provisions is clear from the private statements and prolific public record of these great statesmen. The many leaders of the Radical Republicans wrote extensively about their intentions.

The primary author of the 14th Amendment was Ohio Congressman John Bingham.\textsuperscript{33} Congressman Bingham dedicated his entire political career to the abolition of slavery, the provision of equal civil rights for blacks and the creation of a federal authority to enforce non-discrimination against blacks by the government of the states. The language he chose for the Equal Protection Clause evidenced these intentions as it is written unambiguously as a grant of federal protection of individuals as against state governmental action. The Equal Protection Clause is a charter of negative rights, the right to be free from unequal treatment by state and local government on the basis of, at least, race.\textsuperscript{34}

Congressman Bingham repeatedly expressed, in speeches and in writings, what he and his fellow Radical Republicans were seeking to do with the 14th Amendment. They sought to create a new federal right, the right to the protection of the federal government against state infringement of the civil rights of blacks. These protections would mirror the existing civil rights protections which existed for whites.\textsuperscript{35} The expressed intent was to


\textsuperscript{34} The arguments regarding bases other than race for equal protection protections are beyond the scope of this work. The analysis of the intent of the equal protection clause is best understood in the context of race. It can then be applied in a way that is consistent with this analysis to other protected classifications.

equalize the civil rights of persons regardless of race. This intent is consistent with the actual wording of the Equal Protection Clause, which speaks of a limitation of state power to treat individual persons unequally.36

Bingham’s obvious model was the anti-discrimination theory of the 1866 Civil Rights Act.37 Professor Paul Finkleman describes Congressman Bingham’s thoughts in his excellent historical overview of the passage of the 14th Amendment:

When John Bingham arrived in Congress he brought with him the idealistic goals of northern Ohio Republicans and their abolitionist, Liberty Party, and Free Soil predecessors, who had been fighting for racial equality for the previous three decades. *** Most importantly, he drafted the Fourteenth Amendment in the context of the Black Codes of 1865-66 and the violence directed at blacks and white Unionists in the immediate post-war South.

It was in the context of this history that John Bingham wrote Section One of the Fourteenth Amendment. What did he desire to accomplish with this provision? We can never fully know, of course, but the context of the Amendment suggests that his goals were sweeping and broad. He and others in the majority on the Joint Committee [on Reconstruction] understood that they had to protect the life, liberty, safety, freedom, political viability and property of the former slaves. They had to protect their rights to have meaningful contracts. They had to protect their rights to the courtroom and the voting booth, as well as in the market place. They had to be protected from whipping and other forms of cruel and unusual punishment. They desperately needed the protections of the Bill of Rights - fair trials by fair juries, with legal counsel to represent these largely illiterate former slaves. They needed to be able to express themselves in public and to organize politically. They needed equal schooling.38

To the Radical Republicans, the 14th Amendment was necessary to provide newly freed slaves and other blacks with a federal source of legal protection from the Black

36 Ibid.  
37 Ibid.  
38 Ibid.
Codes. Absent this new federal power, and absent its placement in the Constitution via amendment, the states would be free to mistreat newly freed blacks without legal recourse, leaving them as permanent second class citizens. This would make a mockery of their hard won freedom and the sacrifices of the Civil War. The only way to end the abuse of power by the states was to fundamentally alter the relationship between the states and the federal government in the area of civil rights. The solution was to grant to Congress, the Executive and the federal courts the authority to overrule those state statutes that made legal distinctions on the basis of race.\(^{39}\) These were the motivations of the primary drafter of the Equal Protection Clause.

Other Radical Republican leaders expressed similar motives in approving the Equal Protection Clause. Salmon P. Chase was an Ohio Senator, who served as President Lincoln’s Treasury Secretary and later as Chief Justice of the Supreme Court. Chief Justice Chase was a strong advocate for abolition and for equal civil rights for blacks.\(^{40}\)

Chief Justice Chase repeatedly wrote that the 14\(^{th}\) Amendment was intended to provide civil rights protections to the newly freed slaves and other blacks so that they would have equal civil rights as whites.\(^{41}\) He also described the 14\(^{th}\) Amendment as a federally guaranteed protection of the newly freed slaves from violations of their civil rights by state and local governments.\(^{42}\)

\(^{39}\) Inherent in Congress’ power under Section 5 of the 14\(^{th}\) Amendment to enforce the Amendment against the states is the power to grant to the federal courts the authority to enforce the Reconstruction Amendments.


\(^{41}\) Ibid.

U.S. Senator Charles Sumner of Massachusetts was another Radical Republican leader who was very influential in the drafting of the 14th Amendment.\textsuperscript{43} He was virulently opposed to what he considered the liberal policies of President Lincoln and President Johnson toward the South. He advocated for a long, punitive federal military occupation of the south and for their abolition as states and a change in their status to occupied territories.\textsuperscript{44} He offered an amendment to the bill proposing the 13th Amendment that would have guaranteed equal civil rights without regard to race, using much the same language as was eventually adopted into the 14th Amendment.\textsuperscript{45}

Congressman Thaddeus Stevens from Pennsylvania was arguably the most powerful member of Congress during the Reconstruction era. As Chairman of the Ways and Means Committee, he was another strong advocate for the 14th Amendment.\textsuperscript{46} Congressman Stevens fully expressed his views that the Reconstruction Amendments were adopted to ensure blacks were given the same civil rights as then held by whites.\textsuperscript{47}

The Radical Republican Congress was dominated by men such as these who were motivated by two great moral imperatives: the elimination of human slavery forever and the protection of the civil rights of the newly freed slaves and all free blacks against infringement by state and local governments.\textsuperscript{48} The intent of the framers of the 14th Amendment is not difficult to discern from the historical record. It was to provide for a federal protection of the individual civil rights of each black American, with those civil rights defined as being equal to that of each white American. The Supreme Court

\textsuperscript{43} Donald, David Herbert. Charles Sumner and the Coming of the Civil War. New York: Knopf, 1960.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{47} Ibid.
extensively discussed the history of the passage of the 14th Amendment in many opinions.49

The intentions of the drafters of the 14th Amendment are not hidden by the fog of history or otherwise difficult to ascertain. The intention was, in some respects, radical and in some respects deeply conservative. The 14th Amendment was radical in the sense that it was clearly adopted to alter the prior balance of power which the Constitution had previously struck between the authority of state governments and the federal government. The 14th Amendment expressly increased federal power by enumerating a new one power to restrict state plenary power to treat persons unequally on the basis of race.

However, the 14th Amendment was also a deeply conservative act because it did not otherwise change the basic federalist structure of the nation. It did not overrule the 10th Amendment, which reserves plenary power to the states that are beyond the enumerated powers of the federal government. The 14th Amendment expressly recognized and preserved the continued existence of state sovereignty and the plenary nature of state police power by the very act of restricting it. If state plenary power, as a necessary incident of lawful sovereignty, was to be eliminated by the 14th Amendment, there would be no need for the 14th Amendment to limit that same state plenary power. The existence of the 14th Amendment in the form chosen by the drafters is the best evidence for properly understanding the extent of and limits on its reach.

The Reconstruction Congress was remarkably successful in achieving what it set out to achieve at the end of the Civil War. It placed into the Constitution a permanent ban on slavery and involuntary servitude, a federally guarantee of equal civil rights for each

person that could not be abridged on the basis of race and a federal guarantee of the right to vote, without regard to race. The Reconstruction Amendments modified and altered the pre-war balance of power but did not fundamentally change the federalist nature of the nation. Where the Reconstruction Amendments acted to change the balance of power between the federal and state governments, they changed the prior balance. Where they did not so act, the prior balance remained.

As the Reconstruction period continued and through its completion, the Supreme Court was presented with a series of cases that would clarify the precise nature and the practical extent of these new constitutional provisions. The way in which the Court analyzed and decided these early cases is very strong evidence of the actual historical meaning of the language used and the understanding of the meaning of this language within the then existing legal and political community. As we shall see below, the early Court interpreted the 14th Amendment and the Equal Protection Clause in accordance with the expressed intentions of its drafters, i.e., as a federal protection that was available to each an individual to protect their individual right to be free from unequal treatment on the basis of race, is strong evidence that this is what the 14th Amendment and the Equal Protection Clause meant then and still means today.

III. THE EARLY CASE LAW

The Supreme Court interprets the Equal Protection Clause as a new federal authority to prohibit states from treating individuals unequally on the basis of race – Strauder, the Civil Rights Cases and Yick Wo

The Supreme Court’s first major case interpreting and applying the Equal Protection Clause was Strauder v. West Virginia.50 The facts of Strauder are quite

50 100 U.S. 303; 25 L. Ed. 664; 10 Otto 303 (1880).
compelling and presented an early chance for the Court to apply and therefore define the new amendments. Mr. Strauder was a black man who was charged and then convicted of first degree murder by an all white jury in West Virginia. The jury had been selected under a state statute that expressly prohibited all blacks from serving on juries. This presented a clear example of state action taken to treat jurors and, by implication, defendants, differently on the basis of race.

Mr. Strauder appealed from his conviction on the grounds that the state statute which excluded all blacks from criminal juries violated the Equal Protection Clause by denying black criminal defendants the right to be tried by a jury that was racially proportionate to the larger community. Mr. Strauder made, in effect, a group rights argument, asserting that the Equal Protection Clause was intended to grant to blacks, as a group, the right to racially proportionate service on juries.

The primary issue was framed by Justice Story’s opinion for the Court as determining the rights of each person under the newly adopted 14th Amendment.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

The Supreme Court found that the Equal Protection Clause had been violated by the state statute and it reversed Mr. Strauder’s conviction. However, the Court rejected

51 Ironically, West Virginia was conceived as a free northern state, formed from territory of the Commonwealth of Virginia by an act of Congress during the Civil War. The state statute prohibiting blacks from serving on juries is an example of the type of statute referred to herein as the “Black Codes”.
52 Strauder, at 308, 309.
53 Strauder, at 309.
54 Strauder, at 305 (emphasis added).
the group based rights argument for racially proportionate juries advanced by Mr. Strauder. Instead, the Court based its holding on the grounds that the statute violated Mr. Strauder’s individual right as created by the equal Protection Clause, to be tried by a jury that was selected from a jury pool that was called without consideration of race. The statute was invalidated because it did not provide for a color blind jury pool selection process. Therefore, the state treated Mr. Strauder unequally by denying him the same right that a white man had to a jury pool that might contain members of his race.

The Court’s view of the intent of the Equal Protection Clause could not have been more clearly presented by the language used and the recent political history.

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. … Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. … It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. ***

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are
prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, -- the right to exemption from unfriendly legislation against them distinctively as colored, exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

The Strauder opinion is solid evidence that the early Court viewed the Equal Protection Clause in the same way as those who drafted, passed and voted for its ratification. The Equal Protection Clause was intended to do two things: to equalize the civil rights of all persons under state law without regard to race and to provide a federal remedy to invalidate racially unequal state action (which would be mostly directed toward blacks). This federal remedy included both federal statutes under Section 5 of the 14th Amendment and federal court jurisdiction whenever Article III jurisdiction otherwise existed.

It is the opinion’s language that refers to the intent of the Equal Protection Clause as providing an “exemption from unfriendly legislation” which best captures the essence of the true meaning of the Equal Protection Clause. The “unfriendly legislation” referred to is the “Black Codes” and the Radical Republicans repeatedly stated that the Reconstruction Amendments were necessary to provide a federal authority to supersede these statutes.

The contrast between the universal, individual rights language of the 14th Amendment and the much more specific language of the 13th and 15th Amendments further suggests that the 14th Amendment was intended to be universally applicable to all persons while the 13th and 15th Amendments, while universally applicable in some

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55 Strauder, at 311(emphasis added).
aspects, were specifically written to grant additional special legal rights to those who had been in a prior condition of servitude. Strauder, as the first case which specifically addressed the nature of the rights created and protected by the Reconstruction Amendments, should receive great deference from the Court today as the best evidence of the original intent of the Equal Protection Clause. This justification for this deference is made more compelling by the Court’s cases which followed Strauder.

The next major case wherein the Court considered the precise nature of the rights created or protected by the Equal Protection Clause was the Civil Rights Cases.56 In these consolidated cases, the Supreme Court was asked to determine whether the Civil Rights Act of 1875, which banned private acts of racial discrimination in public accommodations and public transit, was a lawful exercise of the enforcement power granted to Congress by Section 5 of the 14th Amendment.57

The Plaintiffs argued that Congress had the power under Section 5 of the 14th Amendment to prohibit racially discriminatory private acts because the Equal Protection Clause should be broadly interpreted as authorizing the federal government to ban private discrimination on the basis of race in the same way that it had previously been held to authorize the federal government to invalidate state acts of discrimination on the basis of race.58

The Defendants argued that Congress lacked legal authority under Section 5 of the Equal Protection Clause to ban private discrimination because the 14th Amendment,

56 109 U.S. 3; 3 S.Ct. 18; 27 L. Ed. 835 (1883).
57 Civil Rights Cases, at 1. The Supreme Court would later determine that the Commerce Clause did allow Congress to regulate private acts of racial discrimination. See, Heart of Atlanta Motel v. United States, 379 U.S. 241; 85 S. Ct. 348; 13 L. Ed. 2d 258; (1964) However, as of the late 1880’s the Commerce Clause was seen as inapplicable to private acts, including racially discriminatory acts that did not actually cross state lines.
58 Civil Rights Cases, at 11.
by its express terms, acted only to limit state and local governmental power and that it did not grant to the federal government any authority to regulate private transactions beyond what the federal government already possessed elsewhere in the Constitution. The Defendants further argued that since the federal government lacked the authority to regulate private, non-state discrimination in either the first four sections of the 14th Amendment or elsewhere in the Constitution, Section 5 of the 14th Amendment could not be a separate grant of authority of the federal government to ban private discrimination.

The Supreme Court agreed with the arguments of the Defendants and held that Section 5 of the 14th Amendment did not grant to Congress any additional substantive authority to legislate beyond its otherwise enumerated powers as restricted by the 10th Amendment. Section 5 clearly authorized Congress to prohibit state and local governmental racial discrimination. It did not, in addition, authorize Congress to ban private discrimination.

While the Court decided the Civil Rights Cases in a way that denied to Congress the authority under Section 5 to ban private discrimination, it did so in an opinion that strongly affirmed the authority of Congress and the federal courts to ban governmental discrimination. The Court began its analysis by recognizing that the authority claimed by the federal government to regulate the civil rights within the states is conceded to have not existed at all prior to the adoption of those amendments and to have been solely created by the Reconstruction Amendments. “Of course, no one will contend that the power to pass it [the Civil Rights Act of 1875] was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration,
claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power.”59

The Court affirmed the broad understanding within the legal community and the larger nation that states had previously possessed the legal power to treat persons differently on the basis of race and that the Reconstruction Amendments extinguished that legal power, or at least made it subservient to a new and superior federal power. This legal authority was described as one that nullifies prior state plenary power.

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. … [t]o adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.…

[The] abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.60

The Court continues with this analysis and reaffirmed that the rights under the 14th Amendment are secured or protected by prohibiting authority to the states and that it is each individual person who has the right to be treated equally.

Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon

59 Civil Rights Cases, at 10.
60 Civil Rights Cases, at 11.
such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in United States v. Cruikshank, 92 U.S. 542; Virginia v. Rives, 100 U.S. 313; and Ex parte Virginia, 100 U.S. 339.61

The Supreme Court’s interpretation of the Equal Protection Clause in Strauder and the Civil Rights Cases (and other early cases62) could hardly have been more clear or consistent. As late as 1883, the Equal Protection Clause was generally understood by the Supreme Court, the legal community, the larger political community and nation as a whole as the source of an individual right (held by each person) to be free from state action that discriminates on the basis of race. Congress had the authority to enforce the rights of these persons and, where Article III jurisdiction was present, so did the federal courts.

The legal rights created by the 14th Amendment were never understood as affecting any other plenary power of the states incident to their sovereignty, nor were they understood as a source of additional federal power to regulate private discrimination. The Equal Protection Clause was not a grant of special protected status or positive legal rights to members of any racial minority or other group.

The American federal system was still in existence and states were free to act as they had always acted in the exercise of their plenary power save where those actions conflicted with the new federal requirement that each person be treated equally without regard to race. If a state statute or local regulation conflicted with the new federal

61 Civil Rights Cases at 12.
authority to prohibit racial discrimination in the provision of civil rights, the federal government was now armed with the authority to overrule and correct the state action in question and provide relief to the person whose rights had been violated.

This view of the 14th Amendment as a federal protection against state and local governmental racial discrimination was reinforced by the first decision of the Court which applied the Equal Protection Clause to a claim of racial discrimination by a person who was not black. In the case of Yick Wo v. Hopkins the Court addressed a claim that a local government violated the Equal Protection Clause by enforcing a local ordinance in a racially discriminatory manner against ethnic Chinese.

The Petitioners in Yick Wo were non-citizen legal alien resident Chinese nationals. They were convicted of violating a facially neutral San Francisco ordinance which prohibited any person from operating a laundry in the city that was not constructed of stone or brick without prior approval of the Board of Supervisors. The evidence established that the Board of Supervisors had never granted such a license to any Chinese applicant. As a result, Chinese laundries were effectively banned in San Francisco.

