The thesis of Derrick Bell's new book is chilling: racism in this country is permanent; it is intractable. We are, as Professor Bell sees it, a society of former slaveholders and former slaves; and never the twain shall meet. His message is one of despair, yet of strength: a country with a black minority ("the faces at the bottom of the well") destined to suffer permanent second-class status — but a minority that can nevertheless achieve dignity and self-respect by pursuing its foredoomed struggle. It is a message that must strike a responsive chord deep within us; we must have all feared, consciously or unconsciously, that integration is, in many ways, a failure; that the glory days of the civil rights movement have ended; and that the result is, as accurately depicted by Andrew Hacker, "two nations: black and white, separate, hostile, unequal."

The two authors express similarly despairing views, but their works otherwise bear little resemblance to one another. Bell's book is brilliant, witty, literate, creative. It captivates its audience from the first to the last page. There is no doubt that if Professor Bell runs out of law schools — as he well may someday soon — he could easily earn a living as a writer. Professor Hacker's book is clearly the work of a social scientist: plodding, unexciting, but useful and informative. It provides all the facts and statistics necessary to substantiate Bell's views. However, Hacker's book, unlike Bell's, is not one to read for pleasure — or for its literary merit.

Bell's eloquence and imagination are expressed in fictionalized tales that starkly dramatize the primary issue that confronts, and has always confronted, American democracy. Each tale is more fascinating and disturbing than its predecessor. It is only at the end that the reader realizes that Bell has raised and dealt with almost every major

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1. Weld Professor of Law, New York University.
2. Professor of Political Science, Queens College.
question involved in the American Dilemma — and has done so most effectively. However, it is the last tale that sums up Bell’s theme and gives full vent to his cry of despair. The tale, entitled “The Space Traders,” tells the story of spacemen (more correctly, spacepersons) who emerge on our shores and offer to provide all the wealth necessary to rescue our national, state, and local governments from their states of semibankruptcy, all the chemicals necessary to restore our environment to its original pristine state, and a totally safe nuclear engine and fuel sufficient to satisfy all our future energy needs. What the Space Traders ask in return is the right to take back to their home star all African Americans resident in the United States. The tale can, of course, be read on several levels, all equally depressing, all involving the state of black Americans today. As the story winds to its inevitable (to Professor Bell) climax, we see before us just how white America appears to the black co-inhabitants of this land — and we had better understand the bitter nature of their fear and disillusion.

Bell’s theme is echoed in Hacker’s figures. There are indeed two separate Americas. As of five years ago, two thirds of black children were born out of wedlock, and the figure was rising rapidly. Meanwhile only one out of seven white children suffered a similar disadvantage at birth (p. 80). The number of births per thousand African-American women who had never been married is 1020 as compared to 127 in the case of unmarried Caucasian women (p. 76). Forty-five percent of black children are raised in homes where the income is less than the poverty level (p. 99). Only 16% of white children are subjected to so destructive an economic environment (p. 99). Almost a third of all blacks live in poverty, as compared to only 9% of whites (p. 100). The rate of unemployment is almost three times as high among African Americans as among Caucasians, and the disparity is growing rapidly (pp. 102-03). Forty-five percent of the inmates in state and federal prisons are black, although African Americans constitute but 12 to 13% of our population (p. 180). In 1990, well over half the suspects arrested for major crimes were black, as were 40% of the persons awaiting execution on death row (p. 180). As if the facts and figures were not grim enough, Professor Hacker closes with some jarring quotations from de Tocqueville. The final excerpt, possibly the most prescient, is also the most disturbing. In 1835, de Tocqueville wrote:

If I were called upon to predict the future, I should say that the abolition of slavery will, in the common course of things, increase the repugnance of the white population for the blacks.

The danger of a conflict between the white and the black inhabitants perpetually haunts the imagination of the Americans, like a painful dream. [p. 216]

De Tocqueville’s prediction raises the ultimate question implicit in both Bell’s and Hacker’s books: Can black and white Americans live
in peace together? A far-fetched question? I think not. The unthinkable happens frequently these days. Races and ethnic groups find themselves in deadly combat, often with little apparent cause. Serbs, Croats, and Muslims who lived side by side for generations suddenly begin murdering and raping each other at will. In their case, ethnic cleansing seems to have occurred simply because the perpetrators and the victims belong to different ethnic groups — no other reason. Other cases have different roots or origins. Arabs and Jews continue their historic warfare, as bitter as it was fifty years ago when the Grand Mufti of Jerusalem sided joyously with Adolph Hitler in his effort to exterminate all European Jews — as bitter as it has been throughout history. The IRA continues its bloody struggle against the English. The former Soviet republics like Tajikistan are torn by ethnic and religious warfare, as is Afghanistan, and as will be, inevitably, most of North Africa. Hindus and Muslims even after their historic cross-migrations to India and Pakistan have difficulty surviving together in either nation. Only the attempt to make each country as ethnically pure as possible at the time of its creation avoided, at least temporarily, one of the planet’s largest bloodbaths. Wars among tribal groups plague Central Africa. Islamic fundamentalism poses a major threat to those of different ideologies everywhere it takes hold. What the ultimate fate of white South Africans will be remains to be seen. It will not be surprising if the new white minority abandons its homeland sometime after the blacks take control. And even the Czechs and the Slovaks, residents of a peaceful little nation, could not live together in unison, despite their knowledge of the certain economic chaos that would flow from their divorce.

There are many reasons why it is unlikely that open warfare will erupt between blacks and whites in America, including the comparatively small percentage of the population that is African American. But other forms of racial violence may come to infect our daily lives unless the problems inherent in two races attempting to coexist in one land are substantially ameliorated. Last year’s Los Angeles riot, a.k.a. civil disturbance, a.k.a. revolt, may or may not be repeated in 1993 — and for the moment, it appears it will not. But it was hardly the last — or the worst — of such occurrences. If poverty increases, as it well may, and if it continues to increase disproportionately among blacks, as it probably will, crimes of violence against whites — single and en masse — will also increase. It is not beyond possibility that many of our cities will be vacated by whites and become permanent black centers of poverty and crime. It is not beyond possibility that most white Americans will live in the suburbs, in gated communities, designed to keep the armed black “hoods” at bay, and that hostility and fear of persons who look different will come to dominate our national consciences.

But we need not posit such grim results to understand the message
the two authors are sending. This is a sorely divided nation — a nation that is split along racial lines — a nation in which the racial divisions are rooted in slavery and may not be susceptible to the kind of harmonious, idyllic solutions we dreamed of in the 1960s. While miscegenation may be the only practical solution for a nation composed of members of different races, it is not the course America is likely to take. And integration, short of miscegenation, may be subject to far greater limitations than we ever dreamt of in the years following *Brown v. Board of Education.*

Integration of the public school system has in many cases led to schools that are more segregated than they were before we started on our noble enterprise. In Los Angeles, prior to the time the effort to integrate the schools commenced, the school population was approximately 56% Caucasian. It is now 12.7% Caucasian — and it will soon be less. Our attempt to integrate, and the resulting white flight, are not the only reasons, of course. The school-age population of Asians and Latinos has grown tremendously, and both these groups are anxious to have their children receive a public education. Nevertheless, the single most important fact by far is that few whites remain in the Los Angeles public school system, and their number continues to shrink.

Oddly, a saving grace not seriously considered in either book may be the rapidly growing number of other minority group members resident in the United States. In the last twenty years the percentage of the population that is black has remained relatively stable while the percentage of Latinos has doubled, as has the percentage of Asian Americans. There are now more nonblack persons of color in this country than African Americans. What the effect of this proliferation of racial groups will be is hard to predict. Pointing in one direction is the enthusiasm some have for the Rainbow Coalition, and the traditional excellent working relationship among civil rights organizations. In the recent redistricting case that resulted in the election for the first time of a Latina to the Los Angeles County Board of Supervisors, and the shifting of control of that powerful Board from three conservative white males to a group that now consists of a white Jewish male and a black female as well as the Latina, the NAACP Legal Defense and Educational Fund, MALDEF, and the ACLU of Southern California all worked closely together to attain a common objective. Pointing in the other direction is the fact that the primary victims of the violent outrage over the verdicts in *King I* were small businessmen of Korean ancestry whose stores were burned to the ground or otherwise destroyed. Also pointing in the other direction are the newly released...

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5. *Id.* at 335.
figures from the Anti-Defamation League showing that antisemitism among blacks is more than double that among whites, that it is encouraged by some leaders respected in the black community, and that it manifests itself far more than one would have hoped on college and university campuses.  

Neither Hacker nor Bell puts much stock in our growing multiracial society as a brake on the slaveowner-slave dichotomy. Asians indeed are rising so rapidly in the educational hierarchy that whites have a difficult time competing for entry at the University of California at Berkeley (Hacker, p. 138). The problems of Asian Americans are in many ways remarkably dissimilar from those of blacks. At the other end of the scale, illegal immigrants, a.k.a. undocumented workers, are the target of strong black opposition; black leaders complain bitterly that the new arrivals are depressing the job market. Still, the growing racial blurring, caused in part by intermarrying and interracial dating to a degree unthinkable a generation ago, may make sharp racial separation far more difficult to implement. It is interesting, for example, that Justice Thomas chose a white woman for his second spouse and, as Judge Leon Higginbotham has pointed out, lives in Virginia, a state in which he could have been imprisoned not so long ago simply for having a white wife.

The changing social patterns and mores raise some interesting questions. Can racism remain as strong a force as the blurring of the races increases? Can racism maintain its potency if it is either directed at a variety of groups or selects only one of several groups as its object? Our authors would reply that the answers are yes, unequivocally, and that the reason is a deep-rooted history that cannot be eradicated and that differentiates prejudice against blacks from all other forms of racial, ethnic, or religious bias. And sadly, their case is persuasive. What hope is there then, for a harmonious future?

There are two glimmers worth mentioning — one that arose too late to be considered in either book, and one that is implicit in Professor Bell’s. The first is that we have recently elected a President who spoke during his campaign with what appeared to be sincerity and deep emotion about the plight of black America — even though the issue was far from a centerpiece of that campaign. The sincerity was all the more stark when contrasted with much of the rest of the candidate’s election year rhetoric.

Bill Clinton may, just possibly may, understand what Derrick Bell and Andrew Hacker are telling us. It has been upwards of twenty-five years since a presidential candidate dared to speak to the people about the need to place the black underclass on an equal footing, since a

candidate appeared to understand that blacks as a group receive "a lesser start in life" (Hacker, p. 219). Perhaps it is not coincidental that the last time an American president spoke to the people of such feelings was when Lyndon Johnson, another Southerner, delivered the speech that led to the passage of the 1964 Civil Rights Act, the speech in which a president surprised the nation by adopting as his own the battle cry of the civil rights movement, "We Shall Overcome." Our only other modern Southern president, Jimmy Carter, shared many of the same feelings but never succeeded in communicating them effectively to the American people. And the tragic Iranian fiasco prevented him from even beginning to take the actions necessary to bring about significant change.

The question with President Clinton is as it was in the case of President Carter: whether he will be able to do what his heart tells him must be done. Two elements are involved. The first is leadership. The President must again persuade the nation — as John F. Kennedy and Lyndon Johnson did earlier — that our national values require that we move dramatically in the direction of ending racism and achieving equality. This argument will be far harder to make successfully in the 1990s than it was in the 1960s. The issues are less easy to frame in simple dramatic terms. We have no Martin Luther King leading a righteous flock — no Bull Connor at the end of the bridge with fire hoses and police dogs. We have no Rosa Parks refusing to sit in the back of the bus, no seven courageous black youngsters insisting on attending Little Rock High School even if it takes the entire U.S. Army to get them there. We have no Attorney General of the United States, backed up by federal armed might, personally securing the campus of the University of Mississippi while a young black applicant hoping to be enrolled braves the rocks and other projectiles hurled by a violent mob of overweight rednecks; no fearless Attorney General physically confronting a demagogic state governor who is standing in the doorway of another state university — the University of Alabama — in order to prevent prospective black students from entering. Instead, today on television we see pictures of black crime and black poverty, of black welfare mothers, black drug distributors, and black gang members; today we witness only hopelessness and despair in our second nation.

Twelve long years of rule by presidents who had little or no interest in America's core problem, in America's national dilemma, has left us all somewhat demoralized. A Supreme Court that has turned colorblindness on its head, that perks up only when it has the opportunity to decree that a white male has been the "victim" of our effort to achieve greater racial equality, has more than played its part in the weakening of the national will. Thus, we, with President Clinton, start from a place well behind the line at which we had arrived before the disastrous Reagan-Bush years. And, thanks to the Reagan-Bush eco-
nomic policies, there is little money available in the ordinary course to do the job, and it is highly unlikely that President Clinton will be able, politically, to create the new funds we will need if we are to begin to level the playing field.

Massive funding is required, no matter what anyone tells us. Without the bucks, the disasters of inner-city life — from unemployment on down — will not be significantly ameliorated. Still, some change is possible. With luck, the President will be able, by judicious exercise of his appointive power, to change the philosophy of the Supreme Court. And we must always remember that it was the Court, not Congress or the President, that put an end to official segregation in this country. It was the Court, not any other branch of government, that for the first time gave meaning to the phrase “with liberty and justice for all.”

Even with a President who cares, who is determined to help, both the short- and the long-term forecasts are grim. But life can move in unexpected ways; we are not yet able to predict the future with certainty. One senses that this is in part Professor Bell’s message, when at the end of his book he tells young African Americans that, although racism is permanent and intractable, still “something must be done . . . action must be taken . . . We are all part of that history, and it is still unfolding” (pp. 199-200). Democracy carries with it an evolutionary view of life. Americans have always believed that “progress” lies ahead, that each generation can and will make our nation a better, fairer, and more decent land. That Pollyannish theory has, fortunately, not yet been disproved.

Perhaps something will happen that will allow our two nations, black and white, to live together in peace and harmony. Professors Bell and Hacker will be surprised, but delighted, if it does. While there is little reason for optimism, it is in the nature of many of us to hope, and to strive, and to do what little we can to make our country a better place for all. It is to this quality in blacks that Professor Bell appeals when he writes, “[c]ontinued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor” (p. 199). And it is to this quality in whites that Professor Hacker appeals when he says “[i]t is white America that has made being black so disconsolate an estate. . . . Even today, America imposes a stigma on every black child at birth,” and then concludes with a moral challenge to white Americans — to change those conditions without further delay (pp. 218-19). We would do well to listen to the two professors in these respects. We would also do well, each one of us, to do what we can to help end racial prejudice and discrimination in our own communities, and to resist, for as long as we can, accepting the professors’ ultimate conclusion regarding “the permanence of racism” in America.
This March, twenty-five years after the National Advisory Commission on Civil Disorders (the Kerner Commission) made its report to President Lyndon Baines Johnson, warning that "[o]ur Nation is moving toward two societies, one black, one white — separate and unequal," another President, William Jefferson Clinton, received a markedly similar report. The 1993 report, prepared by former U.S. Senator Fred Harris and Professor Roger Wilkins of George Mason University, was released after this book review was written. However, its conclusion strongly echoes the views of Professors Bell and Hacker. The report states: "All the major cities studied by the Kerner Commission have been resegregating. . . . The gap that separates African Americans and whites is growing again." Conditions for blacks in America are indeed on the decline. Twenty-five years hence, they may well be even worse.

10. Id. at 4-5.
INTRODUCTION: RODRIGO’S RETURN

“Rodrigo. My God, you’re back!” What are you doing here?” (Normally, I do not use profanity or take the name of the Lord in vain. But the familiar lanky figure standing in my office doorway had given me quite a start.)

My visitor broke into a broad grin. “I needed a while to get my affairs in order, take care of that immigration problem, and pack. I was admitted to the LL.M. program of that school uptown. So we’ll be neighbors — living in the same city, at any rate.”

“I’m delighted,” I stammered, putting down the book I had been reading and reaching out to shake his hand. “I wrote the INS as soon

1. See Richard Delgado, Rodrigo’s Chronicle, 101 YALE L.J. 1357 (1992) (introducing Rodrigo Crenshaw). On Rodrigo’s lineage, see Derrick Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter BELL, SAVED]; Derrick Bell, Foreword: The Civil Rights Chronicles, 99 HARV. L. REV. 4 (1985). In Delgado, supra, Rodrigo and a professor discuss recent writings by neoconservatives of color, particularly Illiberal Education by Dinesh D’Souza. Rodrigo was born in the United States of an African-American father and Italian mother. When he was 17, Rodrigo moved to Italy when his father, an American serviceman, was assigned to an Italian base. Rodrigo completed high school at the base school, then received a scholarship to study Western Civilization and law at a famous Italian university. As “Chronicle” opens, Rodrigo is seeking out the professor during a visit to the United States to discuss his prospects for a career in law teaching. See Delgado, supra, at 1359-60. See infra notes 2-7, 13, 16-17, 47 and accompanying text for further information about Rodrigo.

2. Rodrigo’s first chronicle concludes with his deportation to Italy when U.S. authorities learn that he performed a short period of military service in the Italian Army. See Delgado, supra, note 1, at 1379.

3. The book was Richard Epstein’s Forbidden Grounds. The author, professor of law at the University of Chicago and editor of the Journal of Legal Studies, offers an original and remorseless attack on the antidiscrimination principle in private employment and on Title VII of the 1964 Civil Rights Act in particular. Pp. 3-4. For Epstein, state-enforced inhibitions against whom one may hire are costly, “imperial,” inefficient, one-sided, easily sabotaged, and antithetical to the freedom of contract on which our system of liberal politics is based. Pp. 3, 42, 159-64, 495-500. Epstein argues that the only legitimate functions of government are to protect property and personal security and to enforce private contracts — in short, to protect a “zone of freedom.” Such a government is principled; but when the state coerces association — as happens
as I got your letter. But I didn’t expect to see you so soon. This is wonderful news.”

“It took a little doing. I received some letters from colleagues of yours who must have read your account of my predicament. They urged me to return. But I already resolved to do that myself. And here I am — just moved into my new apartment on upper Riverside last week. My sister Geneva gave me a hand. You’re the first person I’ve looked up since getting settled.”

“You have no idea how glad I am to see you. I was afraid you’d spend the rest of your life as a cafe intellectual in sunny Italy. At least my letters of recommendation to the LL.M. programs weren’t wasted. Tell me how you did it. I talked to some colleagues about your immigration problem; they were stumped.” I motioned for him to take a seat in my cluttered office, littered with papers and boxes from my recent move. “Would you like a cup of coffee?”

“Thanks,” Rodrigo replied, casting a glance at my office coffeemaker and supply of beans. “I’m afraid I became addicted to espresso in Italy, where it’s practically the national drink.”

As I busied myself grinding the beans and setting the timer, Rodrigo launched into his story. “First, I appealed the INS decision, emphasizing the brevity of my service with the Italian army and my

through Title VII and enforcement of affirmative action, pp. 3-7, 147, 495-97 — its behavior is unprincipled.

Part I of Forbidden Grounds sets out the empirical and theoretical grounds on which Epstein’s attack on the antidiscrimination norm is based, including its high cost, negligible gain, and inconsistency with the liberty principle. It also sets out numerous situations in which racial discrimination may be “rational,” pp. 59-78 — i.e., a positive good — and the relatively few circumstances where Epstein approves the enforcement of antidiscrimination laws. Pp. 79-87. Part II examines the history of race relations and the evolution from Plessy v. Ferguson to Brown v. Board of Education and modern civil rights legislation. Originally, according to Epstein, the Civil Rights Movement was “principled” — concerned with striking down southern laws that prohibited employers from choosing to hire blacks. But it resulted in a system of law that exalts forced bonding on the basis of certain “forbidden grounds” — race, sex, national origin, age, and handicap. Parts III, IV, and VI examine the separate laws of race, sex, age, and disability discrimination. Part V discusses affirmative action.

Running throughout the analysis is Epstein’s powerful absorption — verging on romance — with the idea of contract at will as the bedrock principle of our system of ordered liberty. E.g., pp. 22-27, 32-46, 497-505. In light of Rodrigo’s manifest disdain for Western rationalist, linear thought, see Delgado, supra note 1, at 1365-76, I wondered what he would think of someone like Epstein. As luck would have it, we later turned to exactly this subject. See infra notes 20-36, 48, 60-63, 70 and accompanying text.

4. Professor Stephen Feldman’s letter urges Rodrigo to skip the LL.M. degree and interview directly for a professorship at his school, which will sponsor his immigration application. Professor Lisa Ikemoto urges Rodrigo to put aside his academic pretensions in favor of a career as an activist and “organic intellectual” whose services are desperately needed by the minority community in the wake of the L.A. riots. See Letters from Stephen Feldman, Professor of Law, University of Tulsa, and Lisa Ikemoto, Professor of Law, University of Indiana-Indianapolis, to Yale Law Journal (May 1992) (on file with author).

5. See Delgado, supra note 1, at 1379, where the professor agrees to recommend Rodrigo to four LL.M. programs.
reasons for performing it. But the agency was having none of it — they acted as though they had no discretion, which of course you know they do. They kept telling me to reapply, as though I hadn’t been born here and had no good reason for being in Italy while I was growing up.”

I poured the coffee and asked, “So are you here on a student visa? And if so, how are you going to get a law teaching job later without lying about your intent?”

“That worried me, too, Professor, because as you know I hate lying.”

“So, what did you do?” I asked, indicating the cream and sugar. “Whatever it is, I hope it’s legal. You’re not one of those undocumented aliens, as our Anglo friends call them, are you?”

“Just sugar,” he replied. “I used a two-step procedure. As you know, the European Community went into effect recently. Under the basic agreement, a citizen of one member state is entitled to travel freely and settle in any other.”