The Petitioners argued that the ordinance violated the Equal Protection Clause because it was an action by government which treated them unequally on the basis of their race. The City of San Francisco argued in response that the ordinance was neutral on its face and that it was necessary for the health and safety of the citizenry.

The Supreme Court ruled unanimously in favor of the Petitioners and reversed their convictions. In so doing, the Court re-emphasized that the Equal Protection Clause

63 The Supreme Court did not formally hold that minority groups other than blacks were protected by the Equal Protection Clause until 1954 in the case of Hernandez v. Texas 347 U.S. 475, 74 S. Ct. 667; 98 L. Ed. 866; (1954) However, the implication was clear from Yick Wo that the drafters of the Equal Protection Clause meant it to be available to assure equal protection for all persons as individuals, regardless of race.

64 118 U.S. 356; 6 S. Ct. 1064; 30 L. Ed. 220 (1886).
protected individual rights against unequal actions by the government on the basis of race.

For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *** The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. 65

As the 19th century came to a close, there was remarkable unanimity of opinion about the meaning of the Equal Protection Clause. The Supreme Court unanimously held in multiple cases that the Equal Protection Clause granted to each individual a personal legal right to be treated equally by state and local governments without regard to race in the provision of civil rights. The Court had never held, nor had any Justice argued in a dissenting or concurring opinion, that the Equal Protection Clause created special legal rights to favored treatment to any racial or ethnic group by virtue of their membership in that group. All of these early decisions consistently affirmed the same intention of those in Congress who drafted and adopted these amendments and the general understanding of the population whose votes overwhelmingly ratified it. The Reconstruction Amendments were approaching the status of settled law.

65 Yick Wo, at 370.
However, the consistent understanding and application of the Equal Protection Clause that had been developed by the Court from 1868 through 1886 was to be radically changed by one of the most infamous decisions in the history of the Supreme Court. The Court would, in an act of naked judicial activism, invalidate all of its preceding cases and re-write the Equal Protection Clause. In so doing, the Court would forever change the nation and, in many practical respects reverse the outcome of the Civil War. Decades of racial injustice and oppression would follow as segregation reappeared. In many ways, the nation is still suffering today from the negative effects of this act of judicial hubris.

IV. A RADICAL CHANGE

The Supreme Court rejects the individual rights model and creates a new group based legal right – Plessy, Giles and Brown I

Only eight years after its decision in Yick Wo had extended the individual rights protections of the Equal Protection Clause to persons other than former slaves and other blacks, the Supreme Court completely reversed its interpretation of the Equal Rights Amendment. In Plessy v. Ferguson the Court changed the law of equal protection and the fate of the nation forever. As discussed, supra, the Court, prior to Plessy, had interpreted and applied the Equal Protection Clause as a source of new federal authority to protect each person’s right to be treated equally by the state without regard to race. After Plessy, and the cases that followed, the Court would completely change that interpretation, reading the Equal Protection Clause as providing that legal rights would flow to racial groups and that the individual person would no longer possess the right to be treated equally by the state without regard to race.

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66 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).
One of the great ironies of American jurisprudence is that Plessy began as a test case filed by a group of civil rights activists in an attempt to expand the protections of the Equal Protection Clause to overturn de jure racial segregation in public transportation that had arisen in the south following the end of Reconstruction. Homer Plessy, who was one eighth black, boarded a whites’ only railway car in Louisiana and then informed the railway conductor that he was (legally) a Negro. The conductor ordered him to leave the whites’ only car. Mr. Plessy refused that order and he was arrested, tried and convicted under the criminal statute that enforced segregation in Louisiana’s intrastate passenger rail system. Mr. Plessy’s conviction was affirmed by the Louisiana Supreme Court and he appealed to the U.S. Supreme Court.

Mr. Plessy argued on appeal that the Court’s clear precedents, including Strauder and the Civil Rights Cases, entitled him to equal protection of the laws without regard to his race. His case was a mere straightforward argument for an application of the Court’s prior case law in the context of public transportation. He must have reasonably expected to prevail, since he could assert that his position was consistent with both the intent of the drafters of the Equal Protection Clause and the Court’s unanimous case law. He asked the Court to order the state of Louisiana to honor his individual federal right to ride in any rail car without consideration of his race.

In a 7-1 decision, the Supreme Court rejected Mr. Plessy’s arguments, all of its own precedents and affirmed his conviction. Plessy is the first case where the Court expressly affirmed a state criminal conviction based on the defendant’s refusal to accept the states government’s classification of him as a member of a racial group. Segregation,

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68 Ibid.
defined as the separation of the races into racial groups and the assigning of legal status on that basis was thereby approved as lawful throughout the nation, all with the full power and prestige of the Supreme Court.

The Plessy opinion begins with what can only be fairly described as lip service to the clear historical intent of the Equal Protection Clause and the Court’s prior consistent interpretation of it.

[T]he proper construction of this amendment was first called to the attention of this court in the Slaughter-House Cases, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states. ...[t]he object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law.69

Having recognized and acknowledged what it could not historically deny, the Court then disregarded both the historical record and its prior case law.70 The Court created a completely new analysis, one that relied upon two previously unrecognized concepts. The first was the theory of racial group based rights. The Court reasoned that “equal” under the 14th Amendment really means that each racial group must be treated equally, not that each person must be treated equally without regard to race. So long as the different government designated racial groups received equal physical facilities or

69 Plessy, at 544
70 The Plessy opinion also ignored the most closely analogous case among its own precedents. In the only case where the Supreme Court had previously addressed segregated railway cars, the Court held that state enforced segregation in railway transportation would support a claim for damages by a black person who was denied the right to ride in the car held by the railway company to be exclusively for whites. This case, Railroad Company v. Brown 84 U.S. 445; 21 L. Ed. 675 (1873) was not referenced in the Plessy opinion.
accommodations, they could be legally separated. This was the infamous “separate but equal” doctrine.

The second new and radical concept that supported the Court’s decision in Plessy was the Court’s unprecedented and illogical deference to the policy determinations of state governments in deciding equal protection cases. The Court accepted the Louisiana Legislature’s declaration that it did not intend by its racial segregation to treat blacks as lesser than whites. The Court accepted Louisiana’s assertion that it was merely following the proper “nature of things” by requiring separation of the races. Under this theory, segregation was a benign act, motivated by the state’s recognition of the need for the preservation of peace and order and the overall public good.

But in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.\(^71\)

The Court’s sole justification for this radical change was a disingenuous argument that racial segregation was lawful in public transportation because racial segregation existed in state and District of Columbia public schools. The Court’s circular reasoning was that, because segregated public schools existed in some northern states and in the District of Columbia,\(^72\) racial segregation was not a violation of the equal Protection Clause. The Court phrased the argument this way: “[t]he most common instance of this is connected with the establishment of separate schools for white and colored children,

\(^{71}\) Plessy at 544.
\(^{72}\) Both at the time of the ratification of the Equal Protection Clause and in 1896.
which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.\textsuperscript{73}

The Court’s reliance on the existence of segregated state schools\textsuperscript{74} and the approval of these segregated schools by state courts as justification for the federal government’s refusal to enforce racial equality under the federal Constitution is illogical reasoning of the worst sort. In order to make this argument, the Court ignored the most obvious historical facts before it - that the Civil War had been won by the north, the Constitution was thereafter amended specifically to empower the federal government to stop states from treating persons unequally on the basis of race and that states could no longer do this sort of thing.

The Court further ignored the fact that no federal court had ever upheld the constitutionality of state school segregation under the Equal Protection Clause and that the 14\textsuperscript{th} Amendment did not even apply to the District of Columbia.\textsuperscript{75} The existence of segregated schools in the District of Columbia, while surely evidence of the hypocrisy of the racial attitudes of some people in the federal government and of the persistence of the power of racist attitudes in America as a whole, is immaterial to a legal analysis of the scope of the Equal Protection Clause. The idea that the 14\textsuperscript{th} Amendment could limit the power of the federal government is a conceptual impossibility. The 14\textsuperscript{th} Amendment, by

\textsuperscript{73} Plessy, at 544.
\textsuperscript{74} And in the District of Columbia.
\textsuperscript{75} The Equal Protection Clause of the 14\textsuperscript{th} Amendment has never been held to be applicable to the federal government or the District of Columbia. The District of Columbia Schools were not ordered desegregated until 1954 in the case of Bolling v. Sharpe, 347 U.S. 497 (1954) which was decided on the same day as Brown I. The Bolling Court based its holding on the Due Process Clause of the 5\textsuperscript{th} Amendment and not on the Equal Protection Clause of the 14\textsuperscript{th} Amendment.
its express terms, is a limit only of the authority of state and local governments. It increased the prior authority of the federal government to enforce equality in civil rights.

So far, then, as a conflict with the Fourteenth Amendment is concerned, 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. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.76

This Court’s deference to the self serving declarations of good faith by the state of Louisiana completely reversed the meaning of the Equal Protection Clause. The Equal Protection Clause was adopted to permit, even require, the federal government to take action to prevent the states from treating persons unequally on the basis of race. This authority was needed to counteract the actions of certain states to adopt “Black Codes.” The states had long ago given up their right to ask for or to be given deference by their gross mistreatment of black persons.

After all, the Black Codes were passed with these same self serving justifications of defending cultural mores and preservation of the peace.77 Plessy gave Jim Crow laws the backing of the full authority of the Supreme Court to again subjugate black Americans and other minorities.

76 Plessy, at 553 (emphasis added).
In his famous (and lone) dissent in *Plessy*, Justice Harlan recognized the Court’s radical act and he argued instead for the Court to act consistently with the original intent of the drafters of the 14th Amendment and to faithfully apply the Court’s prior case law.

So … we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race. Thus, the state regulates the use of a public highway by citizens of the United States solely upon the basis of race…. In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. ***

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy."...

Justice Harlan rejects the Court’s act on the grounds that it would move America backward toward tribalism and caste. He offers instead his own version of an American future, a future of hope, a post racial future as envisioned by the drafters of the Equal Protection Clause. His path to that future involved a recognition by the Court that the Constitution, as amended by the Reconstruction Amendments, required the nation, the states and the local governments to be color blind in the law. The Court should recognize no legal distinctions by government on the basis of race.

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color blind and neither knows nor tolerates classes among citizens. With respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no

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78 Referring to the Reconstruction Amendments.
account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. 79

Justice Harlan correctly saw that the Court’s movement of the nation toward a system of caste, class and racial identity would be anathema to the Enlightenment based American ideals of individual dignity, personal equality and equal justice under law. He argued that extending these founding ideals from members of the white race to persons of all races was what made the Civil War worth its horrible cost. Tragically, Justice Harlan’s prediction of the social, political and legal costs of American Apartheid would be prophetic.

In the years following Plessy many states adopted segregation statutes that brought back many of the worst abuses of the Black Codes. These laws kept black Americans in positions of economic dependency and political isolation. 80 However, unlike the battles of the Reconstruction and post Reconstruction eras, those who defended the injustices of the segregationist state were now supported by the full power of the federal courts and the prestige of the Supreme Court. 81

The practical effect of the Supreme Court’s abdication of the authority of the federal courts to protect the rights of persons to equal protection of the law without regard to race was demonstrated by the case of Giles v. Harris. 82 Giles arose when a group of black residents of Alabama filed a federal lawsuit seeking protection of their

79 Plessy, at 555, 556 (internal citation omitted).
81 Ibid.
82 189 U.S. 475; 23 S. Ct. 639; 47 L. Ed. 909 (1903)
right to vote as protected by the 14th and 15th Amendments. The Plaintiffs alleged that certain provisions of the Alabama State Constitution had the effect of denying them, as black Americans, the right to vote.\textsuperscript{83} The Giles Plaintiffs sought an injunction from the federal district court to order the State of Alabama to allow them to register to vote so that they could then have the right to vote guaranteed by the 15th Amendment.

The District Court refused to issue the injunction even though the evidence was clear that the state constitutional provisions had the effect of systematically denying black persons the right to vote. The case was eventually appealed to the Supreme Court where the Court was presented with a clear opportunity to determine the availability of a federal judicial remedy for violation of the right to vote as protected by the Reconstruction Amendments. The Giles Court refused to order any relief and completed the abdication of the federal judicial authority to enforce the Reconstruction Amendments.

In its opinion, the Giles Court candidly admitted that the Alabama Constitution was written with the specific intent to deny blacks the practical right to vote. The Court nevertheless held that it could not order any relief.

The unanimous opinion reasoned that the federal courts were powerless to order each of the Plaintiffs enrolled to vote because such a ruling would be ineffective as a judicial remedy. Instead of accepting the power given to it by the Congress and the Constitution, the Court declined to protect these citizens, and did so by framing the issue as a group rights issue rather than an individual rights issue.

The Court reasoned that it would be impossible to grant relief because the relief would not apply to all effected voters. Since relief to all black voters was deemed

\textsuperscript{83} The white citizens of Alabama were endlessly clever in their attempts to disenfranchise blacks and keep them in a second class status, but to avoid federal intervention. The voting restrictions were placed in the State Constitution instead of statute in order to attempt to circumvent the 14th and 15th Amendments.
impossible, no relief for the individual Plaintiff whose rights had been violated could be ordered. The mendacity of the Giles opinion cannot be fairly described without a lengthy serving of it verbatim.

It seems to us impossible to grant the equitable relief which is asked. … The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? If a white man came here on the same general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. If we accept the plaintiff's allegations for the purposes of his case, he cannot complain. We must accept or reject them. It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question for the future. If we have an opinion that the bill is right on its face, or if we are undecided, we are not at liberty to assume it to be wrong for the purposes of decision. It seems to us that unless we are prepared to say that it is wrong, that all its principal allegations are immaterial and that the registration plan of the Alabama constitution is valid, we cannot order the plaintiff's name to be registered. It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered, but if all could be the difficulty would not be overcome. If the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and
main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured.

The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in § 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. *Hans v. Louisiana*, *134 U.S. 1*. The Circuit Court has no constitutional power to control its action by any direct means. And if we leave the State out of consideration, the court has as little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff’s name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the State itself, must be given by them or by the legislative and political department of the Government of the United States.84

**Giles** was the logical next step on the road to inequality and segregation paved by **Plessy**. The **Giles** Court slammed the doors of the federal judiciary shut for all of Reconstruction. After **Giles**, the federal courts would no longer be available as a means to even attempt to enforce individual civil rights under the Reconstruction Amendments. **Plessy** and **Giles** were radical departures from prior Equal Protection Clause case law and are and should be equally infamous. By 1913, the Equal Protection Clause had been eviscerated by the Court. It was no longer a federal guarantee of an individual’s right to

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84 *Giles*, at 486-488.
be treated equally without regard to race by state and local governments. The federal
courts were now effectively closed to that argument.

The Supreme Court had turned the Equal Protection Clause on its head and
effectively amended the Constitution. The federal government would now assist states in
treating persons unequally on the basis of their race. The Supreme Court had not only
amended the Constitution without a vote of the people, it had literally changed the
outcome of the Civil War. The federal courts had moved from protecting the rights of
each person to equal protection without regard to race; it had made the federal judiciary
into an enthusiastic defender of segregation.

As a result of this judicial activism, black Americans would be subjected to
decades of segregation, legally sanctioned physical intimidation, including lynchings and
brutal political repression by some state governments. The Court had blessed the gross
injustice of Jim Crow and state lawlessness toward black Americans. It was the Supreme
Court of the United States, more than any other government institution that was the direct
cause of Jim Crow as well as its long stain on America’s history.

However, in another of the great ironies of American jurisprudence, the era of
segregation, created by the Supreme Court’s judicial activism in 1896 would be ended in
1954 by another act of judicial activism by the Supreme Court, Brown v Board of
Education \(^5\) (“Brown I”). The journey of the Court from Plessy to Brown I cannot be
properly understood without a brief review of the political and legal movement to end
segregation that arose after Giles. That political movement and the litigation strategy was
developed and implemented primarily by an advocacy group, the National Association
for the Advancement of Colored People (“NAACP”).

The NAACP was formed for the express purposes of ending segregation and advancing the legal and economic status of black Americans.\textsuperscript{86} The group recognized the severe legal roadblock that had been created by the Court’s decisions in \textit{Plessy} and \textit{Giles}. Concluding that the federal courts, bound by \textit{stare devises}, could not be receptive to a frontal challenge to segregation that would reinstate the original intent of the 14\textsuperscript{th} Amendment, the NAACP began an innovative litigation based campaign to challenge the equality component of \textit{Plessy}. The theory of these civil rights pioneers was that the states would be unable to meet the financial requirements of funding two truly equal, segregated systems and that this failure would allow courts to gradually chip away at legal segregation.\textsuperscript{87}

This strategy had some notable successes, including judicial invalidation of restrictive zoning on the basis of race,\textsuperscript{88} assuring the admission of blacks to state law schools\textsuperscript{89} and other state professional schools.\textsuperscript{90} However, the overarching goal of these civil rights advocates and their litigation strategy was clearly expressed. The organization repeatedly said that its goal was to return to the original understanding of the Equal Protection Clause as applied in \textit{Strauder}, “... to secure \textit{for all people} the rights guaranteed in the 13th, 14th, and 15th Amendments to the United States Constitution, which promised an end to slavery, the equal protection of the law, and universal adult male suffrage, respectively.”\textsuperscript{91} However, the separate but equal doctrine was not fundamentally changed until the Supreme Court chose to address it in the context of the

\textsuperscript{87} Ibid.
\textsuperscript{88} \textit{Buchanan v. Warley}, 245 U.S. 60; 38 S. Ct. 16; 62 L. Ed. 149 (1917).
\textsuperscript{90} \textit{McLaurin v. Oklahoma State Regents}, 339 U.S. 637 (1950).
\textsuperscript{91} \textit{NAACP: 100 Years of History} 2009. \texttt{http://www.naacp.org/pages/naacp-history.}
largest example of it, segregated public schools. The evidence presented to the Court in Brown I clearly established that the separate facilities and programs provided to black schoolchildren were grossly inferior to those provided for white schoolchildren.