“Sounds sensible to me,” I said. “Although I can’t help contrasting it to the situation here. If anything, we’ve been tightening up our own immigration policies in response to growing xenophobia aimed at limiting the influx of outsiders — particularly ones with coloration like yours and mine. It reminds me of those waves of ‘nativism’ that seem to rise up when our culture is under threat.”

“I heard about that. So I planned things carefully. First I became an Irish national. This was much easier than you might think, since both Italy and Ireland are members of the EC and, as a graduate lawyer, I had no problem proving I wouldn’t become a public charge. Within a short time I had my own apartment and paralegal job in Dublin, which by the way has a great literary and intellectual life.”

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6. Id. at 1379 (Shortly after his twentieth birthday, Rodrigo served briefly in the Italian army as a “way of paying back the Italian nation for subsidizing my education at a fine university.”).

7. A foreign national who is admitted to a U.S. program of study may generally obtain a temporary U.S. visa. But this requires that the applicant disavow any intent to remain in the United States following graduation. See T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 220 (2d ed. 1991).


Probably a close call, I thought, for I knew how Rodrigo loved such settings. "And how did you get from Ireland to here?"

"Oh, that part was easy. I enlisted the support of an Irish immigration society located in an eastern U.S. city. I told them I was a lawyer with American forebears, and they agreed to sponsor me. Technically, the route used was a private bill."

"A private bill?" I asked.

"I was surprised, too. But, as they explained, it's fairly routine. A U.S. senator of great prestige and standing, himself of Irish descent, sponsors such bills fairly regularly. He thinks the United States needs more Irish men and women, and his colleagues go along even if that year's quota is filled."

"And I suppose there was nothing in the record to show that you had previously been excluded or that you are a budding racial reformer and the subject of a recent law journal article laying bare your somewhat unflattering analysis of Western culture."

"I think your term for it is 'separation of powers.' The immigration service did learn of my plan and may well have tried to intervene. But they got nowhere, because it's a different arm of government. It's one of the nice features of your — I mean our — political system."

I looked up and found my young interlocutor looking slightly guilty. "What is it?" I asked.

"There's one more thing I ought to tell you. I may have overdone it — but you must understand I really wanted to get back. While in Ireland, I bought a title for a few thousand pounds from some down-at-the-heel member of the English nobility. I wanted to assure favorable consideration by your authorities. It turned out probably to have been unnecessary; my law degree and American ancestry were probably enough."

"So, what are you — Rodrigo, the third duke of Crenshaw?"

"Something like that," Rodrigo muttered, looking down at his feet.

"The incongruity has not escaped me."

"I'm just glad you made it back. It's quite a story."

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12. On the use of private bills to circumvent or supplement stringent immigration laws and quotas, see ALEINIKOFF & MARTIN, supra note 7, at 668-73.

13. See Delgado, supra note 1, at 1368-78 (in which Rodrigo explains his theory of the West's decline and need for infusion of new thought).

I. GETTING CAUGHT UP: RODRIGO AND I DISCUSS THE ECONOMICS AND POLITICS OF RACE

"Aside from Geneva and the folks at the Boston Irish immigration office, you’re the only person who’s heard it. What are you working on these days?" Rodrigo craned his neck in an effort to read upside down the titles of the books lying on my desk.15 "The last time we talked you were struggling with black neoconservatism."16

"Your memory is good. Now, I’m trying to get a handle on their counterparts, the law-and-economics movement."

"I did notice that footnote in the reprint you sent me.17 And you guessed right. When we spoke in your office I knew very little about that school of scholarship. It’s not well known yet in Italy — there are hardly any books available except the first one by Richard Posner.18 But there were more in Dublin and, as you can imagine, dozens in the library of my new school. I’ve been reading everything I could lay my hands on. What motivated you to dive into this stuff?"

"Even at my advanced age, Rodrigo, we’re expected to keep abreast. And, as luck would have it, I’ve been invited to a conference on the economics and politics of racial discrimination.19 The organizers plan to pair conservative law-and-economics types with racial reformers like me. I think they are hoping some sparks will fly, although frankly I’m not sure we’ll have much to say to each other."

"Really?" Rodrigo brightened. (Hah — I thought, maybe I’ll learn something. Little do students know how much we get from them. Their enthusiasm and even their sometimes half-baked ideas keep us going and provide the spark necessary to sustain us in an otherwise drab and desolate world.)

"Yes, really," I replied, refilling his coffee cup. "The law-and-economics folks write pages full of formulas and little squiggly signs.20"

15. Aside from Forbidden Grounds, the titles were the following: GARY BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); CHARLES MURRAY, LOSING GROUND (1984); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 615 (3d ed. 1986) (I had been pondering ch. 27, "Racial Discrimination"); and THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984).

16. Delgado, supra note 1, at 1372-75 (focusing on Dinesh D’Souza, Glenn Loury, Shelby Steele, and others writing in this general vein).

17. Id. at 1365 n.25 (wondering whether my interlocutor, who seemed conversant with many of the new trends, also knew about law and economics).

18. POSNER, supra note 15.

19. Like others, I had long been fascinated by the way in which radical and conservative thought sometimes coincide on issues of racial reform. See, e.g., BELL, SAVED supra note 1, at 26-88; Richard Delgado, Enormous Anomaly? Left/Right Parallels in Recent Writing About Race, 91 COLUM. L. REV. 1547 (1991) [hereinafter Delgado, Enormous Anomaly?]; Richard Delgado, Zero-Based Racial Politics, 78 GEO. L.J. 1929 (1990). Perhaps the upsurge in interest in this coincidence accounted for the conference and my invitation to speak at it, I thought.

20. E.g., BECKER, supra note 15 (rigorous analysis of the economics of discrimination).
They talk about things like transaction costs, speak of racism as a 'taste,' and spend more time showing why governmental efforts to cure it would be 'inefficient' than they do deploring the practice itself. We, on the other hand, treat racism as subordination, not a mistake, much less an idiosyncratic 'taste,' and struggle to understand its connection with culture, history, and the search for psychic and economic advantage.

"I have noticed that gulf between the two groups," Rodrigo agreed. "Some LL.M. students and I were talking about it the other day. Maybe that's one of the things you and the other panelists could talk about at the conference, don't you think?"

Smart kid, I thought. That one idea should be enough to get my speech off and running.

"Maybe you could even tie that difference to the notion of 'positionality' that you see emerging in feminism, critical race theory, and other critical literature. The law-and-economics scholars have a certain background, training, and set of disciplinary assumptions, so naturally they look upon discrimination the way they do. They treat civil rights statutes as a form of tariff (pp. 37, 265) because that's how they see the government — as a well-meaning, if clumsy, regulator. That's their slant, their disciplinary bias, their 'positionality.'"

"That's a start," I said, refilling my own coffee cup despite the lateness of the afternoon hour and my doctor's warning to cut down on caffeine. "But where do you go from there? Position, color, and even life experience don't determine all, as our friend Randall Kennedy has been good enough to point out. Tom Sowell, for example, a leading economist of race, is black. And he takes as dim a view of"

21. E.g., pp. 67-73, 497, 500 (arguing that discrimination is sometimes rational and beneficial because associating with persons of diverse races or cultures can impose psychic costs and render communication difficult).


24. See Bell, Saved supra note 1; Delgado & Stefancic, Images, supra note 10, at 1259-61, 1276-79 (both stating that racism is concerned with preserving racial advantage); see also Kathryn Abrams, Hearing the Call of Stories, 79 Cal. L. Rev. 971, 975-76 (1991) (arguing that law's narrative substructure promotes advantage of the powerful but disguises its own operation).

25. I could visualize a nice, slightly wry introduction gently pointing out these initial differences and urging the participants to discuss them in a collegial atmosphere. All this would take five or ten minutes, make me seem the voice of sweet reason, and perhaps head off the usual criticism of me as an intemperate, one-dimensional race reformer.


27. Pp. 28, 37, 73-74, 159, 163; see also supra sources cited in note 23.

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29. E.g., Sowell, supra note 15.
31. E.g., pp. 7-8 (describing his study as systematic, foundational, and as an extension of recent sophisticated studies of laws and market forces); see also Part I, at 13-87 ("Analytical Foundations," including discussion of whether private discrimination may sometimes be rational or efficient).
33. I gathered that Rodrigo was referring to their premise that racism and other forms of prejudice are irrational conduct that the market ought to drive out over time.
34. E.g., pp. 41-42, 265, 496; Becker, supra note 15, at 159; Posner, supra note 15, at 615 & n.1; Sowell, supra note 15, at 96, 112-14, 116.
35. E.g., pp. 41-42; see Becker, supra note 15, at 6, 18; Posner, supra note 15, at 615-18. But see pp. 59-78 ("Rational Discrimination," arguing that discrimination sometimes makes sense — and confers legitimate benefits such as greater ease, familiarity, and better communication among coworkers).
"But the market obviously doesn’t work that way. Consider — the United States has had a free market economy for over two centuries, and racism is as firmly entrenched as ever. The economists reason that an employer or real estate owner who discriminates against African Americans, gays, or women places himself or herself at a competitive disadvantage. Nonracist landlords or employers will be able to employ or rent to better people — at least if they can get their other workers or tenants to go along. Over time, they should drive out competitors who discriminate, because these others will end up hiring or renting to less qualified whites." 36

"That’s the theory, all right, but you and I know the reality is quite different."

Rodrigo drained his cup. "Remind me later, Professor, to explain why things work just the opposite — why racism tends to increase over time rather than dampen, as your friends say it should. The first step, though, is to explain why competitive pressures don’t eliminate racism in the market.”

“I think I know what you’re going to say,” I said. “Competitive pressures don’t work because discriminators as a group know that irrational-seeming individual decisions, if followed by all or most whites, create a system of social advantage. I’ve written about that myself, along with others." 37

“I know. But actually I was going to add something else.”

"Please go ahead. I didn’t mean to interrupt."

"Racism persists, in part, for the reason you mentioned — simple group self-interest. But there’s another dimension, as well. Take employment discrimination. Antiracist hiring decisions are so rare that they make news, and the reason is that it never occurs to individual whites to think that hiring a black could benefit them — that is, the whites.” 38

“But isn’t that just regular irrationality, which the economists say will be cleared up once the lagging firms get the message that nonracist ones do better in competition?”

"With due respect, Professor, I think it’s different. Look at it this way. You and your friends have written about the social construction

36. E.g., pp. 43, 76, 265; BECKER, supra note 15, at 84-88, 159; POSNER, supra note 15, at 615 & n.1, 616-18; SOWELL, supra note 15, at 96, 112-14, 116. But see Cass Sunstein, Why Markets Don’t Stop Discrimination, 8 SOC. PHILOS. & POLY. 22, 25-31 (1991) (citing problems of third parties who prefer to deal with discriminators, of “statistical” discrimination based on a stereotype thought to have a grain of truth to it, and demoralization).

37. On the view that the essence of racism is group advantage, see, for example, BELL, SAVED supra note 1; Bell, supra note 32; Richard Delgado, Recasting the American Race Problem, 79 CAL. L. REV. 1389 (1991) (reviewing ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990)).

38. On the contribution of ethnic imagery and depiction to this process, see Delgado & Stefancic, Images, supra note 10.
of reality, including racial reality, have you not?" 39

"Others more than I," I grumbled. "Although I'm familiar with
that literature, I haven't found it as useful as some have. It seems to
me that racism offers such powerful economic and psychological in-
centives to any group able to get away with it that resorting to fancy
theories is unnecessary."

"Maybe so," Rodrigo conceded. "Although I'll just note that you
are considered a leading proponent of legal storytelling, one function
of which is to deconstruct and displace comfortable, self-serving
majoritarian myths and replace them with less sexist and racist
views. 40 So in a way you're contributing to the reconstruction of so-
cial worlds."

"I know some have said that. But I think of myself as just an
ordinary foot soldier. 41 If others want to put an elaborate postmodern
gloss on it, that's their privilege. I just don't find it necessary."

"Bear with me for a second," said Rodrigo. I noticed he was fur-
rowing his brow, the first time I'd ever seen him depart from his air of
youthful exuberance. "Let's suppose there's a world where all the As
hate and disdain all the Bs, whom they consider stupid, lazy, and mor-
ally debased. The Bs think of themselves as normal, and of the As that
way as well — except for this unlovely trait."

"Sounds a little bit like a society I know," I said.

"And let's suppose, Professor, that the reason the As hold this view
of the Bs is not that there is anything wrong with the Bs. Rather, they
were brought to their current land in chains to perform menial work,
and the As coined an attitude — call it B-inferiority — to justify that
practice. Later, they freed the Bs, but the attitude remained because it
was advantageous to maintain it. 42 So the As circulate and reinforce
stories and myths about B-inferiority at every turn — in children's
tales, TV, movies, advertising slogans, and so on. This all creates a
stigma-picture or stereotype so that virtually everyone in the society
harbors the attitude to some extent."

"This would obviously benefit the As, who could use the Bs as
cheap labor, scapegoats for blue-collar A workers unhappy with their

Rev. 2280 (1989); Delgado, supra note 32; Mari J. Matsuda, Public Response to Racist Speech:
Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); see also Mackinnon, supra note
26 (discussing construction of women and women's role).

40. On legal storytelling as a means of jarring or displacing comfortable majoritarian beliefs,
see Bell, Saved supra note 1; Delgado, supra note 32; Matsuda, supra note 39.

41. As Derrick Bell put it recently (out of the mouth of an old black woman): "I lives to

42. For this general view of the origins of racist stereotypes and attitudes, see Derrick
Bell, Race, Racism and American Law 1-51 (2d ed. 1980).

43. See Delgado & Stefancic, Images, supra note 10.
lot, and so on." 44

"But imagine that a few As are inclined to be rulebreakers and mavericks. Might they not try hiring a few Bs, just to see if it works — just to see if it gave them a competitive advantage?" 45

"Certainly — if only for menial work in times when the surplus labor supply is exhausted."

"No, I mean at other times, and for regular or high-status jobs."

"It's hard to imagine. I suppose they might," I replied, unsure of where Rodrigo was going.

"But the implication of your thought and that of other postmodernists — forgive me, Professor, if I keep calling you that — is that this is unlikely to happen. The shared construct or stereotype of the Bs makes it unlikely that anyone at all will do this. 46 The person would almost have to stand outside the culture."

"Like yourself." 47

"Perhaps," Rodrigo brushed off the compliment impatiently.

"Another way of looking at it is in terms of knowledge. All the economists say the market won't operate perfectly unless everyone has perfect knowledge. 48 But the stigma-picture that white people hold of blacks operates as a screen. Because of the thousands of stories, jokes, scripts, and narratives they hear, whites can never have that degree of knowledge — even the proverbial ones who boast that they count some of us among their best friends." 49

"Very funny," I acknowledged. "Although, in one way of looking at it, they do have 'perfect knowledge.' I understand that your favorite authors equate knowledge with power, hold that it is inseparable from social convention and practice. 50 White people in that sense

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44. See pp. 41-42 (arguing that much discrimination is economically harmful to whites because it deprives them of opportunities to make beneficial trades); BELL, SAVED supra note 1 (portraying racism as system of group advantage). But see BECKER, supra note 15, at 6, 18; POSNER, supra note 15, at 615-17.

45. See pp. 31-35 (arguing that, if even small percentages of private actors are nonracist, market pressures will cause others to follow suit and deal with blacks).

46. See Delgado & Stefancic, Images, supra note 10, at 1261, 1280-82 (terming faith that we can readily escape the force of our own embedded stereotypes and cultural assumptions the "empathic fallacy").

47. I meant to remind Rodrigo of the way in which his years abroad enabled him to see U.S. culture with new eyes; see Delgado, supra note 1, at 1359 n.6.

48. On the role of knowledge, see POSNER, supra note 15, at 96-100, 348-50. On the view that Title VII can decrease information flow to employers and thus increase discrimination, see pp. 28-30.


know us perfectly: the universality of the stereotypes, the way in which they are embedded in the very paradigm we require to communicate with and understand each other, means that the market in a way will operate perfectly — that is, with what passes for perfect knowledge.”

“And will thus perfectly reinforce racial reality — whites over blacks — all the while maintaining that it is perfectly neutral,” Rodrigo added sardonically.51

Now that’s something I can use at the conference, I thought. Worth getting caffeine nerves over.

“We need a good example, or your friends will never get it. What can we use?” Both of us were quiet for a while. I switched the burner on the coffeepot to “Warm.”

II. IN WHICH RODRIGO EXPLAINS WHY THE FREE MARKET DOES NOT CURE RACISM

“I have an idea,” Rodrigo said at last.

“I’d love to hear it.”

“Imagine this thought-experiment. It concerns children, another disempowered group.”

“Do you mean white children or black children — or any kind?” I asked.

“Any kind. Imagine a farm state, say Minnesota, decides to license children to drive vehicles. A lot of children are needed to drive cars, tractors, etc., around the farm, something they now can do perfectly legally as long as they stay on private property.”52

“Okay,” I said. “And why do they decide to let them drive on the roads, which I assume your licensing scheme allows them to do?”

“Two reasons. Sometimes the young drivers need to take the tractor or car on a public road for a short distance to get from one part of the family farm to another.”

“So, to get from the front ten to back twenty acres, they can now drive on County Road 112.”

“Right — that’s the practical reason. But the other one is empirical. Let’s suppose the legislature conducts studies to show that young

51. On the way narrative structures shape what we see and believe, see MacKinnon, supra note 26; Abrams, supra note 24; Delgado, supra note 32; Delgado & Stefancic, Images, supra note 10; Lawrence, supra note 49.

52. Telephone Interview with Gerald Torres, Associate Dean and Professor of Law, University of Minnesota (May 10, 1992) (on underage drivers of farm vehicles and machinery — but not the hypothetical licensing scheme, which is Rodrigo’s imaginary creation).
children between the ages of ten and thirteen are likely to prove quite safe drivers. Psychologists testify that children of this age are apt to be careful, conscientious, and law-abiding. Males under the age of twenty-one, by contrast, are high-risk drivers. So the state adopts a new licensing scheme in which children can drive between the ages of ten and thirteen, but the males have to give up their licenses when they become young adults."

"A pretty outlandish idea," I said, nevertheless intrigued. "I suppose you think there is some connection between children drivers and race?"

"Yes, as you'll see in a minute. But first we have to suppose that Minnesota's experiment actually works. Things are much more convenient for farm families, plus the ten to thirteen year-olds turn out to be the safe drivers the experts thought they would. With teenagers and young males off the roads, the death rate on the highways plunges. Everybody's insurance rates go down fifty percent."

"An intriguing scenario," I allowed. "And what conclusion do you draw from it?"

"This. Would our state's hypothetical program be followed? Would forty-nine other states quickly bring their own licensing schemes in line with Minnesota's?"

"I suppose you are going to say no, but I'm curious why."

"They would all find reasons not to follow the Minnesota experiment, distinguishing their state from that one in some minor respect, when the real reason has to do with the idea of a child."

"I see what you're saying," I said with interest. "The idea of an eleven year-old hunched over a steering wheel, cheerfully and safely driving a car all by himself or herself, is inconsistent with our social construct of a child. It's out of role, like the idea of women in combat today, or of blacks in the Navy a few years ago."

"Exactly," Rodrigo said. "Society can't accept the notion of children as independent, of having the autonomy and freedom of movement that driving a car on public highways brings. Children are meant to be watched, dependent, small, and helpless. We want them to be that way. So, whatever the evidence disclosed, we'd find ways to ignore or discount it."

Hmmm, I thought. Hadn't I heard of evidence law discussions in

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54. Rates for teenage males are very high, of course, but the accidents they cause also force other drivers' rates up.


56. On desegregation of the Armed Forces, see Bell, supra note 32, at 524-25; Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 71-73 (1988).
a similar vein? I made a mental note to ask a colleague who teaches in that area. The studies I dimly seemed to remember indicated that child eyewitnesses, although actually better than older ones, are still not allowed to testify. The full implication of what Rodrigo had been saying struck me. “So, it’s a kind of market failure — no other state would follow the first one’s example, just as racist firms would refuse to follow the lead of a nonracist one, even if this meant giving up a competitive edge.”

“They won’t do it for the same reasons that we won’t empower children, let women fight in combat, or accept gays in certain lines of work. These things go against the grain. Racism, sexism, and homophobia are in the cultural paradigm — in the very set of values, ideas, and meanings we rely on to construct, order, and understand the world, as well as communicate with each other about it.”

“And since they are in the paradigm, we don’t see them, cannot speak against them without seeming and feeling foolish, much less take action to correct them.”

“Exactly, and it’s a dimension your economists ignore in their focus on the microcosm, on the individual, atomized aspect of human interaction and choice. Because of who they are, their disciplinary bias or ‘positionality,’ they systematically misperceive the essence of racism.”

“Rodrigo, I need some dinner. You set a fast pace and, as fascinating as all this is, I’m not as young as I used to be. Why don’t we walk down to the village for a bite?”

I noticed Rodrigo’s quick flash of concern, then added, “Don’t worry, I’ll pay. This is helping me get ready for my conference. I know what it’s like living in the city on a student’s budget. You’re my guest.”

III. IN WHICH MY YOUNG FRIEND STANDS LAW AND ECONOMICS ON ITS HEAD WITH A LITTLE ASSISTANCE FROM THE SOCIOLOGY OF KNOWLEDGE

We were comfortably settled in an Italian restaurant that Rodrigo pronounced “good — at least equal to the ones I used to patronize back there. The pasta seems fresh and homemade. And the wine — not bad, although I see it’s from California.”

“I come here often with colleagues. It’s cheap and they let you stay as long as you want. You had been explaining why law and eco-


59. “Truths” that are accepted into the broader culture, that became part of received wisdom, are highly resistant to change. See Delgado & Stefancic, Images, supra note 10; Delgado & Stefancic, Norms and Narratives, supra note 10; Lawrence, supra note 49.
nomics does not account for racism’s continuing vitality — for the market’s failure to make much of a dent in it.”