However, the Supreme Court would reject the call of the NAACP for a return to Strauder and the original intent of the Equal Protection Clause. The Brown Court would instead accept the group based rights theory of Plessy while setting the stage for Plessy to be overruled. There seems to be little that explains the Brown I Court’s rejection of Strauder and the NAACP’s argument for a return to the original intent. A clue to the motives of the Brown I Court may be found in the language used in the Court’s opinion by Chief Justice Warren.

The Court’s opinion in Brown I begins with some of the most curious language ever placed in a Supreme Court opinion. Chief Justice Warren takes great pains to discuss his assertion that the original intent of the drafters of the 14th Amendment could not be faithfully followed because that original intent was hopelessly obscured by the indeterminably imprecise legislative and political history surrounding the adoption of the 14th Amendment. He refers to the historical record as “inconclusive.”

Reargument [of the Brown I case] was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States.”
Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty. ....  

The Brown I opinion was issued in 1954 and a unanimous Supreme Court declares therein that the history surrounding the adoption and ratification of the Equal Protection Clause is so inconclusive as to be unknowable. Of course, this assertion is preposterous on its face. The Court required the educated reader to willingly suspend disbelief to accept this assertion. The history of the Reconstruction Amendments has been the subject of numerous historical texts and was consistently recounted in numerous Supreme Court decisions. 

A great example of this is the Court’s discussion in the 1948 case of Hurd v. Hodge. In Hurd the Court confidently declared that the intent of the drafters of the Reconstruction Amendments was clearly understood and not particularly difficult to ascertain as a matter of history. 

Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States. ... The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen. Most of these laws embodied express racial classifications and although others, such as those penalizing vagrancy, were facially neutral, Congress plainly perceived all of them as

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92 Brown I at 492 and 493(emphasis added).
consciously conceived methods of resurrecting the incidents of slavery. Senator Trumbull summarized the paramount aims of his bill:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment." Cong. Globe, 39th Cong., 1st Sess., 474 (1866).

Senator Trumbull emphasized: "This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." Id., at 476.93

The Brown I Court takes the extraordinary step of ignoring the clearly relevant legislative, political and legal history surrounding the adoption and ratification of the 14th Amendment. The only reasonable explanation is that Chief Justice Warren is trying to avoid accepting Plessy while still upholding Plessy’s fundamental change in the basic understanding of the Equal Protection Clause. He is trying to both overrule Plessy and keep its group based rights analysis and legislative deference.

The Warren Court clearly wanted to do something in Brown I other than just end segregated schools. The Court wanted to end segregated schools while preserving the group based rights theory of Plessy so that government could continue to make decisions on the basis of race. This conclusion is reinforced by the curious phrasing of the issue presented in Brown I. “We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities

and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."  

In framing the issue as an attempt to discern the constitutional rights of a group of persons as large as all minority schoolchildren within the United States, Brown I signals its fealty to the group based logic of Plessy and to the idea that race should be able used to grant or deny government special treatment to group members as determined by the states. This is the exact holding of Plessy and Brown I accepts it, the only difference being that the minority race would now be favored by the government and the majority race disfavored.

Brown I is rightly celebrated for its historic and morally just practical accomplishment, the end of de jure segregated schools. Nevertheless, Brown I and its progeny should also be understood as a great missed opportunity. The Brown I Court rejected the opportunity it was presented to return to the clear intent of the 14th Amendment. This missed opportunity would result in multiple cases where pluralities of Justices would attempt to expand group based rights. Over the next several years, the Court would continue to struggle with the inherent conflict between the intent of the Equal Protection Clause and its own belief that the Court could benefit the nation through the creation of race based government preferences and quotas. Brown I marked the beginning of a new type of race conscious jurisprudence, the birth of affirmative action and disparate impact.

V. THE COURT EXPANDS GROUP BASED RIGHTS TO PROVIDE PREFERENCES TO SELECTED MINORITY GROUPS

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94 Brown I, at 493.
95 The Court did not miss this opportunity, it intentionally rejected it.
As of 1954 the legal justification for state and local governments to lawfully grant preferential treatment to certain racial groups (and to the detriment of other such groups) without violating the Equal Protection Clause had been established. For purposes of analysis, these racial preferences have been broadly characterized herein as under two general terms: affirmative action\textsuperscript{96} and disparate impact theory.\textsuperscript{97}

These two concepts are similar and yet different in some respects. They both see race as a valid basis upon which to allocate government benefits and to control, through government regulation, private conduct, such as employment. Both see no inequality or injustice in government action that favors members of one race to the detriment of another race on the basis of race. However, they are different in the manner in which they operate. Affirmative action is a political doctrine that is used primarily by the legislative and executive branches to provide explicit preferences to one race and to the detriment of another in government contracting, employment, school admissions and other similar governmental activities. Disparate impact is more applicable in the judicial setting as a theory of proof of allegations of racial discrimination that allows a Plaintiff to recover for an alleged act of racial discrimination in the absence of any proof of any intent to discriminate on the part of the Defendant, usually an employer.

\textsuperscript{96}Affirmative action as discussed herein shall have the meaning set defined by the EEOC. 29 C.F.R. 1608.1 provides: “Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII. Correspondingly, Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1).”

\textsuperscript{97}Disparate impact shall herein be defined as it is defined in the Civil Rights Restoration Act of 1991, Pub. L. No. 102-166 Sect. 1-3, 101-402, 105 Stat. 1071-1099 (1991)
Following Brown I, the constitutionality of each these related legal concepts was addressed by the Supreme Court in a separate line of cases. Because these cases overlapped in time and each concept was considered by the Court at a different point in time, it will assist in this analysis to discuss the cases which developed each concept separately. I will begin by discussing the cases addressing the law of affirmative action followed by a discussion of the cases and the statutory revisions concerning disparate impact.

a. AFFIRMATIVE ACTION - Bakke, Fullilove and Metro Broadcasting

Affirmative action is defined herein as a generic term to refer to programs and policies through which governments and private actors seek to implement policies to grant preferences on the basis of race in favor of one or more selected minority groups. Affirmative Action began as a legal theory with the expressed purpose of advancing the social, economic and cultural status of certain minority groups. These programs were generally advanced by certain progressive academics\(^98\) in an attempt to respond to what was perceived as a lack of substantive progress in remedying the negative effects on blacks and other minority groups of past slavery or legal discrimination and the effects of continuing racial discrimination in American society.\(^99\) As the civil rights movement grew and racial animus declined, these programs became politically popular and became widespread.

The first recorded use by the federal government of the specific term “affirmative action” was in 1961 in Executive Order 10925, issued by President John F. Kennedy. This Executive Order required that all federal agencies take “affirmative action” to ensure


\(^99\) Ibid.
equal employment opportunities were made available for federal employees and applicants for employment who were members of certain minority groups. Executive Order 10925 was later superseded by Executive Order 11246 issued in 1965 by President Lyndon Johnson which required all federal agencies to take affirmative action to increase minority participation in federal contracting.

Affirmative action theory as originally conceived generally rejected the use of strict numerical quotas and set asides and instead concentrated on outreach and programs to increase opportunities for minority advancement. However, results were not quick to materialize and the proponents increased calls for numerical quotas and race based set asides in contracting, employment and other areas. Initially, lower federal courts generally upheld affirmative action programs, including quotas, in employment, contracting and programmatic access as against equal protection challenges. These lower courts generally relied upon the logic of Brown I and the developing line of school desegregation cases which had authorized race conscious remedies to be imposed for prior de jure racial segregation in public schools. The issue of the constitutionality of affirmative action in a context other than school desegregation did not reach the Supreme Court until 1977 in the case of Regents of the University of California v. Bakke.

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100 Ibid.
101 Ibid.
102 Ibid.
103 Ibid.
Bakke arose when Mr. Alan Bakke, a white male, was denied admission to the University of California at Davis Medical School in favor of a lower scoring minority candidate as part of the Medical School’s affirmative action policy. This policy reserved a numerical quota of 16% of total admissions for members of certain university approved minority groups.107 During the trial of the case, the evidence became clear that Mr. Bakke’s application was rejected solely due to his race. Mr. Bakke’s objective qualifications for admission were vastly superior to the minority candidates who were admitted in his place under the affirmative action policy quota.108

Mr. Bakke’s suit alleged that the medical school violated the Equal Protection Clause by rejecting his admission on the basis of his race. The California Supreme Court ruled in favor of Mr. Bakke and ordered him admitted to the Medical School. The University and the Medical School appealed that decision to the Supreme Court.

The Supreme Court decided the case by a divided vote of 4-4-1 and it issued five separate opinions in the case. Four members of the Court agreed with Mr. Bakke that the University was prohibited from denying him admission to the Medical School on the basis of his race. These four Justices ruled on a statutory basis, concluding that Mr. Bakke was entitled to relief under Title VII. Four members of the Court supported the affirmative action quota policy on the grounds that the state did not violate the Equal Protection Clause or Title VII by assigning admission slots into the medical school on the basis of race, so long as the intent of the government’s racial preference was to remedy the effects of past “societal discrimination.”109 The members of this plurality would

107 The policy granted preferences in admissions to “Blacks,” “Chicanos,” “Asians,” and “American Indians.”
108 Bakke, at 275, 276.
109 Bakke, at 276.
approve express racial preference in situations where the Court was assured that the intent of the government’s race based action was “benign” and that the program had the purpose to benefit “discrete and insular minorities”.\textsuperscript{110}

The opinion of the Court was announced by Justice Powell, in an opinion joined by no other members of the Court. That opinion affirmed the California Supreme Court’s holding that Mr. Bakke had been unlawfully discriminated against on the basis of his race and he ordered that Mr. Bakke be admitted to the medical school. Justice Powell’s opinion, however, also reversed that portion of the California Supreme Court’s order that had held that the Equal Protection Clause meant that the constitution was colorblind and that race could never be used as a valid criterion in admissions to medical schools. Justice Powell’s opinion recognized that the original intent of the Equal Protection Clause was to create an individual right to be treated equally without regard to race. But, at the same time he created a limited exception where race could be taken into account by government, to ensure diversity in public education admissions.

Justice Powell’s opinion is notable for its rediscovery\textsuperscript{111} of the original historical understanding of the Equal Protection Clause that had been declared to be historically undeterminable in Brown I. Justice Powell recognized that the Equal Protection Clause exists to protect the individual rights of each person in the United States to be treated equally by state and local governments without regard to race.

It is settled beyond question that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” Shelley v. Kraemer, supra, at 22, 68 S.Ct., at 846. Accord, Missouri ex rel. Gaines v. Canada, supra, 305

\textsuperscript{110} Bakke, at 277.
\textsuperscript{111} After all, that history had been declared inconclusive and intellectually unknowable by Chief Justice Warren in Brown I.
The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. \footnote{Bakke at 289, 290, Opinion by Powell, Justice.} The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. \cite{Shelley} The rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed. \footnote{Bakke, at 321, opinion by Powell, Justice (emphasis added).}

Justice Powell then applied Korematsu's strict scrutiny analysis to Mr. Bakke's claim. He held that the government may have a compelling interest in achieving educational “diversity” and therefore reasoned that an affirmative action program could be constitutional for this end if it was also narrowly tailored in furtherance of that compelling governmental interest. He concluded that the actual affirmative action program as applied to exclude Mr. Bakke was not narrowly tailored and was therefore unconstitutional. Based on his conclusion, a majority of the Court had held that Mr. Bakke prevailed and that he must be admitted to the Medical School.

Justice Powell’s opinion in Bakke was the beginning of the Court’s recognition of the concept of “diversity” as a potential exception to a general rule that the government cannot lawfully consider race in its actions. He approvingly cited an admissions program at Harvard College that gave individualized credit to one’s race as one consideration out of many factors so long as the consideration of race did not rise to the level of a
numerical quota. According to Justice Powell, such a narrowly tailored consideration of race might pass constitutional muster.

Justice Marshall’s dissenting opinion in Bakke sets forth a spirited defense of the group based rights theory for government racial preferences. Justice Marshall enthusiastically endorses the idea that government is and should be free to assign rights and award benefits on the basis of race. Justice Marshall’s opinion only recognizes two areas of limitations on the use of race by government. First, a racial preference would be constitutional if the government can show that it was adopted for “benign” purposes. Second, a racial preference would be constitutional if the program is motivated by intent to remedy a “past history of societal racial discrimination” and that limits benefits to “one or more designated minority groups”. 114

Ironically, Justice Marshall expressly relies upon Plessy to defend his approval of racial preferences. By doing so, he tacitly admits that segregation and affirmative action are conceptual cousins, if not brothers. He finds it significant that the Plessy Court had the opportunity to declare the Constitution to be color blind and that it did not do so. He sees this failure by a racist and bigoted Court to declare the constitution color blind as somehow evidence that government can lawfully treat persons unequally on the basis of race.

Most importantly, had the Court been willing in 1896, in Plessy v. Ferguson, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the “Constitution is color-blind” appeared only in the opinion of the lone dissenter. 163 U.S., at 559, 16 S.Ct., at 1146. The majority of the Court rejected the principle of color-blindness, and for the next 58 years, from Plessy to Brown v. Board of Education, ours was a Nation

114 Bakke, at 384Justice Marshall, dissenting.
where, by law, an individual could be given “special” treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.\footnote{Bakke, at 385 Justice Marshall, dissenting (emphasis added).}

Justice Marshall candidly admits that his conclusion that government has the authority to allow racial preferences is based on the same reasoning that created segregation. He recognizes the obvious injustice of the segregation that resulted from the \textit{Plessy} Court’s approval of group based legal rights and yet he fails to see the great irony of his reliance upon that decision in support of affirmative action. He seems to reject the idea that repeating the injustice of \textit{Plessy} on members of other races would not lead to racial healing or toward a more just society.

Justice Blackmun’s separate dissent is an even more direct call for court approval of racially motivated decision making and race-based affirmative action. He defends government use of as a necessary evil under the theory of two wrongs make a right.

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot-we dare not-let the Equal Protection Clause perpetuate racial supremacy.\footnote{Bakke, at 407 Justice Blackmun, dissenting (emphasis added).}
Justice Blackmun’s argument is that because racial “progress” would not otherwise occur without unequal governmental treatment on the basis of race, government programs must be free to grant preferences and to spend a certain amount of funds favoring minorities until “racism” is eliminated. He never explains how government actions to engage in racism would lead to an end of racism; he seems to assert it as an article of faith. Government consideration of race after Plessy seems to argue against that theory.

Bakke was a landmark case because it was the first time the Court was forced to deal with the issues caused by the inherently irreconcilable conflict between affirmative action and equal protection. Affirmative Action is conceptual nonsense unless it is unequal. A nation can value individual rights or it may value group rights. Since one cannot protect both, trying to protect both is intellectually impossible. However, this did not stop the Court from trying to accomplish the impossible and the Court would grapple with affirmative action in many cases over the next several years.

The next major case addressing affirmative action was the 1980 case of Fullilove v. Klutznick. In this case the Court was called upon to determine the constitutionality of federal affirmative action programs that granted racial preferences in federal contracting. Congress had adopted a Minority Business Enterprises (“MBE”) program that required all federal contractors to award 10% of their sub-contracts to minority owned businesses. An association of contractors challenged the MBE racial set aside program on equal protection grounds.

117 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).
118 The MBE required that this 10% set aside be used to procure services or supplies from businesses owned by citizens “who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.” Fullilove, at 448.
A majority of the Court upheld the federal contracting affirmative action program, although no majority supported any one standard of review. The Court’s approval of the MBE was based upon its determination that Congress possessed special authority to grant racial preferences as part of its remedial authority to end slavery under the 13th Amendment and to provide equal protection of the law under the 14th Amendment. The Fullilove Court based this conclusion by relying on the school desegregation line of cases.¹¹⁹

In these school desegregation cases we dealt with the authority of a federal court to formulate a remedy for unconstitutional racial discrimination. …Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor. Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); see Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). …¹²⁰

By relying upon the school desegregation cases, the plurality opinion in Fullilove conveniently ignored the fundamental conceptual difference between the school desegregation cases and federal contracting affirmative action. The school desegregation cases were based on judicial findings establishing prior de jure racial discrimination by state governments and were supervised by a federal court. The race conscious relief in these cases was purely remedial to the proven violations and was strictly limited to remedying cases of de jure discrimination.¹²¹

¹¹⁹ The school desegregation cases are not discussed herein (other than Brown I) because the race conscious remedies in those cases were court ordered based on a court finding of prior intentional de jure racial discrimination. Because affirmative action programs do not rely upon a court finding of past intentional discrimination and do not purport to be remedial in the same sense, they are inapposite to the issue of the constitutionality of affirmative action programs.
¹²⁰ Fullilove, at 483.
¹²¹ De jure discrimination as used herein is defined as discrimination by governmental action as opposed to discrimination by private action, which is referred to as de facto discrimination.
On the other hand, the affirmative action MBE program was a federal program, not a state one, was not adopted to remedy past de jure discrimination, was not supervised by a court and was not limited to remediation of the past legal wrong. These federal contracting regulations did not rely upon a judicial finding of past de jure racial discrimination. The dissenting and concurring opinions in Fullilove recognized the problems with the direction the Court was taking and gave some hints of the arguments to come.