“Posner, Epstein, and others try, but can’t. Their approach is too confined. They focus on individual choices, on the microcosm, when the essence of racism and other forms of prejudice is much broader than that.60 Epstein, for example, speaks of the right to exclude from a circle of friends and associates as standing on the same footing as the right to join such a circle (p. 497). He speaks of the antidiscrimination laws as forcing individuals into “undesired interaction” (p. 497), something whose “totalitarian implications become clear only when one realizes the . . . steps that must be taken to enforce [them]” (p. 497). Individuals know their own preferences better than anyone else (p. 149), so any governmental meddling is inefficient and likely to make matters worse (pp. 42, 149-51). Charles Murray,61 Thomas Sowell,62 and even Gary Becker63 echo some of these conclusions. What they don’t seem to realize is that, with race, we don’t so much operate irrationally in an otherwise sound world as create a world with irrationality built into its very structure.64 Once we create a world where race matters, we become unaware of our creation’s contingency. Racial generalizations come to seem natural, a sort of baseline, ‘the way things are.’ What now seems irrational is to hire a black or let one in your law school. These decisions require ‘affirmative action’ and are thus morally troublesome, as you and I discussed earlier. Individual actions work in concert ineluctably to reinforce the racial status quo. It feels like freedom, like individual choice. Yet the effect is tyranny.”65

“This has been quite useful,” I said. “I hope you don’t mind if I steal your ideas. You asked me earlier to remind you to tell me something. I’ve forgotten what it was — something about the future perhaps?”

Rodrigo was silent for a moment. “Oh, yes. I was discussing this with one of the other LL.M. students, who is from Ghana. It’s my thesis that racism gets worse over time, not better — in other words, exactly the opposite of what the law-and-economics scholars tell us.”66

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60. For examples of law-and-economics writers’ focus on the individual transaction side of prejudice and racism, see pp. 35-37, 57-74, 265, 419; Posner, supra note 15, at 615-18. When they discuss the possibility that prejudice may implicate broader currents and forces, these scholars tend to afford such concerns little efficacy or to dismiss them because racism concerns supposedly intractable historical evils. See, e.g., pp. 495-99 (conceding that debate about racism swirls around “symbols”).


63. Becker, supra note 15, at 6, 16, 153 (describing discrimination as a “taste”).

64. Bell, Saved supra note 1; Delgado & Stefancic, Images, supra note 10 (both characterizing racism as structural, not accidental or a matter of individual pathology).

65. See Delgado, supra note 1, at 1361-63, 1374-75.

66. See supra notes 33-37, sources cited therein, and accompanying text.
"I've been pointing that out myself, although possibly for different reasons. And I doubt you'll have any more success than I've had. I'm sure you've noticed, Rodrigo, that it's almost impossible to get most white folks to see that things are getting worse. They love to fasten on the myth of black progress. Tell them twenty dismal statistics about African-American poverty, early death, and despair, and they'll come up with a single cheerful statistic that they heard somewhere that suggests that things are getting better — that today there are more partially sighted Hispanic plumber's apprentices in Ohio than there were twenty-five years ago, more black undergraduates majoring in Naval R.O.T.C. at land grant colleges, or some such thing. But tell me your theory of why the market does not drive out racism but accentuates it."

"It's simple," said Rodrigo, deftly wrapping a long strand of pasta around his fork. "Once you understand that racial differences are social constructs and that racial mythology is intensely interest-promoting yet firmly believed, you see how racism accelerates, feeds on itself. The image becomes reality, which in turn reinforces the image, which seems truer and truer and ultimately beyond refutation."

"Sort of a self-fulfilling prophecy," I offered. To be truthful, I didn't quite get his drift and wanted him to spell it out a little more. Was my blood sugar level low, or was I just not up to following this wunderkind? I took another bite of my fettucini Alfredo.

As though reading my thoughts, Rodrigo added, "Maybe that's a little too elliptical. What I meant was that we have constructed an image of blacks as inferior — as unintelligent, not very ambitious, and so on. Originally, this served transparently majoritarian purposes — justifying slavery first, and later the black codes. But over time this transparency drops out. Now, we really begin to see blacks, women, children, the way the construct holds. The occasional high-achieving black or woman — or independent self-sufficient child — is disregarded or lauded as an aberration. For their parts, the objects of the stereotype either internalize it or are coerced into their assigned roles. Minorities in fact become poor, women domestic, children passive and 'cute.' The image becomes real, true in the sense of 'beyond refutation.' Young children are probably more dependent today

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67. For earlier views of this "optimism gap" (in which whites hold that things are getting better for blacks, while blacks think the opposite), see Robin D. Barnes, An Extra-Terrestrial Trade Proposition Brings an End to the World as We Know It, 34 ST. LOUIS U. L.J. 413 (1990); Bell, supra note 41; Richard Delgado, Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?, 97 YALE L.J. 923 (1988).

68. On the way American society coined this attitude to justify treatment of blacks, see Bell, supra note 42; Delgado & Stefancic, Images, supra note 10, at 1259-61 (focusing on prevailing cultural images).

than they were 100 years ago. Women are just as much objectified sexually, if not more so. And so on.”

IV. IN WHICH RODRIGO EXPLAINS HIS NEO-CRYPTO-
THEOLOGICO DOUBLE FEEDBACK LOOP

“T’m still not convinced, Rodrigo. Your argument lacks rigor. It may seem plausible to me, but the law-and-economics types on my panel see themselves as hardheaded scientists. Moreover, few of them are familiar as you and I are with the day-to-day reality of life as a person of color. They think things are getting better, that all we have to do is let the market operate. You’ll need to show them the exact mechanism by which racism tends to worsen, not improve, over time. You can’t just offer vague ideas like self-fulfilling prophecies and social constructions that feed on themselves. Your Minnesota example was interesting, but not persuasive in my opinion.”

“I don’t know how else to show someone who believes all diseases are individual that there is such a thing as social pathology.”

Both of us were silent. Rodrigo was furrowing his brow a second time. “Professor, are many of your law-and-economics colleagues religious?” he asked.

The question took me by surprise. “I don’t know. Probably. Yes, at least one that I know of — fairly devoutly so. But what’s the relevance of their faith or lack of it?”

“Religion is something beyond empirical proof. Maybe you can build on that to question their faith in microtransactions and analysis as the whole story.”

“I don’t follow you.”

“Well, haven’t many religions emphasized miracles, predestination, the notion of a fair and just world, and other manifestations of God’s efficacy?”

“Yes, I suppose so,” I said.

“And haven’t all conquerors from Hammurabi on down invoked religious explanations to justify their conquests and rule over other nations?”

“Of course. Our young friend Robert Williams wrote a brilliant article entitled ‘Documents of Barbarism’ showing how the early settlers applied European myths of supremacy and Manifest Destiny to justify genocide and plunder of Indian lands. Even the judiciary was complicit in developing a version of this — the Discovery Doctrine,

70. But cf. Sowell, supra note 15 (arguing against affirmative action and antidiscrimination law as inimical to blacks’ interests).
71. E.g., John Calvin, Institutes of the Christian Religion (Henry Beveridge, trans., Wm. B. Berman Publishing 1953); see David Hume, Dialogues Concerning Natural Religion 51-56 (Norman K. Smith ed., 1947) (addressing “argument from design”).
72. See Robert A. Williams, Documents of Barbarism: The Contemporary Legacy of Euro-
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according to which Indian lands might be appropriated by any European person or nation.”

“So, can we say that religion, to the extent it speaks to the issue, confirms a culture in what it thinks and does? If society is unjust, if upon looking about them the members see manifest differences between the standards of living, levels of employment, infant mortality rates, and so on, of their group and others — then something must be wrong with those others. They lack character, ambition, the right genes. The social system is fine, because divinely ordained; the fault lies with individual actors like you and me.”

“Religion, like any powerful narrative, is canonical,” I observed. “Anything that deviates from the narrative or tends to cast doubt upon it is itself put in question. The poverty and despair of communities of color puts the fair-world tenet in question. So, the narrative supplies a reason — our fault.”

“Are you and I free of that narrative, Professor?”

“I’m not sure,” I answered. “They conclude that, because the world is fair yet we are poor and despised, there must be something wrong with us individually, or with our culture or family — we are not among the Elect. We, by contrast, having the same belief in a fair world but knowing that we are normal — like everyone else — interpret differences in the distribution of social goods like jobs, longevity, wealth, and happiness as evidence of malevolence or neglect on the part of those in power, or else as basic defects in the social system.”

“And so each group interprets the very same reality to reinforce its own beliefs about racial justice,” Rodrigo concluded.

“And whites become more and more convinced that blacks and Hispanics are complainers, always conjuring up exaggerated claims of discrimination when all we need to do is go out and work and find the opportunities that are there.”


75. On “double consciousness,” in which excluded people see themselves in two perspectives at once — that of the majority race, according to which they are demonized and despised, and their own, in which they are normal — see W.E.B. Du Bois, The Souls of Black Folk 3-4 (Kraus-Thomson 1973) (1903); Ralph Ellison, The Invisible Man (1952). For contemporary explications of double or multiple consciousness, see Bella Hooks, Feminist Theory: From Margin to Center (1984); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women’s Rts. L. Rep. 7 (1989).

76. Then I quickly thought: not just whites. See Delgado, supra note 1, at 1373-74; Delgado, Enormous Anomaly?, supra note 19, at 1548-51 (discussing neoconservatives of color such as
"Your friend and colleague Thomas Sowell says more or less that, and he’s black. He says if the Irish, Chinese, and West Indians can make it, so can African Americans."

"But you said both groups seize on the same evidence to confirm their positions, thus drifting farther and farther apart over time."

"Oh, yes," Rodrigo replied. "People of our persuasion see the same events, the same history, and either give up and withdraw — feeling what’s the use — or else clamor, riot, or write pungent law review articles and books like you, Professor. Each group’s conduct just reinforces the other’s view that the second group is unjust and impossible. Over time, blacks get more militant and whites more complacent, with a little help — on both sides — from the legacy of John Calvin, Charles Darwin, and Adam Smith."

"A double feedback loop with roots in religion and faith in a fair world," I mused.

"Something like that," he said.

"I think I may try this out on my law-and-economics friends. Now that I think about it, many of them are religious — even if they only believe in the Invisible Hand. Maybe I can get them to see that societal discrimination is something more than irrationality and that it’s likely to get worse before it gets better."

"Good luck."

A few minutes elapsed while we finished dessert and I summoned the waiter. I gave him my credit card, and as we waited I expressed a concern that had been nagging at me. Choosing my words carefully, I asked my young friend:

Glenn Loury, Thomas Sowell, Shelby Steele, and Steve Carter); see also Sunstein, supra note 36, at 31-32 (explaining the phenomenon in terms of cognitive dissonance).


78. See, e.g., Sowell, supra note 15, at 20-22, 77-78.


80. On the contribution of Enlightenment faith in science to belief in black inferiority, see Stephen Jay Gould, The Mismeasurement of Man (1981); Richard Delgado et al., Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research, 31 UCLA L. Rev. 128, 132-33 (1983). See also Sunstein, supra note 36, at 33-34 (explaining that the empowered group adopts merit criteria to define others’ conduct as devoid of merit and their own as meritorious and nondiscriminatory).

81. Attributed to Adam Smith, the term refers to the unseen operation of the all-wise market. See Adam Smith, The Wealth of Nations (Mod. Libr. ed. 1937).
"Rodrigo, if this is the picture that the new Critical thought introduces, I'm not sure I or many others will want to see it. Baleful images deepen and rigidify. Racism and sexism increase over time. Compared to that, most of us will take liberalism. Where's the opening for transformation, for hope? Why struggle if things are the way you say? What's the point?"

"Some of those criticisms have been leveled at your own work, Professor, as I'm sure you know," Rodrigo replied levelly. "The world is not ordained to be a pleasant place — that's wish fulfillment. One shouldn't pick a philosophy or perspective merely because it makes one feel good."

"Agreed. But where do you go from there? What's the point of struggle? I assume you are back from sunny Italy for a reason. Why did you return to this vale of tears?"

V. IN WHICH RODRIGO EXPLAINS, WHY STRUGGLE

"Because, as I mentioned earlier, the United States' — indeed the entire West's — dominant culture is in disarray.83 Their economy, infrastructure, educational system, cities, and environment are in sharp decline, yet they are stuck — perseverating — digging in and doing harder and with more energy the very things that got them into trouble in the first place.84 They're listening to the neoconservatives and nativists who tell them they can be great again by being American — thereby turning their backs on the very voices and points of view that might save them, might enable them to break free from deadlock and stagnation."

"But I thought I just heard you say that the potential for basic change, at least on the racial front, is highly limited. If the United States is to save itself, it must incorporate ideas and people from nonwestern sources — and yet these are the very sources they've constructed, as you put it, to seem unworthy, ridiculous, lazy, and morally debased . . . ." I paused to drive home to Rodrigo the blind alley to which his analysis seemed inexorably to lead.

"There's a way out," Rodrigo said quietly. "They're our stigma-

82. On criticism of critical writing as too despairing, see Alan D. Freeman, Race and Class: The Dilemma of Liberal Reform, 90 YALE L.J. 1880 (1981); Commentary, 24 CONN. L. REV. 497 (1992) (including various authors' comments on Bell's realist premise); Robert M. O'Neil, A Reaction to "The Imperial Scholar" and Professor Delgado's Proposed Solution, 3 LAW & INEQ. J. 255 (1982).

83. See Delgado, supra note 1, at 1375-76.

84. Id. at 1373-76 (setting out Rodrigo's view that the West is suffering economic decline, cultural stasis, and environmental deterioration); see also id. at 1381-83 (Appendix: Rodrigo's Printout; listing books and articles on the theory of cyclicity among nations and on the United States' decline in particular). I was also reminded of the United States' recent refusal to sign proposed bioprotection treaties at the Earth Summit in Rio de Janeiro. E.g., Paul Raeburn, U.S. at Loggerheads over Forests, BOULDER (CO) DAILY CAMERA, June 11, 1992, at A1.
pictures, after all. We made them, we can unmake them. There's no objective inferiority of peoples of color to worry about, no reason why white folks must always be on top, no reason why all persons cannot have equal levels of dignity and respect. As soon as one sees this, one places oneself on the path of liberation. The culture, the practices, the thousand images and roles they've assigned to us, all reinforcing the idea of our inferiority\textsuperscript{85} — all these are revealed as contingent, not necessary. We can accept them or not. They can, too. Our approach in this sense is much more liberating — and more subversive — than liberalism. We need not live in a world we do not like, \textit{that we did not help create}, and then seek minor adjustments and changed positions within that unfairly structured world. We may work for change. If we don't, everything will fail.\textsuperscript{86}

"And so, law and economics is . . . ."

"A useful way of ordering relations and transactions within a given system, say, Western capitalism — but a poor way of understanding and dealing with broad, systemic distortions built into the very structure of that system. Relying on economic theory to solve problems of race and sex makes about as much sense as reading Gramsci for help with one's household budget."

* * *

"Speaking of budgets, how are you managing your finances? This is an awfully expensive city for a student."

"I had saved up some from my year of practice in Rome and Dublin. Geneva was nice enough to help me find a rent-controlled apartment. And I got a loan, like two thirds of my fellow students. Which reminds me, Professor — my tuition bill's due tomorrow morning. Thanks for the dinner, but I'd better get to my bank before it closes. Good luck at your conference, if I don't see you before then."

I watched his lanky figure disappear from sight, paid the bill and left, ignoring as best I could the stares of a yuppified couple at the next table.\textsuperscript{87} As I walked home through the late summer evening, I felt one of those rare surges of happiness over being a teacher. I was happy to have next month's talk largely mapped out, and grateful to Rodrigo for having helped me think it through. What a rare student! With a start I realized that the afternoon's discussion had focused almost en-

\textsuperscript{85} See Delgado & Stefancic, Images, supra note 10.

\textsuperscript{86} On counterstorytelling as jurisprudential method and means for challenging, enriching, or changing the dominant culture, see Bell, Saved supra note 1; Williams, supra note 32; Abrams, supra note 24; Delgado, supra note 32; Matsuda, supra note 75.

\textsuperscript{87} What about two well-dressed men of color put them off, I wondered briefly. Rodrigo and I had been engaged in exactly the sort of economic trading that, according to the law and economists, should reduce prejudice. Was it that we were eating in their favorite restaurant? Were of the same sex? Were engaged in intense intellectual discussion? Yet another nagging reminder of the separateness of race and economic class as disadvantaging factors, I mused. On the "hate stare," see Harlon L. Dalton, The Clouded Prism, 22 Harv. C.R.-C.L. L. Rev. 435 (1987).
tirely on my concerns and, except for the first part, little on his. I hoped his adjustment to American legal education and pedagogy went well, and resolved to call him up after a week or two of classes to see how things were going.
REPOSESSION: OF HISTORY, POVERTY, AND DISSENT

Martha Minow *


With the passing of Justice Thurgood Marshall, this nation has lost not only a man who truly made history, but also a man who knew history and knew it mattered. His attention to history crucially served his pursuit of racial and social justice, for history supplied details about how oppression works and how human experiences and institutions simultaneously change and stay the same. For those moved by Justice Marshall's legacy, renewed attention to history can spur devotion to the struggle to include the excluded, and it can guide those struggles with reminders about the complexities of human experience.

For reminders and for spurs, reading The Dispossessed: America's Underclasses from the Civil War to the Present is one place to start. The historical details of impoverishing circumstances are more powerful than the book's comments on the current scene. In The Dispossessed, award-winning author Jacqueline Jones 1 extensively documents the dislocations of the most impoverished Southern Americans — both black and white — during the economic transformations that accompanied the Civil War, the World Wars, and the Depression. Jones provides thick, factual details about sharecropping and peonage labor, phosphate mining and migrant labor camps, government practices, and survival strategies pursued by individual families facing an economy moving from agriculture to industry and from local to global. She wants to locate the "underclass" in a history of national and worldwide economic change, which displaced whole groups of workers from the mainstream economy (pp. 205, 271, 287).

Jones wants to use this history to comment on current claims that poor people deserve their poverty because they lack the virtues which promote hard work and thus perpetuate a culture of dependency (pp. 27, 291-92). She also wants to challenge the image of the underclass as

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African American; in its place she offers a story of poor Southern whites and blacks who share experiences of economic exploitation and dislocation (pp. 1-2, 174-75).

By her own acknowledgment, however, blacks continuously faced harsher circumstances and more invidious oppression than whites (pp. 110-11, 128-29, 140-55, 163-64, 233-34). In addition, the book does not systematically address the "culture of poverty" argument, nor does it address what portion of the population did not fit Jones' story about individuals and families desperately seeking work. I do not disagree with her critique of the culture of poverty but only note that this critique is not the book's strong suit.\(^2\)

Indeed, the strength of *The Dispossessed* lies in its details, details garnered from government documents, oral histories, and an array of archival and secondary sources. The author's concerns about public debate over the "underclass" neither capture nor contain these details. A better way to summarize the details is to marshal them to address the central theme of dislocation: Why did so many poor Americans find themselves moving from place to place during the past century-and-a-half? In what way is it fair to describe this dislocation — as chosen or imposed? As dispossession? I will use this review as a chance to offer this summary and to invite readers to consider how such history can guide future struggles for social justice.

I. WHY DID PEOPLE MOVE?

*The Dispossessed* paints a picture of poor Southern Americans moving — from plantation to plantation, from plantation to city, from South to North, and back again. Ultimately, some nine million people, white and black, migrated from South to North between 1910 and 1969; in 1910, ninety percent of all blacks lived in the South and, by 1960, as many blacks lived in the North as in the South (p. 205). Jones convincingly identifies the multitude and variety of reasons and contexts for such movement. The quest for autonomy by former slaves and the effort by whites to distinguish themselves from blacks led individuals and families to change jobs and homes after the Civil War (pp. 14-15). The simple search for more favorable work conditions influenced many who moved (p. 26). Some moved to resist employers who wanted to impose employment terms resembling slavery.\(^3\) Others moved to avoid total dependency on hugely oppressive work conditions such as those in coal and phosphate mines.\(^4\) Many moved

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2. For a sharp criticism of the book, especially in its efforts to relate to contemporary policy debates, see Adolph Reed, Jr., *Parting the Waters*, THE NATION, Nov. 23, 1992, at 633, 637-41 (reviewing RAYMOND S. FRANKLIN, SHADOWS OF RACE AND CLASS (1991) and JACQUELINE JONES, THE DISPOSSESSED (1992)).


4. See p. 130.
to take seasonal jobs, such as picking crops (p. 167), or to seize occasional opportunities, such as construction projects (p. 225) or wartime factory work (p. 226).

According to Jones, families frequently settled accounts at the end of a period of agricultural employment only to find that they had made barely any cash, given the employer’s terms on debts or the employer’s fraud (pp. 116-17, 124, 191). A congressional representative from North Carolina reported in 1901 that “[t]here is a great deal of fraud perpetrated on the ignorant; they keep no books, and in the fall the account is what the landlord and the store man choose to make it. They cannot dispute it.” Many employees responded to such exploitation by moving. Some started by traveling local roads to look for work but ultimately had to venture to other states.