Justice Powell’s concurring and dissenting opinion expressed his deep concerns with the direction the Court was suggesting in the Fullilove plurality. Justice Powell worried that racial set asides would act to punish innocent white Americans (and other, non-favored minorities) and thereby reduce the good faith of the white majority and damage the nation as a whole.

A race-conscious remedy should not be approved without consideration of an additional crucial factor - the effect of the set-aside upon innocent third parties. See Teamsters v. United States, 431 U.S., at 374-375, 97 S.Ct., at 1874. … In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); Dred Scott v. Sandford, 19 How. 393, 15 L.Ed. 691 (1857).\(^\text{122}\)

Justice Powell correctly saw that the harm to “innocent third parties” by racially based programs mandated the highest standard of review for all race based programs, including affirmative action. He argued that all governmental actions that are taken on the basis of race are always unjust because it is always wrong to treat people as mere members of their race. The injustice of race based treatment can only be allowed as a

\(^{122}\) Fullilove, Justice Powell concurring and dissenting, at 496.
limited and specific remedial measure to grant relief in cases where past slavery and/or de jure segregation have led to actual harm. To extend the idea of allowing the extraordinary relief of race conscious remedies that are required for proven cases of de jure segregation to the amorphous and virtually unobtainable goal of eliminating societal racial discrimination is a bridge too far.

Affirmative action cannot be justified on the same rationale as school desegregation. Affirmative action requires (and produces) an innocent victim, by definition. Court ordered school desegregation does not produce any victims, provided the remedy is consistent with an individual rights approach to the issue. White children who are ordered to attend an integrated school that is the result of remedying a past act of de jure discrimination are not innocent victims because they were not, in a legal sense, harmed.123

Justice Stewart’s dissent in Fullilove makes a strong argument in support of the original historical meaning of the Equal Protection Clause - as a federal guarantee of an individual right for every person to be treated equally by the law without regard to race. His dissent expressly calls on the Court to act boldly and thereby lead the nation out of the morass the Court created in Plessy by having the courage to follow the dissenting opinion in Plessy.

“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. … The law regards man as man, and takes no account of his surroundings or of his color.

123 This statement is not to be taken as suggesting that one can or should ignore the real difficulties faced by some individual white children and many more black children during the desegregation process. Those difficulties were real and, in many cases, severe. However, these harms were often the result of individual acts of bad faith or incompetent implementation of desegregation, not desegregation itself. Integrated schools (meaning schools that are not de jure segregated) are required by the Equal Protection Clause. The right protected by the Equal Protection Clause is best understood as the right of every child to be assigned to a school without regard to race. There are, by definition, no “innocent victims” of school desegregation in the sense that affirmative action always produces an “innocent victim.”
…” Those words were written by a Member of this Court 84 years ago. Plessy v. Ferguson, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (Harlan, J., dissenting). … Today, the Court upholds a statute that accords a preference to citizens who are “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts,” for much the same reasons. I think today’s decision is wrong for the same reason that Plessy v. Ferguson was wrong, and I respectfully dissent….

The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. … Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid. McLaughlin v. Florida, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222; Bolling v. Sharpe, supra, 347 U.S., at 499, 74 S.Ct., at 694; Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194.\[124\]

Justice Stewart argues that because racism is always immoral and unequal, courts applying the Equal Protection Clause must always reject race based remedies, even if the claimed reason for the race based action is benign in nature. He understood that an intellectual rationalization can always be made for differential treatment on the basis of race. A standard of subjectively benign racism can be asserted for any number of programs, many of them not truly benign.

The intellectual and philosophical justification for injustice is almost always the claimed “greater good” to be served by the particular injustice. Many, including church leaders who supported the National Socialist Party in Germany in the 1930’s and 1940’s, justified their support for Hitler as a service to the “greater good.” \[125\] Justice Stewart rightly recognizes that history teaches that no truly greater good can ever be served by the use of racial preferences and group legal rights. Racial distinctions are simply antithetical

\[124\] Fullilove, at 522, 523 Justice Stewart, dissenting.
to the Enlightenment, to American legal traditions of equality before the law and to the known intent of the drafters of the Equal Protection Clause.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, quoted in Loving v. Virginia, supra, at 11, 87 S.Ct., at 1823. … In short, racial discrimination is by definition invidious discrimination. …. The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is “universal in [its] application, to all persons . . . without regard to any differences of race, of color, or of nationality.126

Justice Stewart concludes his argument against allowing the government to make and enforce racial classifications by noting some of the practical absurdities which arise via this exercise. He comments on the conceptual and definitional impossibilities created by any law based on the legally indefinable concept of race. He notes that government cannot even define what a race is, much less “equally” or “fairly” distribute benefits among various racial groups. After all, a distribution of special governmental benefits to members of “racial” groups cannot occur without first adopting a working definition of what “race” is and the mundane and dangerous task of creating government approved racial classifications and assigning each person to their designated group.

Laws that operate on the basis of race require definitions of race. Because of the Court's decision today, our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white. … Most importantly,

by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race - rather than according to merit or ability - and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of “racial entitlement” will be fostered, and private discrimination will necessarily be encouraged.127

Governmental racial preferences in the present time cannot remedy any of the historical injustices of slavery and segregation. Attempting to do so is a classic case of two wrongs don’t make a right. The Court’s attempt to remedy past wrong acts by approving a current wrong act will only stagnate what would otherwise by the natural progress of civil society to a less polarized future, a post racial future. The drafters of the 14th Amendment sought to eliminate government sponsorship of racism and, by doing so, allow the power of civil society to bring the nation to a place where race will matter less over time.

Obviously, a majority of the Court was not persuaded by Justice Stewart’s compelling arguments about the dangers of racial group classification and in support of Justice Harlan’s vision of a color blind constitution. Following the Court’s tacit approval of them in Fullilove, affirmative action programs were greatly expanded at all levels of government.128 Federal affirmative action programs were implemented in many areas, including federal contracting.129

The next major case where the Court considered an equal protection challenge to federal affirmative action programs was Metro Broadcasting, Inc. v. F.C.C.130 In this case

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127 Fullilove, at 525, Justice Stewart, dissenting (internal footnote omitted).
129 Ibid.
the Court was asked to determine the constitutionality of a racial quota adopted by Congress that required that a certain number of radio broadcast licenses be reserved for sale only to minority owners of radio stations.

In an opinion by Justice Brennan, the Court upheld the racial set aside program. Justice Brennan reasoned that the program met the requirements of the Equal Protection Clause because Congress possessed authority to remedy past discrimination that did not extend to state and local governments. Justice Brennan further based his holding on the application of a new, intermediate level of judicial scrutiny. This new intermediate level of scrutiny would be applied in reviewing the constitutionality of federal affirmative action programs adopted by Congress for benign purposes and in furtherance of an “important” governmental interest. This test differed from strict scrutiny in that it did not require that the governmental interest be “compelling” and it did not require that the program be “narrowly tailored” to achieving the compelling interest.

By rejecting strict scrutiny of all racial classifications, the Metro Broadcasting Court abandoned its own precedents and re-introduced the deferential standard first articulated by the Court in Plessy. If a reviewing court found that the legislature’s stated reasons for its chosen racial classifications and resulting preferences were “benign” in nature and that they were implemented with the intent to promote “diversity,” the Court would grant deference to the claimed motives of the legislature.131 By this mechanism, the Court would control the legality of racial preferences.

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131 Of course, this test was itself without standards, leaving the constitutional test essentially without any objective standard. The Court thereby reserved to itself the authority to subjectively determine the propriety of all racial preferences. The standard would be simply what could corral five votes from the nine members of the Court.
With *Metro Broadcasting*, the Court had achieved a majority opinion in favor of affirmative action, at least as to federal programs approved by Congress. The federal government was free to take race into account in any program so long as it first declared the program to be for benign purposes and for the promotion of diversity. Any challenge to these motivations would face the strong resistance of the announced deference to the expressions by Congress of its benign intentions and its goals for the challenged programs. These expressions of legislative motives would be upheld by reviewing courts, unless, of course, the Supreme Court disagreed and overruled them on a case by case basis.

The push for group based legal rights and special racial preferences by race had completed its long march through the Court so that the original intent of the drafters of the Equal Protection Clause had been completely reversed. The Equal Protection Clause now meant the opposite of what its drafters intended it to mean. *Metro Broadcasting* was the modern fulfillment of the *Plessy* majority opinion. Race would matter, as a matter of law, for the foreseeable future.\(^{132}\) The Court would no longer start from the premise that all racial preferences should be reviewed with the extreme skepticism of strict scrutiny. Instead the Court had approved racial group preferences that granted governmental benefits to one racial group while explicitly punishing members of another racial group, all in the absence of any evidence, much less proof of present discrimination.

\(^{132}\) One (perhaps) unintended consequence of this change is that the ability of any racial group to claim relief does not require any history of actual or societal discrimination. As an example, recent black immigrants are to be the beneficiaries of racial preferences for blacks even though none of their ancestors were brought to America as slaves and none of their ancestors were victims of de jure segregation or governmental racial oppression. It is racial group membership that carries with it the constitutional right to preferred treatment, not a history of slavery, legal oppression or de jure segregation.
The Equal Protection Clause had been changed by the Court from a tool to protect the negative right of every person to be free from unequal treatment by the government on the basis of race to a positive instrument of progressive societal change, a tool that could be employed in the service of the cause of group identity and allegiance over individual rights and national citizenship. The Metro Broadcasting majority had adopted the argument that had been rejected by the Court in Strauder.

Justice O’Connor’s dissenting opinion begins with a stirring reminder that the Equal Protection Clause was intended to benefit individuals, not racial groups.

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens “as individuals, not ‘as simply components of a racial, religious, sexual or national class.’” Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083, 103 S.Ct. 3492, 3498, 77 L.Ed.2d 1236 (1983). Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.

Justice O’Connor’s opinion continues by noting the lack of any historical or precedential support for the conclusion by the majority that a lesser standard of judicial review should apply to federal race based affirmative action programs, as opposed to state or local ones. She strongly defends her conclusion in Croson that strict scrutiny should be applied to all racial classifications and that two different standards of review are not intellectually or historically justified.

As we recognized last Term, the Constitution requires that the Court apply a strict standard of scrutiny to evaluate racial classifications such as those contained in the challenged FCC distress sale and comparative licensing policies. See

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133 Metro Broadcasting, at 602, Justice O’Connor, dissenting. (emphasis in original)
Strict scrutiny” requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The Court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. Yet the Government's different treatment of citizens according to race is no routine concern. This Court's precedents in no way justify the Court's marked departure from our traditional treatment of race classifications and its conclusion that different equal protection principles apply to these federal actions.134

Justice O’Connor’s dissent calls on the Court to keep the Pandora’s Box of making law by group based racial classification closed by retaining the strict scrutiny test for all racially based classifications made by government at all levels. She notes the obvious, that the government cannot make “benign racial classifications” because that phrase is an oxymoron.

The Court's reliance on “benign racial classifications,” ante, at 3008, is particularly troubling. “Benign’ racial classification” is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right; see Shelley v. Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948), securing to each individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group.

She asks where in the historical record of the 14th Amendment is there evidence that the drafters intended for either the Court or any legislature to have the power to make and define a “benign” racial classification.

The Court's emphasis on “benign racial classifications”

134 Ibid.
suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to narrowly confined remedial notions, “benign” carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be “benevolent.” By expressly distinguishing “benign” from remedial race-conscious measures, the Court leaves the distinct possibility that any racial measure found to be substantially related to an important governmental objective is also, by definition, “benign.” See ante, at 3008-3009. Depending on the preference of the moment, those racial distinctions might be directed expressly or in practice at any racial or ethnic group. We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.135

In his separate dissent, joined by Justice Scalia, Justice Kennedy notes the complete absence of any historical support for the Court’s fundamental change of the 14th Amendment. He writes that the historical record of the intent of the 14th Amendment is easily available, readily understood and quite convincing.136 Justice Kennedy identifies the radical nature of the change in the Equal Protection Clause suggested by the Metro Broadcasting opinion. This radical change is an abuse of the authority inherent in the judicial structure of our federal system, for under that system no court has authority to interpret rather than apply the unambiguous terms of the Constitution. “Legal provisions that are clear on their face or where the intent of the drafters is clear from the historical

135 Ibid.
136 Metro Broadcasting, at 634, Justice Kennedy, dissenting.
record should be applied, not reversed by judges through the trick of adopting shifting standards of review that are outcome determinative.”

Justice Kennedy further argues that the Metro Broadcasting majority is exhibiting its own institutional hubris by failing to recognize its own historical inability to make sound, helpful national policy in the area of race. He reminds the reader of the Court’s very poor historical record in distinguishing between “benign” and “non-benign” racially based actions by government officials. After all, it was the Supreme Court’s Plessy majority that first introduced the concept of judicial deference to legislative expressions of “benign” intentions in making racial classifications. That the Plessy majority created this doctrine of legislative deference in racial classifications under the Equal Protection Clause and did so in furtherance of our nation’s leading example of a historical judicial injustice demonstrates the problem with the entire concept.

Almost 100 years ago in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), this Court upheld a government-sponsored race-conscious measure, a Louisiana law that required “equal but separate accommodations” for “white” and “colored” railroad passengers. The Court asked whether the measures were “reasonable,” and it stated that “[i]n determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort.” Id., at 550, 16 S.Ct., at 1143. The Plessy Court concluded that the “race-conscious measures” it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in Plessy, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Plessy’s standard of review and its explication have disturbing parallels to today's majority opinion that should warn us

137 Metro Broadcasting, at 635, Justice Kennedy, dissenting.
something is amiss here….\textsuperscript{138}

Plessy and Metro Broadcasting are based upon the same quicksand - an assumed, but not principled - ability of courts to make correct or just determinations of legislative expressions of benign intent in legislation that categorizes Americans and treats them differently on the basis of race. Justice Kennedy correctly notes that the same reasoning supports both Plessy and Metro Broadcasting and that this same reasoning supported the apartheid government of South Africa. “[T]he following statement would fit well among those offered to uphold the Commission's racial preference policy: “The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.”\textsuperscript{139}

The Metro Broadcasting decision opened the door for an expansion of federal affirmative action programs, at least those deemed by the Congress to be “benign” programs in furtherance of “diversity”.\textsuperscript{140} As of 1990, the law of affirmative action was nothing if not muddled and uncertain. As noted, herein, the Court had applied strict

\textsuperscript{138} Justice Kennedy’s opinion continues:

\begin{quote}
Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. While the Court repeatedly refers to the preferences as favoring “minorities,” \textit{ante,} at 3003, and purports to evaluate the burdens imposed on “nonminorities,” \textit{ante,} at 3025, it must be emphasized that the discriminatory policies upheld today operate to exclude the many racial and ethnic \textit{minorities} that have not made the Commission's list. The enumeration of the races to be protected is borrowed from a remedial statute, but since the remedial rationale must be disavowed in order to sustain the policy, the race classifications bear scant relation to the asserted governmental interest. The Court's reasoning provides little justification for welcoming the return of racial classifications to our Nation's laws. (internal footnote omitted)
\end{quote}

\textsuperscript{139} See, South Africa and the Rule of Law 37 (1968) (official publication of the South African Government).

\textsuperscript{140} Diversity was discussed in Bakke, supra and will be discussed, infra, in the analysis of Grutter. Initially this was not a major focus of the cases and it gained in importance as the courts restricted “benign” reasons for racial preferences.
scrutiny to invalidate state and local governmental affirmative action programs in Croson in 1989 and approved them for federal programs in Metro Broadcasting. These differing standards were not satisfactory to anyone.

By 1990 the Court had created a muddled jurisprudence of affirmative action that was fragmented and borderline incoherent. Federal affirmative action was subject to intermediate scrutiny and state affirmative impact was subject to strict scrutiny. As discussed infra, the fragmentation that characterized the Court’s affirmative action jurisprudence was also present in the Court’s development of, and expansion of, the doctrine of disparate impact.


Disparate impact theory began as a fairly arcane scholarly concept that modified the standard elements of proof of unlawful employment discrimination under Title VII of the Civil Rights Act of 1964.\(^{141}\) Title VII clearly prohibited intentional racial discrimination in employment by employers subject to the act. In other words, Title VII prohibited disparate treatment of racial minorities in employment.

However, some commentators asserted that Title VII also extended to prohibit claims of unlawful employment discrimination even in the absence of intent to discriminate.\(^{142}\) The issue arose where an employer adopted a neutral employment practice that was not held to be intentionally discriminatory but which adversely impacted one or more racial minority groups. Could an employee recover under Title VII under these circumstances and, if so, what would be the method of proof?


Disparate impact theory was initially developed through the issuance of Guidelines by the Equal Employment Opportunity Commission (“EEOC”). The EEOC declared that Title VII prohibited employment practices where there was no intentional discrimination but where an employment test or other practice used by an employer resulted in a disproportionate impact on minority applicants or employees.\textsuperscript{143} The EEOC explained that the Plaintiff asserting a disparate impact theory must present evidence of a statistically significant disparity in the racial composition of the workforce, or a subcomponent of that workforce, that could support an inference of racial discrimination. This statistical disparity could be established by the 80% rule.\textsuperscript{144} While the statistical disparity was not, of itself, unlawful, the employer would be liable for


\textsuperscript{144} The 80% rule is explained on the EEOC website as “guidance”:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

http://www.uniformguidelines.com/uniformguidelines.html#18
discrimination unless the employer could prove, by a preponderance of the evidence that the disparity was caused by “business necessity”.\textsuperscript{145}

The Supreme Court first addressed the availability of relief under Title VII in the absence of evidence of intentional discrimination, using the disparate impact theory in the 1971 case of \textit{Griggs v. Duke Power}.\textsuperscript{146} \textit{Griggs} was filed as a class action by certain employees and applicants for positions of employment with Duke Power Co. The company had adopted requirements that governed applications for employment or employees seeking promotion from one branch of the company to another. These requirements were either a high school diploma or passage of an intelligence test.\textsuperscript{147}

At the trial level, the District Court made findings of fact that the company’s new employee and promotion policies were strictly race neutral and that they were not adopted with intent to discriminate on the basis of race. On appeal the 4\textsuperscript{th} Circuit Court of Appeals affirmed, in part, holding that the company could not be held liable because an intent to discriminate was a necessary evidentiary component for actionable claims of discrimination under Title VII.\textsuperscript{148} The Circuit Court reasoned that the language of Title VII expressly requires proof of intent to discriminate against the Plaintiff on the basis of race.\textsuperscript{149}

The Circuit Court’s analysis relied upon the common sense conclusion that anti-discrimination law becomes illogical in the absence of an intent component.\textsuperscript{150} As a matter of definitional necessity, discrimination requires that the act being complained of

\begin{footnotesize}
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  \item \textsuperscript{146} 401 U.S. 424; 91 S. Ct. 849; 28 L. Ed. 2d 158.
  \item \textsuperscript{147} \textit{Griggs}, at 427.
  \item \textsuperscript{148} \textit{Griggs v. Duke Power} 420 F2d 1225 (4\textsuperscript{th} Circuit 1970).
  \item \textsuperscript{149} \textit{Griggs}, at 429.
  \item \textsuperscript{150} \textit{Griggs}, at 430.
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be done because of the protected classification. An act that is not taken because of racial animus is, ipso facto, taken for some other reason or for no reasons. Acts taken by free people that are not taken to discriminate on the basis of race reside in the realm of personal freedom and autonomy. One cannot logically discriminate against another person on the basis of their race without intending to do so.\textsuperscript{151}

The \textit{Griggs} Court was not persuaded by the logic of the Circuit Court opinion. Instead, the Court unanimously reversed the Circuit Court, accepted the disparate impact theory and held that Title VII did provide for a claim for disparate impact relief. The Court adopted the EEOC’s interpretation of disparate impact, holding that an employer would be liable if its employment practices resulted in disproportionate impact upon one or more minority groups unless the employer could prove, by a preponderance of the evidence, that the challenged practice was required by “business necessity.”\textsuperscript{152}

The Court relied primarily upon the congressional record to justify its acceptance of disparate impact liability under Title VII. The Court reasoned that Title VII was intended to do two things, to offer a remedy for past intentional discrimination in employment by the employer and to eliminate the generic employment effects of past societal discrimination, what the Court called “built in headwinds.” The Court held that

\textsuperscript{151} There are commentators, primarily on the political left, who argue that discrimination exists at the subconscious level and that, as a result, subconscious discrimination exists and should be actionable. The foremost advocate of this position is Professor Charles R. Lawrence III. In a 1986 article titled \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, Stanford Law Review, Vol. 39, No. 2 (Jan., 1987) Professor Lawrence expressly advocates for the elimination of any requirement that intent be a component of an actionable claim of unlawful racial discrimination. He reasons that a large part of racial discrimination is subconscious and therefore racism cannot be remedied without an active role by courts to judge the effects and outcomes of employment and other decisions rather than intentions and processes. In Professor Lawrence’s view, disparate impact should be extended to apply to all claims of racial and other discrimination as well as employment cases under Title VII. I would agree with Professor Lawrence that the distinction between employment and other discrimination is not conceptually justified. However, I would conclude that all discrimination claims must, definitionally, be based on a finding of intent, and that any other rule is merely the wolf of race-balancing dressed up in sheep’s clothing.

\textsuperscript{152} \textit{Griggs}, at 432
these “built in headwinds” were actionable even if the employer did nothing to cause them.

... [t]he Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F.2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.153

The Court’s holding in Griggs turned the normal rules of evidence and logic upside down. Duke Power had been found innocent of any intent to discriminate against the Plaintiffs on the basis of their race. The company did not act in any way with regard to race. It treated whites and blacks the same. Yet it was held liable. Griggs should rightfully be viewed with infamy, as a case where the Court failed to defend first principles.

One of the first principles of the rule of law must be that the innocent must be free of legal sanction.154 Innocence must be an absolute defense to any charge and this maxim is universally recognized in the area of criminal law.155 The Griggs opinion disregards

153 Griggs, at 432
154 The rule of law means general rules of law that bind all people and are promulgated and enforced by a system of courts and law enforcement, not by mere discretionary authority. In order to secure equal rights to all citizens, government must apply law fairly and equally through this legal process. Notice, hearings, indictment, trial by jury, legal counsel, the right against self-incrimination—these are all part of a fair and equitable “due process of law” that provides regular procedural protections and safeguards against abuse by government authority. Among the complaints lodged against the king in the Declaration of Independence was that he had “obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers,” and was “depriving us in many cases, of the benefits of trial by jury.” http://www.firstprinciplesjournal.com/articles.aspx?article=1434&loc=r
155 Universal Declaration of Human Rights United Nations – Article 11 “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable
this basic tenet of law and simply declared that innocence alone will not be a valid
defense to a claim of race discrimination under Title VII. The employer must be both
innocent and then prove that its innocent actions were motivated by a “business
necessity.”

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.156

Griggs authorized recovery under the disparate impact theory under Title VII. However, as a case involving statutory interpretation, Griggs did not address the question of whether disparate impact recovery would be available to Plaintiffs in other types of litigation, including constitutional claims under the Equal Protection Clause. However, within five years the Court would be presented with just such a case, asking whether disparate impact theory could support liability for constitutional violations, specifically violations of the Equal Protection Clause. This case was Washington v. Davis.157

Washington v. Davis arose as an employment case filed by a group of black police officer candidates in the District of Columbia.158 These candidates alleged that a


156 Griggs, at 431.
157 426 U.S. 229; 96 S. Ct. 2040; 48 L. Ed. 2d 597 (1976)
158 Because Title VII did not then cover employees of the District of Columbia, Plaintiffs filed their suit as a civil rights case asserting that the screening test violated the Equal Protection Clause.
written employment test adopted by the city government of the District of Columbia were unconstitutional because they had a disparate impact on them as a group. These black candidates scored far lower on the standardized test than did white candidates, as a group.

The parties to the litigation stipulated that the test that was adopted and administered by the District government without any discriminatory intent. The District Court and the Court of Appeals applied the Griggs\(^{159}\) disparate impact standard to this constitutional claim and found liability, reasoning that a statistical disparity existed that broke down on the basis of race and that the DC government had failed to prove that the test was a “business necessity.”\(^{160}\) The Supreme Court granted certiorari.

Based on the Griggs unanimous decision imposing disparate impact liability issued only five years earlier, it seemed reasonable to assume that the Court would extend the Griggs standard to allow disparate impact discrimination claims to be made under the Constitution. However, in an opinion authored by Justice White, the Court reversed the Circuit Court and found in favor of the District of Columbia government. The Court expressly declined to extend the disparate impact theory to claimed violations of the Equal Protection Clause.

Justice White begins his analysis in Washington by distinguishing the instant case with Griggs. He bases this distinction on the fact that Griggs was a case of statutory interpretation and is therefore only applicable to claims brought under Title VII. The Court did not extend Griggs to impose a general rule that applies in constitutional claims of equal protection.

\(^{159}\) Seemingly with the consent of the parties.

\(^{160}\) Incredibly, neither party challenged the Court of Appeals’ determination that the Griggs disparate impact analysis was applicable to constitutional claims. The Court raised it \textit{sua sponte} under the plain error doctrine.
As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.161

Justice White then reviewed the case law which recognized the logical requirement that intent to discriminate must be a necessary component of any claim of discrimination. He cites to *Strauder* and the long line of cases thereafter as persuasive authority for the proposition that actionable claims of racial discrimination in violation of the Equal Protection Clause require that the Plaintiff establish proof of intent to discriminate on the part of the defendant.162

Almost 100 years ago, *Strauder v. West Virginia*, 100 U.S. 303 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the *Equal Protection Clause*, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). …

Justice White further outlines the many reasons why proof of intent to discriminate is and must be a necessary component of any equal protection claim. He references the school desegregation cases which all turned on a finding of prior de jure

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161 *Washington v. Davis*, at 238, 239.
intentional racial discrimination by the state or local government to support a federal remedy.

The rule\textsuperscript{163} is the same in other contexts. … The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the \textit{Equal Protection Clause}. The essential element of \textit{de jure} segregation is "a current condition of segregation resulting from intentional state action." \textit{Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973)}. "The differentiating factor between \textit{de jure} segregation and so-called \textit{de facto} segregation... is purpose or intent to segregate." \textit{Id., at 208.} See also \textit{id., at 199, 211, and 213}.\textsuperscript{164}

Justice White continues by noting that, while evidence of a statistically significant disparate impact may constitute admissible evidence of intent to discriminate and that it may combine with other proof to show intent to discriminate in a particular case, disparate impact evidence, on its own, cannot support a valid cause of action alleging an equal protection violation. To prevail under a claim of discrimination in violation of the \textit{Equal Protection Clause}, a Plaintiff must carry the burden to prove that the Defendant intended to discriminate upon a prohibited basis.

Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, \textit{McLaughlin v. Florida, 379 U.S. 184 (1964)} that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. …

\textit{Washington} obviously conflicts with \textit{Griggs} in that it requires proof of intent to discriminate to recover for employment discrimination on the basis of race and \textit{Griggs}.

\textsuperscript{163} Meaning the rule that requires Plaintiffs to carry the burden to prove intent.
\textsuperscript{164} \textit{Washington v. Davis} at 239, 240.
does not. Justice White seems to recognize the inequality of this conflict and he resolves it by rejecting the fundamental logical basis for Griggs.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person... equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.


Simply put, Griggs and Washington are fundamentally irreconcilable. However, the Washington Court did not overrule Griggs and thereby left in place this conflict.

The Equal Protection Clause was adopted to require state governments166 to treat persons equally without regard to race. Under Washington v. Davis, these same state governments were now free to use employment tests that had a disparate impact yet private employers, who were never covered by the Equal Protection Clause, would face liability for the same action and the same disparate impact claim. State and local government employers were exempt from liability for the consequences of their own past (and sometimes present) creation of segregation and discrimination, while American businesses, many of whom opposed segregation and discrimination, were forced to bear financial liability for what were generally state government created ‘headwinds.’

Over the next several years, the Court would avoid taking any case that might require it to address the obvious conflict between Griggs and Washington v. Davis. However, in 1989, the Court finally addressed disparate impact, in a case that

165 Washington v. Davis, at 244
166 Not private actors.
substantially modified Griggs and the disparate impact test. This case was Ward’s Cove Packing v. Antonio.\footnote{490 U.S. 642 (1989) Because Ward’s Cove was effectively overruled by the CRRA in 1991, a more lengthy discussion of the case is not necessary for the analysis and will be is omitted.}

In Ward’s Cove, the Court clarified that, under Title VII, the employer’s burden to produce evidence of “business necessity” did not shift the ultimate burden of proof of discrimination to the Defendant and that the ultimate burden of proof remained with the Plaintiff. Ward’s Cove did not overrule Griggs, did not eliminate disparate impact theory or otherwise fundamentally reconcile Griggs with Washington v. Davis. However, it did change the practical application of the law of disparate impact under Title VII.

In this phase,\footnote{168 The phase of a disparate impact case where the Defendant must prove “business necessity” by a preponderance of the evidence to avoid liability.} the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff. To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, see 810 F.2d 1485-1486, or in the panel's decision on remand, see 827 F.2d 445, 447 -- suggesting that the persuasion burden should shift to petitioners once respondents established a prima facie case of disparate impact -- its decisions were erroneous.

"[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." Watson, supra, at 487 U. S. 997 (O'CONOR, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248, 450 U. S. 256-258 (1981). *** The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was "because of
such individual's race, color," etc., that he was denied a desired employment opportunity. See 42 U.S. C. §2000e-2(a).\textsuperscript{169}

Following Ward’s Cove, Congress amended Title VII to effectively repeal Ward’s Cove’s modification of Griggs via the Civil Rights Restoration Act of 1991 ("CRRA"). The CRRA placed into statute the Griggs requirement that all employers covered by Title VII\textsuperscript{170} be subject to liability for disparate impact employment discrimination unless they could carry the burden to prove “business necessity.”

The CRRA placed into statute a requirement that employers consider race in taking actions to avoid potential disparate impact liability. Employers were required to review the racial composition of the employee or applicant group and make a race based judgment about whether the test unlawfully disproportionally affected the minority group. If the employer invalidates a test because it has a disproportionate impact,\textsuperscript{171} that decision is, by definition, one that is made on the basis of race, an action that is expressly prohibited by both Title VII and the Equal Protection Clause.

If the employer accepts the test, it faces potential disparate impact liability even if it can prove that it had no subjective intent to discriminate. Therefore, after the passage of the CRRA, all employers subject to Title VII would face liability\textsuperscript{172} for any employment test, regardless of how it responded to the results of the test. The CRRA had, perhaps unwittingly, created a “Catch 22”\textsuperscript{173} situation for employers, especially for governmental

\textsuperscript{169} Ward’s Cove, at 660.

\textsuperscript{170} Including now all state and local governments.

\textsuperscript{171} That is, it does not contain enough persons of the “correct” race or the racial proportions are not deemed by a reviewing court as sufficiently representative.

\textsuperscript{172} And constitutional liability, if the employer is a state or local government.

\textsuperscript{173} “There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and
employers, who were now facing possible constitutional liability, including personal liability, for violating the Equal Protection Clause every time they approved any employment or promotion test.

However, the constitutional issue raised by the CRRA would not reach the Court for several years. In the meantime, the Court once again turned its attention to the area of affirmative action. These later affirmative action cases provided the means by which the Court would begin a fundamental change in direction, one that is still ongoing today. The Court began its return to the individual rights approach of the late 19th century and away from the group based rights jurisprudence it had created with Plessy and followed through Metro Broadcasting.

VII. THE RETURN TO INDIVIDUAL RIGHTS

The Supreme Court moves away from group based rights – Croson, Adarand, Grutter and Ricci

Beginning with Plessy and continuing through Metro Broadcasting, the Court had followed a clear pattern of changing the meaning of the Equal Protection Clause through the tool of interpretation. This movement was in a single direction, away from the original understanding of the Equal Protection Clause as a federal authority to protect an individual’s right to be treated equally by state and local government without regard to his race and toward the creation of a positive right held by members of designated racial groups to special treatment under law based on their membership in a government approved racial group.

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However, in the 1989 case of **City of Richmond v. J.A. Croson Co**\(^{174}\) the Court made a sharp change in direction.\(^{175}\) For the first time in over a century, a majority of the Court decided a case that was true to the original intent of the Equal Protection Clause and that was expressly based on the characterization of the right protected thereby as an individual right. **Croson** is one of the most important cases ever decided by the Court. It signaled a fundamental change in the course of the nation. It is not without a certain irony that such an important case arose from such a modest and mundane beginning.

**Croson** began as a bid challenge over a contract for plumbing fixtures at a city jail. The City Council of Richmond, VA had adopted an affirmative action racial set aside program for all city contracts. The program required that all city contracts with prime contractors include a provision that 30% of the dollar amount of all subcontracts be awarded to one or more minority owned contractors or subcontractors, also known as Minority Business Enterprises (“MBE”). The 30% set-aside for minority subcontractors did not apply to city contracts awarded to minority-owned prime contractors.

The Croson Co. was the sole bidder on the plumbing contract. It attempted to meet the requirements of the affirmative action program by negotiating with several MBE’s to join it in the project. These negotiations were unsuccessful. Croson then asked the city for a waiver of the 30% minority set aside requirement. The city denied the waiver request and announced its intention to re-bid the contract. Croson then filed suit in federal court alleging that the city was in violation of the Equal Protection Clause by

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\(^{175}\) The Court had, in **Wygant v. Jackson Board of Education**, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) invalidated a school district’s race based reduction in force policy tiebreaker which had chosen the individual teacher to be laid off on the basis of race. Wygant applied strict scrutiny to this race based action by government and invalidated it as not in furtherance of a compelling governmental interest and as not narrowly tailored. However, because Wygant did not garner a majority opinion, it is best viewed as a stepping stone to Croson. Therefore, it will not be analyzed further herein.
refusing to award it the contract on the sole basis of the race of the company’s owner. The city prevailed at the trial level which affirmed the affirmative action policy. The 4th Circuit eventually reversed\textsuperscript{176} and the Supreme Court granted certiorari.