As an illustrative example, Jones offers the story of John and Virginia Crews, black sharecroppers in York, Alabama. She quotes from their daughter’s book:

[R]eckoning time in December 1911 brought the shock of bitter disappointment; the white plantation owner paid the three adults in their household only $11.00 for a whole year’s labor. But cries of outrage would not put food on the table, so in January Virginia hired on as a strawberry picker for a neighboring farmer, and John “was riding for miles each day checking out any rumors about public work, road repair, anything,” in the vicinity of their home. . . . [C]onvinced that justice would continue to elude him on the Alabama countryside, this black man left his family in the spring of 1912 and traveled to the city of Bessemer, where he learned of jobs for coal miners in far away Virginia. John Crews summoned his family, and together they traveled by company-sponsored train to the town of Embodin. Over the next six years the family sought steady work and refuge from exploitative employers, first in a small settlement in the hills above Embodin; then in Cincinnati, where John could find only irregular construction work and Virginia labored as a domestic; and after that in Logan, West Virginia. In Logan the family felt keenly the lack of schools and churches, and in 1917 a disastrous flood forced them to leave. Finally they settled in Detroit, so that John could take advantage of the wartime boom and work for American Car and Foundry, a job he lost after the armistice. Over the next half century he would scrounge for work of any kind, whether pushing a broom or a junk cart, in an effort to make good on a vow Virginia had made to herself one wintry night in Alabama long ago: “Stars, I promise you that I won’t stop until I get a home of my own . . . a REAL HOME!” [pp. 206-07]

As this story suggests, frequent moves reflected a persistent search for work frustrated in part by racial barriers, in part by exploitative employers, in part by job shortages, and in part by the lack of a supportive community.

Jones tells of one man named Ed Brown, a black sharecropper, who moved in search of a better mattress, by which he summarized his view of success for himself and his family (p. 78). Brown claimed that “every time you come up in the world you got a better mattress” (p. 78). A sharecropper’s bed would probably be made of unginned cotton, lumpy from seeds, while a farmer who rented land could sleep on a mattress stuffed with cotton softened by ginning — the kind of mattress Ed Brown’s wife wanted. In the 1920s Ed Brown’s search for a better mattress “took him to six different plantations, six different white employers” (p. 78). Under the terms set by a white employer, Brown could grow a good crop but could not extricate himself from debt, and that frustrated him. On one occasion in 1925, an employer announced that, after settling accounts, Brown was free of debt but could take home only three dollars for his labor. Brown had been savvy enough, however, to hold back two extra cotton bales until after the reckoning — and managed to collect $150 for them. But that only happened once. Brown continued to search for better employment, even when that required him to pursue seasonal jobs away from his family (p. 81).

Jones concludes that a family’s decision to leave exploitative employers was normal and that the contrary decision to stay would have been perceived as exceptional. Employers even developed a practice to facilitate the movement of employees with debts: through “debt transferral,” one employer agreed to assume the debts of a worker in exchange for securing the worker’s release from his present employment situation. Jones comments: “Assuming that many of these unpaid bills were rather small, transferrals seem to have represented a form of collusion among planters, a gentleman’s agreement among competitors for subordinate labor” (p. 116).

Devotion to family played a central role in decisions to move, even though such decisions often split families. Many restricted their moves to a local or regional terrain in order to stay close to kin (p. 41). Some would move as extended families — when one household faced eviction (p. 123), or when a better economic opportunity attracted some family members (p. 223). Families moved to save children from exploitation (p. 215) and to find a better way to provide for themselves (p. 211). Men sometimes moved away from their families to work sites inhospitable to the rest of the household and sometimes moved to rejoin families or to search for work that would allow the family to live together (p. 226).

Families moved and split apart in search of work, and employers

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7. P. 124. Jones talks of family relocations without much attention to the dynamics of choice and constraint among the adults in the family. Although evidence of such dynamics would be difficult to find, Jones’ approach has the unfortunate effect of treating families as singular units rather than sites of potential conflict and accommodation among actual individuals.
became expert in "exploiting the desire — and, in many cases, the desperation — of kin to provide for each other" (pp. 155-56). Jones shows a gift for locating the interests of employers behind the onerous lives of employees; she explains how different kinds of households served different purposes. Farmers who commuted to mills and distilleries depressed the wages of laborers resident in work camps. The lack of employment opportunities for wives in extractive-industry communities kept them dependent on the wages of their menfolk. In contrast, camps that employed women and children reduced their labor costs by means of a meager family wage. And finally, the counterpoint to these examples was the all-male camp, a "little man-made hell," where men were stripped of all dignity and of the hope that flows from the nearness of, and contact with, family members. 8

The patterns of mobile and constantly shifting labor evidently served the interests of employers (p. 116); thus, employers seldom sought to enforce Jim Crow laws limiting the mobility of agricultural workers, except during labor shortages (p. 107).

II. HOW TO CHARACTERIZE MIGRATION

One word for the moves Jones describes is "shifting" and, as Jones notes, "[i]n the minds of Southern planters, shifting was intimately related to croppers' 'shiftlessness,' an all-purpose term used to refer to indolence and moral laxity" (p. 106). I, for one, will never hear the term shiftless again without thinking of Jones' stories of so many lives spent searching for work. Her stories are a powerful response to charges of moral deficiencies among the poor.

A. Choice?

Closely connected to debates over the moral virtues of those who so often moved is the cloudy issue of choice: Were the moves chosen or coerced? The debates over morality reflect a faulty view that choice and coercion are cleanly separated. Instead, they are intimately connected, for some choice remains within all but the most extreme constraints while some constraints render choice all but meaningless. 9 Thus, Jones' reports of individuals who would have preferred to be settled but had to move (pp. 169-70), and others who moved because they hoped for something better (p. 193), are difficult to assess. Similarly, it is unclear what Jones wants to say about choice and constraint when she describes black men moving their families in search of work; she asserts that the legacy of slavery made these men feel especially inadequate as providers (p. 211). Does Jones mean to imply that these


efforts to assume personal responsibility are themselves socially determined?

But most curious, and elusive, is the matter of choice and constraint for people who did not move. For Jones, contemporary urban ghettos provide a vivid example: Are people trapped or do they choose to stay? (pp. 277-81). Jones implies that the presence of drugs, especially crack, alters the scene. She also suggests that postindustrial wages are too low to provide an incentive to uproot a family (p. 285). But insufficient evidence exists that high wages, perceived job prospects, or freedom from illicit drugs explain fully, or even largely, the pattern of moves during the past 150 years. The moves always imposed large costs in terms of family stability, kinship networks, community ties, and loss of home. Yet those costs seem acceptable to those who have made it. As Justice Marshall noted shortly before he died, “Even many educated whites and successful Negroes have given up on integration and lost hope in equality. They see nothing in common — except the need to flee as fast as they can from our inner cities.”

Jones tells of Jimmy Green, “who lived [in the 1970s] in the black section of Natchez, Mississippi . . . with a sporadic income,” and who “yearned for a steady, $6-an-hour job” (p. 285). But he did not see the point of moving: “Natchez is Natchez all over the world. The other places are only bigger than Natchez.” Perhaps Jimmy Green had heard enough stories of those who moved and found nothing better, stories like those Jones has accumulated. Perhaps Jimmy Green and others like him are choosing under enormous constraints and favoring community ties over the risky venture of moving. Jones contrasts “[w]ell-to-do families [who] can afford to explore new job opportunities” and who “sever community ties, and relocate, secure in their decent standard of living,” with “poor communities” whose “social networks, more than jobs, constitute their lifeblood” (p. 291). But why should social networks be this lifeblood now and not before, during the period studied by Jones? Poor people who moved in the past had more hope for jobs, and perhaps more hope of transporting their social networks with them. Jones elsewhere indicates that extended families at times moved together; at other times, whole communities transplanted themselves. Attention to that level of choice — choices by individuals to act as communities — would strengthen the story and shed light on the complex issues of choice and constraint in the lives of the migrants.


The book is strangely devoid of discussion of its subjects as political actors or of the political choices that caused the economic and social patterns that produce migration and perpetuate poverty. Jones largely treats the migrations as inevitable social responses to inevitable economic change. Yet, in her introduction, Jones asserts that "[t]he historical processes that created impoverished groups represented political as much as economic forces," and that these forces should be understood as decisions by planters, factory owners, and public officials to abandon certain communities (p. 3). This critical insight seldom reappears in the rest of the book, which refers instead to national and global economic forces as if they were natural, inevitable, and immune to human influence. A worthy successor to this book would be a project exploring the range of political choices that influence the economic divestment and displacement that constrained the structure of opportunities for impoverished people. Similarly, a worthy political initiative would ask how to distribute the costs and benefits of economic transformations fairly, rather than assume that the costs should fall on the most vulnerable.

B. Dispossession?

Notions of constricted choice inform Jones' authorial choice of title and her periodic use of the term dispossession throughout the book. This is an intriguing way to describe the dislocation of people from their homes as they searched for better lives and employment or simply escaped from exploitation. It is a curious word choice because it implies that these poor people had possessions to lose. For the freed slaves, such possessions may seem hard to locate; even the poor whites who joined the migrating stream seem to have had little to lose by moving. The historical reality is that moving took little away from people who had nothing from the start.

Yet, a close reading of Jones' assembled facts supports the use of dispossession. Surely all who move risk losing simple attachments to home, origins, and familiar places even when they remain within the same county or region. This loss must have been even more acute for those who did leave familiar territory and for those who became newcomers, "hillbillies," or strangers in their new environments. As Jones notes, after the Civil War the former slaves lost customary scavenging

12. E.g., p. 287. Jones does acknowledge that "corporations created distressed communities when they abandoned their own workers in favor of cheaper ones abroad" (p. 285), but she then treats such decisions as part of an inexorable process of worldwide labor exploitation (pp. 285-87).

13. Jones actually discusses how the notion of a stream of migrant agricultural labor misleads us if it implies a "regular and continuous pattern" of people following crops for harvesting, when, in fact, "most migrants labored in only one or two states each summer." P. 173. Nonetheless, Jones herself uses the stream metaphor to describe the migrations along the Atlantic shore between 1880 and 1990. Pp. 170-71.
rights as landowners invented a system of wage labor that served their own interests (pp. 32-34). Depriving people of the opportunities to gather leftover crops, to hunt, and to fish meant depriving them of the small space for self-sufficiency they had once enjoyed. Later, changes in agricultural practices even deprived sharecroppers of their land, which converted them into rootless providers of specialized labor with no opportunity for choice or autonomy (p. 170). Along with restrictions on workers’ abilities to market their own crops (p. 76), the conversion of agricultural work into wage labor deprived many people of degrees of self-possession.

Basic physical safety also declined over time, although Jones provides no hard data of this phenomenon. Still, a form of dispossession occurs when poor black people fear the predatory impulses of whites cruising for entertainment in black neighborhoods (p. 164), harassment by whites disturbed by blacks’ purchasing power (p. 216), and violence and crime at the hands of a few truly deviant people within the poor black community (p. 293). Dispossession is the result when corporations divest from low-income communities (pp. 285-87). The abundance of ways to deprive desperate people of hope profoundly demonstrates the looming potential for dispossession.

III. HOW TO FRAME NEW STRUGGLES

Lawyers use history. In debates over the Constitution, lawyers point to historical patterns and to historians’ arguments. Historians also use history, and they often seek to influence public policy and law. One danger for both lawyers and historians is oversimplification. When used instrumentally, history is too often shorn of its complexity, nuance, and tension. Another danger arises in reading present-day concerns back into the past. These risks can arise in histories of American poverty. But Jones’ The Dispossessed, along with Nicholas Lemann’s work The Promised Land,14 and Michael Katz’ In the Shadow of the Poorhouse,15 largely avoid such pitfalls. Instead, they locate contemporary problems within the past and perhaps fuel new struggles for social justice.