Justice O’Connor authored a majority opinion affirming the 4th Circuit which was joined by five other Justices. Croson was clearly a majority opinion and it ended the string of plurality opinions that had characterized the Court’s recent jurisprudence on this issue. Justice O’Connor began her opinion with a discussion of the proper standard of judicial review for determining the constitutionality of race based affirmative action programs. She held that all cases of race based decisions by state and local governments must be subjected to strict scrutiny. Justice O’Connor’s holding that strict judicial scrutiny must be applied to all race based actions by state and local governments was an express rejection of the idea in the Fullilove plurality that intermediate scrutiny should be applied to race based decisions by government if the governmental race based decision involved a “benign” affirmative action program that promoted “diversity”.

Having first determined that strict scrutiny was the proper standard of review, the Croson majority opinion next addressed the conceptual issue of the precise nature of the rights protected by the Equal Protection Clause. The opinion extensively reviews the historical record governing the adoption and ratification of the 14th Amendment.

Justice O’Connor concludes that the intention of the drafters of the Equal Protection Clause is easily discernable from a scholarly review of the historical record.\textsuperscript{177} She found that their intent was to create a new constitutional authority for the federal

\textsuperscript{176} The 4th Circuit originally held in favor of the City and the Supreme Court granted certiorari and then remanded for consideration in light of Wygant. Applying Wygant, the 4th Circuit found in favor of Croson and the City appealed. The Supreme Court granted certiorari again.

\textsuperscript{177} Interestingly, this is the same historical record that the Brown I opinion declared incomprehensively ambiguous.
government to intervene in the actions of state and local governments to protect the individual civil rights of all persons from unequal treatment on the basis of race.

As this Court has noted in the past, the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their “personal rights” to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making.\(^\text{178}\)

The Court rejected the argument that had been first espoused by the majority in *Plessy* and that had been accepted by the Fullilove plurality. This argument was that the Equal Protection Clause was a grant of positive authority for a state or local government to treat government designated racial groups in different ways, some more favorably than others. The *Croson* opinion reasoned that any such view of the Equal Protection Clause had no historical or logical basis upon which to base such a claim. In addition, the Court strongly argued that any use of race by government is inherently damaging to the social fabric and can operate to the ultimate detriment of those it purports to help.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See, *University of California Regents v. Bakke*, 438 U.S., at 298, 98 S.Ct., at 2752 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth").\(^\text{179}\)

The *Croson* Court held that the Equal Protection Clause does not operate to allow

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\(^\text{178}\) *Croson*, at 493

\(^\text{179}\) *Croson*, at 495.
state or local governments to take race into account while recognizing that states could do so in the very limited circumstances to remedy its own past acts of *de jure* racial discrimination. Since the City of Richmond had presented no evidence that its affirmative action program was enacted to remedy its own past acts of *de jure* racial discrimination in city contracting or that the set aside program otherwise met strict scrutiny\(^ {180} \) the program violated the Equal Protection Clause.

**Croson** was a landmark case that marked a clear shift by the Court in a new direction. It established the clear and easily applied legal framework of strict scrutiny to be applied to analyze all equal protection cases. This test had the added benefit of being both consistent with the individual rights structure as expressed by the drafters as well as the Court’s original cases. The *Croson* decision held that the rights protected by the Equal Protection Clause are individual rights, have always been individual rights and will always be individual rights that are possessed equally by every person in America.

Justice O’Connor took care in her opinion to respond to Justice Marshall’s contention in his dissent that the majority opinion’s reliance on strict scrutiny for all race based distinctions would result in a retreat from the nation’s “progress” in the area of race relations. She reasoned that the majority view was historically accurate and fundamentally just.

Our continued adherence to the standard of review employed in *Wygant* does not, as Justice MARSHALL’s dissent suggests, see *post*, at 752, indicate that we view “racial discrimination as largely a phenomenon of the past” or that “government bodies need no longer preoccupy themselves with rectifying racial injustice.” …. Rather, our interpretation of § 1 stems from our agreement with the view expressed by Justice Powell in *Bakke* that “[t]he guarantee of equal protection

\(^ {180} \) Defined as being in furtherance of a compelling governmental interest and narrowly tailored to achieve that interest.
cannot mean one thing when applied to one individual and something else when applied to a person of another color.”
Bakke, supra, 438 U.S., at 289-290, 98 S.Ct., at 2748. 181

The Croson majority opinion returned the Court to the place where the Equal Protection Clause began and should have always been, as the source of federal protection of each person’s individual right to his or her civil rights without regard to race. While Croson stopped short of specifically holding that the Constitution, as modified by the 14th Amendment, would be seen by the Court as color blind in all instances, Justice O’Connor left little doubt that it would be the rare case indeed where a racial classification by government would survive strict scrutiny.

We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for “remedial relief” for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. “Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications....” Bakke, 438 U.S., at 296-297, 98 S.Ct., at 2751 (Powell, J.). We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality. 182

Justice Scalia’s concurring opinion in Croson expresses his hope that the Court’s holding would signal the Court’s unambiguous return to the original understanding of the Equal Protection Clause as a protection for an individual’s right to equal civil rights. He

181 Croson, at 500.
182 Croson at 505, 506.
also offers a warning of the dangers faced by the nation and to the larger culture of giving in the temptation to permit the government to assign rights and privilege on the basis of race by using the “benign” standard. Justice Scalia calls on the Court to move beyond the entire concept of race.

But those who believe that racial preferences can help to “even the score” display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still. … Racial preferences appear to “even the score” (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.\(^\text{183}\)

Justice Scalia argues that the inherent injustice of racism itself requires the recognition by the Court of a legal barrier to ban governments from engaging in racial classification and from recognizing race based group rights. Racial classification was a definitional requirement of the intellectual attempts to justify African slavery in the south and racism generally. Therefore, the 14\(^{\text{th}}\) Amendment should be read and applied as it was written and how the drafters intended, as a way to end the authority of state and local governments to make or enforce racial classifications and the group based legal rights that can only exist if the government can first make racial group classifications.

Justice Marshall’s dissent in Croson is a well written defense of group based legal rights, governmental racial group classifications and racial preferences. He argues enthusiastically in favor of overt affirmative action to “assist” government designated racial groups and for group based rights. He reasons that, because racism and racial inequality have not been eradicated from the larger society and culture, the government

\(^{183}\) Croson, at 704, Justice Scalia, concurring
must be granted the power to grant preferential treatment to certain racial minority groups.

More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command.184

Because he believes so strongly that such power should exist, Justice Marshall sees it in language that was written to say something that is quite the opposite. Justice Marshall argues that the Court should read the 14th Amendment as allowing states to use, through the device of intermediate scrutiny, race based “remedies” that serve an “important governmental interest” and are ‘substantially related” to those interests.

My view has long been that race-conscious classifications designed to further remedial goals “must serve important governmental objectives and must be substantially related to achievement of those objectives” in order to withstand constitutional scrutiny. University of California Regents v. Bakke, 438 U.S. 265, 359, 98 S.Ct. 2733, 2783, 57 L.Ed.2d 750 (1978) (joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (citations omitted); see also Wygant, supra, 476 U.S., at 301-302, 106 S.Ct., at 1861 (MARSHALL, J., dissenting); Fullilove, 448 U.S., at 517-519, 100 S.Ct., at 2794-2795, MARSHALL, J., concurring in judgment). Analyzed in terms of this two-pronged standard, Richmond's set-aside, like the federal program on which it was modeled, is “plainly constitutional.” Fullilove, supra, at 519, 100 S.Ct., at 2795-2796 (MARSHALL, J., concurring in judgment)185

There are two major problems with this analysis. First, the Equal Protection

184 Croson, at 529, 530, Justice Marshall, dissenting.
185 Croson, at 533, 534, Justice Marshall, dissenting
Clause was never intended by its drafters, the Congress that adopted it or states that ratified it to be understood in this way. The historical record and the early case law belie his reading. Second, the standard of review suggested, “intermediate scrutiny” is a standard that is so imprecise and indefinite as to be no standard at all. Any race based governmental action can arguably fulfill an “important” governmental interest. One example that comes to mind is segregation, which was imposed on the nation by Plessy in furtherance of an asserted “important” governmental interest. The Louisiana Legislature found, and the Plessy Court agreed, that segregation was necessary to protect the public order and that majorities of both races were in favor of it.

Justice Marshall further argues that states were empowered by Section 5 of the 14th Amendment to act as partners with the federal government to use race based means to achieve perceived beneficial results for selected minority groups. Justice Marshall cites no historical evidence in support of this clearly radical assertion. The most obvious of the intentions of the 14th Amendment was to limit state authority, not expand it.

Croson left two major issues unresolved. The first was whether its holding would apply to race based affirmative action programs by the federal government. The second was whether any race based actions by state and local governments could survive the very high burden of strict scrutiny. In other words, whether any consideration of race by states would ever be permitted or would strict scrutiny always be “strict in theory and fatal in fact.”

As discussed, supra, a plurality of the Court in Fullilove had argued for a lesser standard of review, intermediate scrutiny, for race based affirmative action programs or

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other programs created for alleged “benign” purposes. However, prior to Croson, a majority opinion of the Court had never approved the use of intermediate scrutiny to approve any affirmative action policies. Metro Broadcasting had adopted intermediate scrutiny for federal affirmative action programs and was decided after Croson which overruled state and local affirmative action programs.

The Metro Broadcasting Court distinguished Croson on the grounds that the federal government was not subject to the limitations that the 14th Amendment imposed on states and that the federal government was granted authority by Section 5 of the 14th Amendment to use race based affirmative action programs. As the Metro Broadcasting plurality opinion stated:

It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress. In Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), Chief Justice Burger, writing for himself and two other Justices, observed that although “[a] program that employs racial or ethnic criteria ... calls for close examination,” when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are “bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to ‘provide for the ... general Welfare of the United States' and ‘to enforce, by appropriate legislation,’ the equal protection guarantees of the Fourteenth Amendment.”187

Obviously, the Croson and Metro Broadcasting opinions left the state of Equal Protection law in an unsettled state. Many legal scholars and commentators expressed concerns with the simultaneous existence of two different standards of constitutional scrutiny for affirmative action programs that could be identical in content, albeit from

187 Metro Broadcasting at 563(internal footnote omitted) (emphasis added)
different governmental authorities.\textsuperscript{188} Such a two tiered system was not supported by any coherent legal theory or accurate historical analysis. Nevertheless, this dual system continued for another five years, until the Court revisited the issue of affirmative action in the case of \textit{Adarand Constructors, Inc. v. Peña}.\textsuperscript{189}

\textit{Adarand} began as a challenge to the award of a federal contract. The contract was issued for the repair and replacement of guardrails on a highway project and was given to a minority contractor solely due to a racial set-aside program. This program required that companies who wished to bid on federal contracts must have at least 10\% of their subcontracts with minority owned businesses. The Adarand Company was the low bidder on the guard rail contract but lost the contract to a higher bidder due to the 10\% minority sub-contractor provision.

The company filed suit and argued that the federal government’s minority set aside program violated the Equal Protection Clause because it denied it a contract solely on the basis of race. The affirmative action program was upheld by the District Court and the Tenth Circuit Court of Appeals affirmed, applying the intermediate scrutiny standard of review of \textit{Metro Broadcasting}. The company appealed and the Supreme Court accepted the case.

Justice O’Connor authored the opinion for the Court in \textit{Adarand}. She began her opinion by noting the obvious conceptual inconsistencies caused by the existence of two different standards of constitutional review for affirmative action programs which included racial preferences – strict scrutiny for state programs under \textit{Croson} and

intermediate scrutiny for federal programs under Metro Broadcasting. She placed the responsibility for this unsatisfactory state of affairs squarely where it belonged, on the Court.

The Court's failure to produce a majority opinion in Bakke, Fullilove, and Wygant left unresolved the proper analysis for remedial race-based governmental action. See, United States v. Paradise, 480 U.S., at 166, 107 S.Ct., at 1063 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); Sheet Metal Workers v. EEOC, 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J.).

After recognizing the jurisprudential confusion caused by the Court’s lack of a consistent majority opinion on these issues, Justice O’Connor announced that the Court would apply strict scrutiny to all racial classifications made by government, whether by federal, state or local government. Adarand expressly overruled Fullilove and Metro Broadcasting to the extent that they held that a lower standard of judicial review should be used for testing the constitutionality of racial classifications asserted by the federal government to be for “benign” or remedial purposes.

Having established that strict scrutiny would be the proper test for the Court to use in judging the constitutionality of all race based government actions, Justice O’Connor then applied strict scrutiny to the federal sub-contracting set aside program challenged by Adarand. She found that the sub-contracting set aside affirmative action program was not in furtherance of a compelling governmental interest nor was it narrowly tailored to achieving the stated compelling governmental interest. The contracting set-aside therefore violated equal protection and Adarand was entitled to be

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190 Adarand, at 221
awarded the contract without regard to race.

Justice O’Connor’s opinion in Adarand relies greatly on the reasoning of her opinion in Croson. Croson reviewed in great detail the clear historical record that conclusively establishes that the drafters of the Equal Protection Clause intended to create an individual right to equal protection without regard to race. Her opinion in Adarand re-emphasized that the Equal Protection Clause was intended to ensure that all persons would possess the individual right not be treated unequally by their government on the basis of race. Justice O’Connor clearly sees this as a right held by each American.

With Croson, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. … The three propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," Hirabayashi, 320 U.S., at 100, 63 S.Ct., at 1385--should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," ibid., should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.191

Adarand finished what had been begun in Croson, ending the Court’s decades-long efforts to re-write the Constitution through gross distortions of the Equal Protection Clause in service to race based political ideology. The Court had fundamentally changed the 14th Amendment in Plessy and that change continued through Metro Broadcasting.

191 Adarand, at 222
Adarand is a seminal case because it stopped this misappropriation of the Constitution. Adarand and Croson brought historical accuracy, intellectual coherence, conceptual consistency and fundamental equality back to American equal protection law. Adarand is the direct descendant of and ideological successor to Strauder. While the Adarand Court stopped short of adopting the color-blind Constitution sought by Justice Harlan, it nevertheless provided a national jurisprudence where race would almost never matter, which is a great improvement over Plessy and Giles. These two cases offered an intellectually consistent and historically accurate reading of the original intent of the drafters of the Equal Protection Clause.192

Following Croson and Adarand, the nation could have reasonably anticipated that the consensus and framework set forth by the Court for analyzing and deciding cases under the Equal Protection Clause and for the eventual elimination of these cases as virtually all attempts by government to treat people unequally on the basis of their race would be unconstitutional. The extremely limiting test of strict scrutiny and the view of the rights protected by the Equal Protection Clause as individual and not group based rights would surely invalidate all or virtually all use of race by government. These twin pillars of strict scrutiny and individual rights based analysis would, over time, result in the eventual elimination of race based governmental programs, a de facto color blind Constitution.

However, the future beyond race suggested by Adarand would not be realized. The strict scrutiny analysis always left open the caveat that some race based action by government might be so compelling and narrowly tailored as to satisfy the test. The

192 Although, as argued herein, a color blind approach would more closely meet the intent of the drafters and would be more intellectually consistent and fundamentally fair.
Adarand Court left open the possibility that a race based action by government could be lawful. Affirmative action programs were still theoretically possible, although there was a general acceptance that the strict scrutiny standard, properly understood, would be “strict in theory but fatal in fact.”\(^{193}\)

However, the Court proved unable to keep closed the Pandora’s Box of racial preferences that it seemed to have sealed closed in Croson and Adarand. It revived the moribund doctrine of affirmative action with its 2003 decision in the case of Grutter v. Bollinger.\(^ {194}\) Ironically, it was Justice O’Connor, the author of Croson and Adarand, who cast the deciding vote and wrote the opinion that re-opened the constitutional door to race based affirmative action policies and programs by state and local governments. As will be discussed herein, Grutter was a major step back into the abyss opened by Plessy that many had hoped had been closed by Adarand.

Grutter began when Barbara Grutter, a white female applicant to the University of Michigan Law School, was denied admission to the Law School in favor of one or more less qualified minority applicants. Ms. Grutter’s application was denied solely on the basis of her race under the Law School’s affirmative action policy. Ms. Grutter filed suit in federal court, alleging that the Law School had discriminated against her on the basis of her race in violation of the Equal Protection Clause. Her claim was grounded on Croson and Adarand and she argued that the Law School’s use of race was not justified under the strict scrutiny test or under an individual rights based analysis.

The Law School admitted at trial that it had developed and implemented a racially based affirmative action program to intentionally select candidates to be offered

\(^{193}\) Fullilove, 448 U.S., at 519, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (Marshall, J., concurring in judgment).

\(^{194}\) 539 U.S. 306 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).
admission based, at least in part, on explicit racial criteria. It further conceded that, in accordance with its affirmative action program, it denied admission to Ms. Grutter on the basis of her race. The Law School argued that its actions were nevertheless constitutional because its affirmative action program satisfied the strict scrutiny standard. The Law School based this argument on its assertion that it had a compelling governmental interest in achieving racial “diversity” within its student body, which the Law School defined as the presence of a “critical mass” of certain racial groups. The Law School further argued that its affirmative action program was narrowly tailored to meet the compelling governmental interest in possessed in “diversity.”

In a 5-4 decision, the Court applied the strict scrutiny standard of judicial review under Croson but upheld the Law School’s racially based affirmative action program as constitutional under the Equal Protection Clause. The Court found that the affirmative action policy was in furtherance of a compelling governmental interest and that it was narrowly tailored to meet that interest.

Justice O’Connor began her analysis by identifying the compelling governmental interest at issue as “diversity” in higher education admissions. She defines the asserted narrowly tailored means as “granting preference in admissions to certain identified minority group members to obtain a critical mass of diversity within the student body.” However, while Justice O’Connor calls her analysis “strict scrutiny.” it bears little resemblance to the traditional strict scrutiny analysis as actually defined by the Court in prior cases. The strict scrutiny analysis in Grutter certainly looks nothing like the strict scrutiny analysis in Croson and Adarand.
There are two major differences between the strict scrutiny test applied in *Grutter* versus the strict scrutiny test applied in *Croson* and *Adarand*. The first is the Court’s discovery in *Grutter* of a previously unrecognized First Amendment Free Speech based exemption from the 14th Amendment for state Law Schools. The second is *Grutter*’s abandonment of the requirement that strict scrutiny be actually strict, in the sense that a reviewing court applying strict scrutiny is charged with viewing the government’s asserted justification for the discriminatory use of race with extreme skepticism. These two modifications of strict scrutiny changed the nature and reach of equal protection jurisprudence.

Justice O’Connor’s recognition of a First Amendment based Free Speech right of states\(^{195}\) to discriminate on the basis of race is not only unprecedented, it its intellectually incoherent. This change to the Equal Protection Clause is wholly unsupported by any historical analysis, any prior case law and is incoherently reasoned. She defends the First Amendment exemption to the 14th Amendment through a very weak analysis:

> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.\(^{196}\) (internal citations omitted) In announcing the principle of student body diversity as a compelling state interest, Justice Powell [in *Bakke*] invoked our cases

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\(^{195}\) Or is it more analogous to an affirmative defense?

\(^{196}\) As noted below, it is true that the Court has long extended First Amendment free speech rights to individual professors at state and local universities in recognition of the First Amendment’s protection of free speech in support of academic freedom. That is not the same thing as recognizing the right of a state government, which is subject to the limitations to its sovereignty imposed by the 14th Amendment, to claim First Amendment rights to engage in race discrimination. Does Justice O’Connor really believe that the First Amendment can trump the 14th Amendment, which was passed after the First and thereby should control in any area in which they conflict? The absurdity of this assertion can be seen by asking in what other areas might the state wish to engage in “expression” that unequally affects persons by race? Can a state establish a racially exclusionary state agency similar to the Skinheads, the New Black Panther Party, the nation of Islam, La Rasa or other? Under the analysis in *Grutter*, the answer is yes, if it is doing so to promote diversity.
recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." Bakke, *supra*, at 312. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U. S., at 313 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.*, *supra*, at 603).197

This passage is troubling on several levels. First, she seems to ignore that Justice Powell’s opinion in Bakke was joined by no other Justice. It is not a majority or a plurality opinion. Therefore, it is not precedent upon which to base a rejection of the current majority decisions that are precedent, i.e., *Croson* and *Adarand*. Justice O’Connor’s citation to Keyishian is completely inapposite of the claimed point. Keyishian held that a state could not exclude an individual from state university employment who expressed certain subversive ideas. This case supports the idea that the First Amendment protects the speech of an individual state employee, not some non-existent First Amendment right to free speech of the state agency itself.

None of the other cases198 cited by Justice O’Connor as authority in support of her action to create, out of thin air, a new free speech based constitutional right of the state to engage in racial discrimination that would otherwise violate the 14th Amendment actually support such a right. These cases all concern the nature of First Amendment rights of persons, to wit, law school professors and similar academics, to an individual right to

197 *Grutter* at 329.
198 These cases are *Wieman v. Updegraff*, 344 U.S. 183, 195, 97 L. Ed. 216, 73 S. Ct. 215 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S., at 603, 17 L Ed 2d 629, 87 S Ct 675. None of these cases hold that an Agency of state government has a First Amendment right to discriminate on the basis of race.
academic freedom. They do not address, much less recognize, a corporate First Amendment free speech right of the state itself to discriminate on the basis of race.

The idea that a state, through its agencies, might possess a First Amendment right to free speech at all, much less one that trumps the 14th Amendment, had never been mentioned by the Court before Grutter held that such a right exists. The cases that discuss possible First Amendment rights of states as states are in a completely different context from Grutter. They generally discuss the theoretical possibility that such a corporate right may exist to invalidate Congressional action to regulate funding that limits a law school’s possible freedom of expression.199 This right, if it exists at all, has nothing to do with the question of whether a state agency has a corporate First Amendment right to be free to engage in racial discrimination conduct that would otherwise violate the 14th Amendment.

The 14th Amendment was adopted for the express purpose of abolishing state sovereign power to engage in unequal treatment of individuals on the basis of race. To the extent that a state may have had, before the adoption of the 14th Amendment, a First Amendment Free Speech right to engage in racial discrimination, that right, along with all other authority of a state to engage in racial discrimination was eliminated by the 14th Amendment.

Justice Thomas recognized the obvious problem with Justice O’Connor’s reliance upon the First Amendment in his dissent:

The Court bases its unprecedented deference to the Law School--a deference antithetical to strict scrutiny--on an idea of "educational autonomy" grounded in the First Amendment. Ante, at 156 L Ed 2d, at 333. In my view, there is no basis for

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199 See, e.g., Rumsfeld et al., v. Forum for Academic and Institutional Rights, et al. 547 U.S. 47; 126 S. Ct. 1297; 164 L. Ed. 2d 156; (2006)
a right of public universities to do what would otherwise violate the Equal Protection Clause. The only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in Bakke. Justice Powell, for his part, relied only on Justice Frankfurter's opinion in Sweezy and the Court's decision in Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U.S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967), to support his view that the First Amendment somehow protected a public university's use of race in admissions.

Keyishian provides no answer to the question whether the Fourteenth Amendment's restrictions are relaxed when applied to public universities. In that case, the Court held that state statutes and regulations designed to prevent the "appointment or retention of 'subversive' persons in state employment," 385 US, at 592, 17 L Ed 2d 629, 87 S Ct 675, violated the First Amendment for vagueness. The statutes covered all public employees and were not invalidated only as applied to university faculty members, although the Court appeared sympathetic to the notion of academic freedom, calling it a "special concern of the First Amendment." Id., at 603, 17 L Ed 2d 629, 87 S Ct 675. Again, however, the Court did not relax any independent constitutional restrictions on public universities.

I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination. The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.

Justice Thomas has logic, history and the Court precedent exactly right. There simply is no logical or legal basis that supports any conclusion that the First Amendment can trump the 14th Amendment in establishing the rights of state and local government entities to discriminate on the basis of race. Until Grutter, the Supreme Court has been remarkably consistent in upholding the foundational ideal of the 14th Amendment - that the 14th Amendment eliminated all legal authority of the states to treat persons unequally

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200 Grutter at 362, Justice Thomas, dissenting
on the basis of race. Justice O’Connor’s reliance on the First Amendment to justify her
decision in Grutter to approve racial discrimination by a state agency does not withstand
even the most basic constitutional or logical analysis.

As illogical and unprecedented as Justice O’Connor’s acceptance of the existence of a First Amendment Free Speech right of a state to discriminate on the basis of race may be, her second newly discovered basis for upholding the affirmative action policy of the University of Michigan law School is even more troubling. She justifies her decision to approve the racial discrimination against Ms. Grutter on deference to the state’s assertion that its racial discrimination was based on “benign” motives, an act of good public policy, intended only to meet the societal mores and cultural expectations of the community.

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U. S., at 318-319.\footnote{Grutter, at 333.}

Justice O’Connor accepts as true and sufficient the mere assertions by the state government of its own good faith and benign intentions in making and enforcing discriminatory racial classifications.

The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body. *** We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondents Bollinger et al. 34; Bakke, supra, at 317-318, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of
Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary).

Justice O’Connor never explains why a mere assertion by the state that it is acting in “good faith” when it discriminates on the basis of race should be accepted as being made in good faith by a reviewing court applying strict scrutiny. She does not even accept that the Law School should be required to define “diversity” or explain how is expected to actually work in any empirical way, including how the law School will determine when it reaches “critical mass” and how education is to be improved by the claimed "diversity.".

The Court’s uncritical acceptance of the representations of a state that it is acting in good faith in adopting racially discriminatory statutes and policies should be very familiar to any student of the Court, especially an Associate Justice such as Justice O’Connor. After all, this is the exact same presumption of good faith and deference to the state upon which the Plessy Court upheld Louisiana’s segregation statute.

So far, then, as a conflict with the fourteenth amendment is concerned, 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.202

Justice O’Connor attempts to distance her opinion from the inescapable conclusion that it is in perfect harmony with the classic racist assumptions that racial minorities are fundamentally different and would, therefore, approach life from a racially

202 Plessy, at 550
unique perspective. However, these racist assumptions underlie the entire conceptual
foundation of the concept of “critical mass” and “diversity.”

The Law School does not premise its need for critical
mass on "any belief that minority students always (or even
consistently) express some characteristic minority viewpoint on
any issue." Brief for Respondent Bollinger et al. 30. To the
contrary, diminishing the force of such stereotypes is both a
crucial part of the Law School's mission, and one that it cannot
accomplish with only token numbers of minority students. Just
as growing up in a particular region or having particular
professional experiences is likely to affect an individual's
views, so too is one's own, unique experience of being a racial
minority in a society, like our own, in which race unfortunately
still matters. The Law School has determined, based on its
experience and expertise, that a "critical mass" of
underrepresented minorities is necessary to further its
compelling interest in securing the educational benefits of a
diverse student body.203

The Law School admits that it prefers to admit less qualified racial minority
students and deny admission to more highly qualified white students to achieve a “critical
mass” in “diverse” enrollment to enhance the learning environment. In order for the
learning environment to be enhanced by diverse races, the Law School must base its
policy on the falsity that “races” think differently. The Law School candidly argues that it
should be free to discriminate on the basis of race to that it can alter its learning
environment by changing the composition of the student body by skin color. They want
more people who think and act like “minority” students than those who think and act like
“majority” students. Unless one assumes that “majority” students and “minority” students
think and act individually, due to their race, then diversity means nothing and critical
mass is, by definition, impossible to achieve.

203 Grutter, at 333
One of two things must be true. Either minority students bring a uniquely “minority” point of view to the classroom by virtue of their minority status and thereby create “diversity” or they do not. If they do not, then the claimed educational benefit of diversity through minority presence is merely a pretext to exclude for some other reason. The only reason for affirmative action in service to “diversity” that fits the evidence and argument is the political goal of race balancing, meaning economic and political advancement for chosen minority groups in support of political goals.204

The only conceptual difference between the Court’s acceptance of the presumed good faith of the state Grutter and in Plessy is that Plessy approved Louisiana’s “good faith” preference for “white” over “non-white” passengers while Grutter approved Michigan’s “good faith” preference for “non-white” over “white” students. The Supreme Court was wrong to approve and thereby extend the life of racial segregation in 1896 in Plessy and it was wrong to approve and extend the life of racial discrimination in 2003 in Grutter.

To her credit, Justice O’Connor eventually admits in her opinion that she knows that what she is authorizing is fundamentally unjust and erroneous as a matter of law and public policy, as well as personally unfair to Barbara Grutter. In spite of recognizing the injustice, she nevertheless inflicts on Barbara Grutter the loss forever of her individually chosen professional career path and the life that she could have lived and assigns her this burden as a burden that is not “undue” because Barbara Grutter is, after all, a white person, who, by virtue of her skin color, has fewer civil rights than the minority applicant who took her spot, her education and her life path.

We acknowledge that ‘there are serious problems of justice connected with the idea of preference itself.’ *Bakke,* 438 U.S., at 298, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308, 57 L Ed 2d 750, 98 S Ct 2733. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups."


(Emphasis added)

Justice O’Connor casually, almost off-handily, dehumanizes Barbara Grutter into something other than an individual American with equal constitutional rights. She is now only a member of the white race and, as such, is nothing more than a member of the racial group that is disapproved of by the state of Michigan. She must therefore carry her burden, the burden of her race because that burden is not an “undue” one for her to carry.

Perhaps in recognition of the gross injustice of this outcome and the incomprehensible nature of the reasoning behind it, Justice O’Connor concludes her opinion with what may be fairly characterized as the most ludicrous obiter dicta in the entire history of the Supreme Court. She rationalizes her abandonment of her own historic work in rescuing the Equal Protection Clause in *Croson* and *Adarand* by actually asserting that the right she recognized for the state of Michigan to discriminate on the basis of race comes with something a constitutional right is not supposed to have - an expiration date. The concept that a constitutional right can have expiration date and have one on a date certain is nonsensical in the extreme. Justice O’Connor finds that perhaps Barbara Grutter’s daughter or granddaughter might one day have the same civil rights as
other Americans, rights that she denied to Barbara Grutter, the right to equal protection of the laws without regard to race.

… race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. …

The requirement that all race-conscious admissions programs have a termination point "assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." Richmond v. J. A. Croson Co., 488 U.S., at 510, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion); ***

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondents Bollinger et al. 34; Bakke, supra, at 317-318, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.205

Justice O'Connor's opinion in Grutter expressly approves and authorizes state acts of racial discrimination against Barbara Grutter and those like her for at least another 25 years.206 The Grutter opinion repeats the gross legal and moral error of Plessy. Plessy

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205 Grutter, at 341,342.
206 Justices Ginsburg and Breyer have a different view of how long "diversity" will be lawful discrimination. They argue that states will no longer be allowed to discriminate on the basis of race only after all of the vestiges and incidents of racism and all of the economic inequalities that can be fairly or
gave the Supreme Court’s approval and legal protection to the segregationist and their racist group based rights agenda. *Plessy* gave a license to legally discriminate that lasted 69 years.

The Court has now again given its approval of and legal protection to another racially based group rights ideology, diversity. While there is no doubt that the actual harm suffered by black Americans because of *Plessy* is greater by orders of magnitude than the actual harm suffered by Barbara Grutter and other white Americans under *Grutter*, the fact of the harm and the nature of the harm are the same. Homer *Plessy* and Barbara Grutter were each denied equal protection of the law solely due to their race. It remains to be seen whether the license to discriminate on the basis of race in the protections of basic civil rights issued to the states by *Grutter* lasts as long as the one issued by *Plessy*. In the end, *Grutter* can only be understood as standing for the proposition that two wrongs can make a right.

*Grutter* was the last major decision by the Supreme Court in its affirmative action jurisprudence to date. Discrimination on the basis of race is now lawful in the United States for the purpose of achieving “diversity” in higher educational admissions. However, *Grutter* is not the Court’s current latest word on the boundaries of the Equal

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unfairly attributed to racism are completely eliminated. These two Justices certainly think this process might take a little longer than 25 years.

The Court's observation that race-conscious programs "must have a logical end point," *ante, at 156 L Ed 2d, at 341*, accords with the international understanding of the office of affirmative action. ***

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest [**2348**] values and ideals. … From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action. *Grutter*, at 344, 345.
Protection Clause in the context of employment discrimination. The Court would examine the Equal Protection Clause in the employment context in a disparate impact case, the 2009 case of *Ricci v. DeStefano.*\(^{207}\)

The facts of the *Ricci* case present an almost textbook example of the legal and moral issues that arise whenever government takes race into account in making employment decisions. The City of New Haven, Connecticut wanted to adopt an examination to use to assist it in creating a list of eligible for promotions to officer from its firefighter ranks. In an attempt to make sure that the screening test did not create disparate impact liability for the city under the CRRA, the City hired an expert in the field of employment testing to develop, administer and grade the test. After the test was administered and scored, the top scoring applicants were all white or Hispanic. No black firefighters scored high enough on the test to be qualified for promotion.

Following as extensive political outcry from the local black community, the city’s Civil Service Board voted to reject the results of the screening test and refused to promote any of the white or Hispanic firefighters and these firefighters filed suit, alleging that they had been subject to disparate treatment on the basis of their race in violation of both Title VII and the Equal Protection Clause. The Plaintiffs alleged that the City’s refusal to accept the test results was on the basis of race because the city was not satisfied with the racial composition of the highest scoring applicants.

The District Court granted summary judgment to the City on the grounds that the City’s action did not constitute intentional discrimination on the basis of race. The District Court reasoned that the City’s rejection of the test was not motivated by discriminatory intent on the basis of race but was instead motivated by an intent to avoid

\(^{207}\) 129 S. Ct. 2658; 174 L. Ed. 2d 490 (2009).
liability under the CRRA. The Court of Appeals summarily affirmed the District Court.

The Supreme Court accepted the case and reversed the Court of Appeals. The majority opinion by Justice Kennedy avoided the conceptual conflict between the CRRA and the Equal Protection Clause by deciding the case on a novel ground. Justice Kennedy created a new legal test by which the conflict between the prohibition in disparate treatment on the basis of race in Title VII and disparate impact liability under the CRRA could be finessed.

Justice Kennedy called his new legal test the “strong basis in evidence” test.

We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that had it not taken the action it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.

Justice Kennedy borrowed his strong basis in evidence standard from earlier Equal Protection case law in the area of school desegregation where is was used to provide a theoretical basis for the use of race conscious remedies by courts in cases of proven de jure discrimination. Prior to Ricci, the Court had never used the school desegregation cases as models for employment discrimination cases because the theories are so different.

208 Of course, this distinction in motives is one that is without a real difference. The Equal Protection Clause prohibits the use of race in making employment decisions by state and local governments. Congress cannot, by statute, change the meaning of the Equal Protection Clause. By requiring employers to consider race in employment decisions through the CRRA, Congress merely succeeded in making all disparate impact decisions, including those by private employers, into state action and thereby actionable under the 14th Amendment.

209 Ricci, at 497.
School desegregation cases under Brown I and its progeny require, as a 
precondition to relief, that the Plaintiffs prove the existence of established state or local 
governmental policies of de jure race discrimination. Employment discrimination under 
Title VII requires that the Plaintiff meet the burden shifting tests of McDonnell Douglass 
v Green\textsuperscript{210} and the case law that developed thereafter.

However, race based de jure segregation in schools that has been proven in court 
and race based employment discrimination claims, especially ones that are asserted are 
the result of race neutral policies or practices are not the same thing. The special 
procedures, legal rules and protections in school desegregation cases are beyond the 
scope of this work. For purposes of this analysis, it is sufficient to note that Justice 
Kennedy’s majority opinion relies on this framework but fails to adequately address the 
distinctions between the two types of cases in Ricci.

There are several practical and conceptual problems with Justice Kennedy’s 
application of the “strong basis in evidence” standard in an employment discrimination 
case. These problems are discussed at length in Justice Ginsburg’s dissent in Ricci but are 
not central to the scope of this paper. The fundamental problem with applying the strong 
basis of evidence test in an employment context is that an employer will have a very 
difficult, if not impossible task in knowing in advance of a Title VII lawsuit whether or 
not it truly had a strong basis in evidence for any particular employment decision. 
Disparate impact cases are almost always statistically based and involve extensive expert 
testimony that requires judges and juries to consider very fine lines. The obvious 
incentive of the strong basis in evidence rule is to not conduct employment or promotion

\textsuperscript{210} 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)
tests. In addition, the strong basis in evidence test provides no conceptual basis upon which an employer can safely predict in advance of litigation how any particular court or jury might decide whether a “strong basis in evidence” existed, in spite of the employer’s subjective intent not to discriminate.

The Kennedy opinion, which completely ignores the obvious Constitutional issue, stands in stark contrast to the concurring opinion filed by Justice Scalia which squarely addresses this true Constitutional issue raised by the case.

I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection? The question is not an easy one. See generally Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493 (2003). 211

Justice Scalia recognizes that, by codifying disparate impact theory into Title VII, the federal government took governmental action to require employers, both public and private, to take race into account in making employment decisions. The codification of Griggs into the CRRA extended the Equal Protection Clause’s mandate of equal treatment without regard to race in employment to cover all employers subject to Title VII, whether public or private. All private employment decisions by companies subject to Title VII are now state action due to the mandatory nature of Title VII’s disparate impact requirement. 212

Ironically, Title VII now requires intentional race discrimination in

211 Ricci, at 516.
212 But if the Federal Government is prohibited from discriminating on the basis of race, Bolling v. Sharpe, 347 U.S. 497, 500, 74 S. Ct. 693, 98 L. Ed. 884 (1954), then surely it is also prohibited from enacting laws mandating that third parties -- e.g., employers, whether private, State, or municipal -- discriminate on the basis of race. See Buchanan v. Warley, 245 U.S. 60, 78-82, 38 S. Ct. 16, 62 L. Ed. 149 (1917). Ricci, at 2681
employment, if the employer is not satisfied with the racial breakdown of the test results, Under *Adarand* and *Croson*, that is race discrimination.213

Post *Ricci*, an employer faces liability in every occasion where they conduct an employment test. The employer can be liable under the disparate impact requirements of Title VII if it accepts the test or under Title VII and the Equal Protection Clause if it rejects the test.

**IX. ANALYSIS**

The Supreme Court has currently approved three general categories of cases where state and local government may lawfully treat similarly situated persons differently on the basis of race. The first is cases where courts have found the existence of state and local government intentional de jure discrimination.214 The second is affirmative action programs, at least those programs that are implemented by state and local governments to achieve “diversity” in higher education student enrollment.215 The third is disparate impact under the CRRA.

In the first of these categories, court ordered remedies for *de jure* discrimination and segregation, the authority to make race based actions flows directly from the Equal Protection Clause. This authority is broadly accepted as a proper use of race by the federal government to end state actions that discriminate on the basis of race. There is little, if any, disagreement with the proposition that the 14th Amendment not only permits but requires the federal courts to impose race based remedies in favor of Plaintiffs who

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213 It would also violate the disparate treatment provisions of Title VII, thereby making Title VII internally inconsistent. However, this internal inconsistency could possibly be cured by a court’s interpretation that would reconcile the inconsistent provisions. In light of the clear violation of the Equal Protection Clause by the CRRA, the internal inconsistencies within Title VII need not be discussed further.

214 This category primarily consists of school desegregation cases, although it also includes others such as voting rights cases.

215 At least until the expiration of Justice O’Connor’s 25 year license from *Grutter*.
have been the victims of de jure racial discrimination by a state or local government.
After all, the federal courts are one of the enforcement mechanisms expressly intended by
the drafters of the 14th Amendment to be used to empower the federal government to
enforce the Equal Protection Clause against the states.

The other two categories where the Court had approved of racially discriminatory
action by state and local government, affirmative action and disparate impact, are much
more problematic. For the reasons expressed herein, the Court should find the use of race
based action by state and local government in both of these areas unconstitutional
because they violate the 14th Amendment.

The Reconstruction Amendments were adopted with the specific intent to change
the balance of power between the federal government and the governments of the
sovereign states in the area of race. Prior to the adoption of these Amendments, state
governments lawfully could, and often did, treat persons differently on the basis of race.
If you were white, you received the protections of many more civil rights than if you
were black, including the right to vote, the right to keep and bear arms, the right to serve
on a jury, the right to civilly contract, the right to due process and the right to provide
testimony and other evidence in court.216

The Reconstruction Amendments created a new, federally enforceable, individual
right that was available to every person, the right to be treated equally without regard to
race by state and local governments. Under this new balance between state and federal
authority, any person who was treated unequally due to his (later her, also) race by the
state or local government could petition the federal government to take action to
vindicate these rights given to them by the 14th Amendment. The right to equal protection

216 Strauder at 305, 306.
of the law created by the 14th Amendment was universally understood to be a negative, individual right, the right not to be treated differently by the government on the basis of race.

This clear historical record is strengthened by the fact that the early cases universally read the 14th Amendment in just this way. These early cases were decided by justices who had lived through these tumultuous times and were contemporaries of the drafters of the 14th Amendment. These cases all support the individual, negative rights reading of the Equal Protection Clause. In all cases from Strauder through Yick Wo, the Court consistently applied the Equal Protection Clause as an anti-discrimination instrument, to limit state plenary power and to require not differing treatment that was based on race. This consistent understanding was consistently upheld by the Court until the Court ended it with Plessy.

One of the little discussed and most disappointing truths of our nation’s history is that it was Supreme Court, the institution that declares itself dedicated to the proposition that each person shall have Equal Justice Under Law,217 that created our nations long struggle with de jure segregation and discrimination. It was the Plessy Court218 that perverted the clear intent of the 14th Amendment and, by doing so, diverted the nation away from its now unrealized alternative history and into the hateful path of segregation. The Court used the unsupported theories of group based rights and racial classifications to create decades of racial suppression and hatred. Plessy was a legal and moral abomination that is without support in Constitutional law or history.

The Court certainly possesses the power to bend the law to meet what it from time

217 As the entrance to the Court proudly proclaims.
218 And before Plessy, the Dred Scott Court.
to time becomes convinced is the greater political good. This power must be very enticing, almost intoxicating. The lure of being able to simply declare that the Court is serving the larger societal goal of “racial progress,” that its distortions of the Constitution are necessary to serve the larger good and that the Court will be judged by history by its own self serving declaration of its own “benign” intentions must be very strong today, just as it must have been equally strong in the minds of the Plessy Court. After all, segregation was certainly the accepted practice by the elite opinion of that day.

The Justices who decided Plessy, Giles, Metro Broadcasting and Grutter certainly followed what they believed to be the “better” policy choice, in the light of the elite opinions of the day. What these cases argue for is a certain humility of Supreme Court Justices, the humility to accept that they cannot always see clearly in matters of public policy and that the framers of the Constitution recognized that fact and expected the Court to read and apply the Constitution as written. The history of the effects of the Court’s approval of race based preferences clearly demonstrates the damage that can result from this lack of humility and the Court’s resulting lack of fealty to the wisdom of the drafters of the Reconstruction Amendments. These men had survived a horrific Civil War and had seen the evils that could be done by state and local governments who insisted on seeing the world through the distorting prism of race.

One of the most compelling advocates of the view that the law cannot be truly equal so long as it sees through the distorting prism of race was Yale Law School Professor Alexander Bickel. Professor Bickel powerfully described the potentially fatal danger to a pluralistic, democratic society and the rule of law from the Supreme Court’s acceptance of the idea that citizens can properly be viewed by the law not as individuals
but as members of racial or other government designated groups. In his book The Morality of Consent\(^{219}\) Professor Bickel argues:

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[A] \text{ racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.}\(^{220}\)
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The advocates of racially based affirmative action and disparate impact are taking a great risk with the future of our nation and our culture. Professor Bickel recognizes that a legal system where “All animals are equal but some animals are more equal than others”\(^{221}\) is fundamentally in conflict with the founding ideals of this nation and cannot indefinitely sustain a valid claim of legitimacy.

The motivating ideal of the drafters of the 14\(^{th}\) Amendment was to secure individual liberty for all persons in America, equally, regardless of race under a constitution that empowers the federal government to limit the authority of state governments to infringe upon the individual right to equal treatment without regard to race. Unfortunately, this ideal is one that is not now shared by many Americans. The progressive wing of the Supreme Court, the progressive political movement and its advocates within the legal profession and in academia offer a sharply different reading of the relationship between the individual American and his or her government. Those who hold these beliefs are advocates for the classification of Americans into racial and other

\(^{219}\) Bickel, the Morality of Consent.
\(^{220}\) Id, at 133.
group identities where the government then assigns special rights upon groups rather than treating all persons equally.

One of the foremost advocates of race consciousness and group legal rights is Georgetown University College of Law Professor T. Alexander Aleinikoff. Professor Aleinikoff argues that government must take race into account in service to the larger political good of equality in outcomes and that it must do so regardless of the original intent of the Equal Protection Clause and the Court’s early case law. He reasons that a legal system that “pretends” that race does not or should not matter before the law creates a harmful denial of reality. Therefore, government must possess the authority to take race based and group based action to “correct” racial injustice and to lessen the economic disparity that exists along racial lines.

While the legal strategy of colorblindness achieved great victories in the past, it has now become an impediment in the struggle to end racial inequality. At the base of racial injustice is a set of assumptions—a way of understanding the world—that so characterizes blacks as to make persistent inequality seem largely untroubling. A remedial regime predicated on colorblindness will have little influence at this deep level of social and legal consciousness because it cannot adequately challenge white attitudes or recognize a role for black self-definition. In the pages ahead I will explain and justify this somewhat paradoxical claim that a norm of colorblindness supports racial domination. I will conclude that in order to make progress in ending racial oppression and racism, our political and moral discourse must move from colorblindness to color-consciousness, from antidiscrimination to racial justice.\textsuperscript{222}

Professor Aleinikoff sees the law foremost as an instrument of social engineering to achieve a more just result for groups of people classified by race rather than one of equal rights for all and the anti-discrimination principle. His goal is the exact same goal

as the one expressed by Justice Marshall in *Fullilove*, Justice Brennan in *Metro Broadcasting* and Justices Ginsburg and Breyer in *Grutter*. The Court must look to the equality of the races measured as economic and political results, not equality of civil rights for individuals.

Professor Aleinikoff’s argument and that of the Justices mentioned above must be rejected both as a matter of a legal doctrine and as a matter of political theory. As a matter of constitutional interpretation, there is simply no support for the position advocated by supporters of affirmative action and disparate impact that the text, the legislative history, the historical record or the early cases apply the 14th Amendment were ever intended to address anything other than civil rights through an anti-discrimination principle. A judge applying any written document is charged foremost with determining the intent of the law making authority that wrote it. Any substitution of the intent of the law making body for the judge’s subjective policy preferences becomes undemocratic and illegitimate. The Supreme Court describes this principle as “…when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'”

As a political matter, those who advocate for equality of results as the standard fail to fully acknowledge the risks to the legal system and to politically unpopular or weak groups that come from giving government the power make racially motivated decisions. Professor Aleinikoff assumes, without proof, that such race based decisions will be “benign” and in the best interests of blacks and other discrete and insular minorities. In fact, the historical evidence is much stronger that race based decision making by government results in harm to a culture, a nation as well as to racial

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relations.\textsuperscript{224}

Those who seek to change the Constitution into something other than what those who ratified it must carry a heavy burden. The Radical Republicans who passed the Reconstruction Amendments were elected to enshrine a particular vision of individual political equality without regard to race into the Constitution. These changes were hotly debated and ultimately passed through the amendment process.

The fact that Justices on the Supreme Court could overrule the meaning of the lawfully adopted amendments is one that challenges the legitimacy of the Court as an institution. While such power exists, the Court must decline to use it and to do so in recognition of the institutional limits on the Court and its own historical failures. The continued legitimacy of the idea that government can lawfully treat persons unequally on the basis of their race makes a mockery of the sacrifice of those who fought the Civil War and those who did all they could to end race based governance by adopting the Reconstruction Amendments.

Continued use of race based categories is obstructing our nation from moving beyond race to other national issues that we all share. There are many Americans who seek to keep the issue of race alive as a way to divide our nation. It is the Supreme Court, more than any other institution, which has kept and continues to keep the issue of race alive. The Court can do the nation a great service by returning its equal protection jurisprudence to its original intent. So long as the Court refuses to do what the Constitution clearly requires it to do, America will continue to be negatively preoccupied and its progress impaired by the issue of race.

\textsuperscript{224} Several examples come to mind, including the internment of the Japanese during World War II, segregation following Plessy, apartheid in South Africa, the caste system in India, the Supremacy Act of 1534 and Nazi Germany.
There are two opposite and irreconcilable visions of the nature of the American nation that are competing for America’s future under law. The first vision is one of individual political and civil rights, where legal rights and responsibilities are jealously possessed by the individual citizen and all possess the same equal civil rights. This vision is that of both the founders of the nation and the drafters of the Reconstruction Amendments.

The competing vision sees the individual person as a member of a racial or other group rather than as an individual. This group based view of the law sees America’s future as much more collective in nature and sees the law as a means to equality in political and economic ends.

A return to an individual rights based view of the Equal Protection Clause through the elimination of all affirmative action programs and the disparate impact theory does not necessarily require a completely color blind constitution. Race based remedies for proven charges of de jure racial discrimination would still be available through the federal courts. Congress would still have the power under Section 5 of the 14th Amendment to take such actions as necessary to ensure that all persons were being treated equally without regard to race.

The Equal Protection Clause simply requires that government not discriminate on the basis of race and that the federal government take such actions as necessary to make sure racial discrimination by state and local government does not occur. Government cannot use race to engage in social engineering or to attempt to remedy past societal or cultural racism, economic inequalities or other cultural realities that do not have a connection to past or present intentional racism by government.
The Court must remove itself permanently from the business of social engineering and racial politics and return to what it has the constitutional authorization, the institutional competence and the legal authority to do, protect and defend the individual right of each American to be treated equally by the government without regard to race.

IX. CONCLUSION

The broad, powerful language of the Reconstruction Amendments brought civil rights and justice to millions of former slaves and other minorities. These amendments allowed our nation to begin to meet the promise of our founding, to truly be one nation. Great social, political and economic good has come from these amendments. Such a successful experiment in vindicating the rights of persons under a written constitution should be respected.

The words of the Equal Protection Clause are powerful, so long as they are respected by the people. It is the power of these words and the respect they carry that requires that those who possess the power to alter them through interpretation to handle that power with great deference and modesty. These words exist as guarantees of liberty and they mean what they say. These words must be protected and preserved. The language of the Equal Protection Clause is broad and majestic, but refreshingly unambiguous.

The Equal Protection Clause does two things. It grants each person in America the right to be treated equally by government without regard to race and it grants each American the right to have that right protected and enforced by the government of the United States. Whenever the Court has affirmed this view, it has expanded personal autonomy, political freedom and racial healing. When it has strayed from this view, the
nation has suffered. The Court should take the first case it can find to issue a simple holding, relying on *Strauder*, that each American has the right to be treated equally by the government without regard to race, except in cases where racially based actions are necessary (under a strict scrutiny standard) to remedy adjudications of past de jure acts of racial discrimination or segregation. Such a holding would result in an historically accurate, clear and workable rule of law that would allow the nation to begin the larger process of moving to a post-racial society.