Those struggles have and will continue to invoke the ideals of equality, liberty, and fairness. What The Dispossessed may add is the language of compensation for takings. For, as Jones demonstrates, the impoverished have suffered not just poverty, but successive takings of their dignity, autonomy, homes, and hopes. The resonance of compensation arguments should grow, given the Supreme Court’s recent

expansion of the Takings Clause,\(^\text{16}\) although the Court's concern has been to protect property owners, not the poor. Compensation and reparations also frame claims by Japanese-American internment victims and native Hawaiians.\(^\text{17}\) Someday, perhaps, the risks of poverty will be shared more fairly, and repossession will take its place in the language of political and legal change.


\(^{17}\) See generally Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987). Similar arguments can be made on behalf of native Hawaiians regarding their displacement from land and sovereignty.
IF THE EYE OFFEND THEE, TURN OFF THE COLOR

John Harrison*


Although both groups produce a great many words, students of the Fourteenth Amendment are at a disadvantage compared to the infinitely large collection of monkeys who set out to produce Hamlet by typing random keystrokes. The monkeys are bound to produce their tragedy. But despite splendid contributions like Andrew Kull's The Color-Blind Constitution, ¹ Fourteenth Amendment scholars are unlikely to come up with a canonical account of either the original meaning of the amendment or its subsequent adventures as a doctrine of the Supreme Court.

Lacking the word-crunching capacity of the infinite monkeys, Kull uses a technique more suited to finite but intelligent creatures. He has taken as his organizing theme the idea that the Constitution is or should be color-blind — that it should flatly forbid governments from considering race or color in making decisions. The story he develops on that theme is something like Hamlet, in that the protagonist is ultimately undone. According to Kull, although the idea of color blindness has been in play throughout the history of American race law in general and the Fourteenth Amendment in particular, it has consistently been rejected. The framers of the amendment, he says, considered a ban on the consideration of race in government decisionmaking (what we usually call classification by race), and instead adopted the Equal Protection Clause, which forbids, not racial classifications per se, but arbitrary or unreasonable classifications. The Supreme Court, in applying the amendment, has flirted with color blindness but has instead repeatedly endorsed various forms of the ban on unreasonable classifications.

Kull's subject matter is rich enough that a reviewer is tempted to set his own collection of monkeys loose on the book, saying everything that comes to mind on the theory that some of it will be interesting. Instead, because readers have finite time and patience, I will discuss in detail two of the most significant aspects of Kull's story. The first

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concerns his account of the framing of the Fourteenth Amendment, in which he concludes that the Reconstruction Republicans deliberately adopted an amendment that contained not the rule of color blindness, but a ban on unreasonable classifications. Kull’s conclusion is more debatable than he supposes because the Republicans may not have thought that Section 1 of the Fourteenth Amendment means what we now take it to mean. They may have thought that they had banned the use of race in certain defined areas of government activity, even though their amendment does not mention race.

Second, I will try to use Kull’s story of Supreme Court equality doctrine to make a point about the way constitutional provisions operate. As Kull describes it, the struggle between color blindness and reasonable classification is the struggle over whether to remove questions of race from politics because a reasonable classifications regime requires that political choices still be made, albeit by the courts. My observation is that Kull, without saying so, has made the case for formalism in constitution drafting: his narrative presents an instance in which an issue was not removed from politics, but instead simply transferred from legislatures to courts, because the constitutional provision was insufficiently rigid — was not enough a rule and too much a principle.

At the end, after discussing some history and some theory, I will present one last thought about the monkeys.

I. KULL’S STORY

Kull’s story begins in earnest with a case that arose under a state constitution which, unlike the original federal Constitution, explicitly mentioned equality, although not race or color. The Commonwealth of Massachusetts proclaimed that “[a]ll men are born free and equal,” but in the 1840s Boston operated separate schools for white and non-white children. In 1848 Sarah Roberts, denied admission to the white school nearest her home, brought suit against the city of Boston. Her attorney was Charles Sumner, antislavery firebrand and future U.S. senator. Sumner argued that the constitution made all people equal before the law, and that equality before the law was inconsistent with race discrimination (pp. 41-48).

Sumner urged a rule of color blindness, but he had to wring it out of general language of equality that made no mention of race or color. The Supreme Judicial Court of Massachusetts, per Chief Justice Lemuel Shaw, rejected Sumner’s claim. As Kull describes it, Shaw’s analysis is an eerie preview of the next 150 years of American race law. His approach is by now familiar to everyone who has survived an intro-

2. MASS. CONST. art. I, § 1 (1780).
ductory course in American constitutional law. Shaw conceded that under the Massachusetts Constitution all were equal before the law, but thought the very universality of that principle kept it from forbidding racial classifications per se. After all, said Kull's Shaw, "government must classify in order to legislate" (p. 50). Some classifications, such as those according to age, are clearly permissible (p. 50). The principle of equality before the law, then, requires that "the classifications by which the individual's rights are 'settled and regulated' . . . be reasonable ones" (p. 50). The court then decided that the racial classification, whether or not desirable policy from the judges' point of view, was a reasonable one in light of the prejudices of the community (pp. 50-51). Boston's schools remained segregated.

From Roberts, Kull derives the leading figures of his Manichean universe. On one side is the rule of color blindness, espoused by Sumner. On the other is Shaw's doctrine that reasonable classifications are permissible. Shaw's approach is equal protection orthodoxy as we know it.4 Thus, when Kull refers to the requirement of reasonable classification, he means to contrast it with a requirement of color blindness. Reasonableness includes all the current "levels of scrutiny," from minimum rationality to strict scrutiny. The term reasonable classification as Kull uses it means anything that is not strict color blindness; it does not merely mean minimum rationality.

The next, and far more important, encounter between color blindness and reasonableness took place during the drafting of the Fourteenth Amendment by the Thirty-ninth Congress, which convened in December 1865. Almost immediately, arch-Radical Representative Thaddeus Stevens proposed a constitutional amendment that would require total color blindness: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."5 The next day, a more moderate Republican, Representative John Bingham of Ohio, introduced a forerunner to Section 1 of the Fourteenth Amendment; his proposal would have empowered Congress "to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in

4. "If we have difficulty in understanding what Shaw is talking about — the problem of reconciling the principle of legal 'equality' with the political fact of unequal treatment — it is because modern constitutional theory has so thoroughly incorporated Shaw's solution that we no longer recognize the problem." P. 50.

5. P. 67 (footnote omitted). Kull suggests that Stevens' proposal may have been influenced by two constitutional amendments put forward by antislavery leader Wendell Phillips during and shortly after the Civil War. In December 1863, Phillips proposed both a constitutional ban on slavery and an amendment providing that "no State shall make any distinction among its citizens on account of race and color." P. 58 (footnote omitted). In July 1865 the National Anti-Slavery Standard, then under Phillips' editorial direction, began to display the following proposed constitutional amendment at the head of its editorial column: "No State shall make any distinction in civil rights and privileges among the naturalized citizens of the United States residing within its limits, or among persons born on its soil of parents permanently resident there, on account of race, color, or descent." P. 62 (footnote omitted).
their rights [of] life, liberty, and property." As Kull tells the story, the first session of the Thirty-ninth Congress, which adopted the Civil Rights Act of 1866 and proposed the Fourteenth Amendment, was a struggle between Stevens' color blindness rule and Bingham's language of general equality. Repeatedly, according to Kull, color blindness lost and general equality won.

This happened, he says, in the drafting of the pivotal Civil Rights Act of 1866. The Act was designed to eliminate the Black Codes, under which provisionally reconstructed southern states had limited the basic rights of freed slaves, qualifying their capacity to make contracts, own property, and use the court system. As originally proposed, the 1866 Act included a general ban on race discrimination with respect to "civil rights or immunities" as well as a specific list of rights with respect to which discrimination was forbidden. After the Senate passed the bill, Republicans in the House expressed the fear that the general language might be thought to include political rights, especially suffrage (pp. 77-79). The bill was amended to eliminate the offending phrase and passed over President Johnson's veto (p. 79). As adopted, it provided that citizens of "every race and color, without regard to any previous condition of slavery or involuntary servitude" would have, with respect to specified subjects, "the same right[s]" as white citizens. Says Kull, "When the issue was joined, an unqualified rule of nondiscrimination mustered no measurable support in the Thirty-ninth Congress."

Then we come to the main event, the Fourteenth Amendment. In February 1866, the House of Representatives debated but ultimately postponed a precursor amendment, drafted by Bingham, that would have given Congress power to eliminate the Black Codes. Kull gives

6. P. 67 (footnote omitted).
7. As Kull recognizes, it is hard to overstate the importance of the Civil Rights Act for understanding Section 1 of the Fourteenth Amendment. "It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment 'constitutionalized' the Civil Rights Act of 1866." P. 75.
8. See 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, at 110-17 (1971); see also S. Exec. Doc. No. 6, 39th Cong., 2d Sess. (1867) (collecting Black Codes).
10. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.
11. P. 79. Kull is correct if he means to say that Congress declined to ban race discrimination with respect to all legal rights. But the suggestion Kull seems to make, that in adopting the Civil Rights Act of 1866, Congress rejected a ban on race discrimination in favor of something vaguer, p. 69, is astonishing. The 1866 Act referred in so many words to race, color, previous condition of slavery, and the rights of white citizens.
12. It provided:
The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.
CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).
credit for Shavian prescience to Representative Robert Hale, Republican of New York, who during the debate on Bingham’s draft foresaw (Kull says) the modern doctrine of equal protection. According to Kull, Hale argued that because “the entire legal system is necessarily a fabric of inequalities and discriminations, of categories and classifications,” an equal protection provision “if it is not to destroy altogether the possibility of government, can mean only ‘equal treatment for those who should be treated equally’” (p. 81).

Kull then describes how the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, rejected explicit bans on race discrimination in favor of more general language, including the second sentence of Section 1. The Republicans were unwilling to mention race explicitly, Kull suspects, because they feared political disaster should their proposal “hold out the prospect of Negro suffrage, immediate or prospective” (p. 86). Instead, they declined to mention race.

The effective way to secure the equality of the races before the law was to impose a rule of nondiscrimination. Contemplating the consequences of such a rule in 1866, Republicans decided that what they wanted after all was only a selective and partial equality before the law. The way to achieve this, they discovered, was to guarantee “equality,” leaving it to others to determine what “equality” might entail. [p. 87]

Stevens had lost and Bingham had won.

From then on, the meaning of equality was up to the courts, and Kull next describes the pre-Plessy judicial interpretation of the Fourteenth Amendment and related state constitutional provisions. The Supreme Court’s early decisions encouraged the friends of color blindness. The state courts, however, generally upheld segregated schools on the grounds that separation was permissible as long as the two

13. 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.

U.S. CONST. amend. XIV, § 1. The Joint Committee considered and ultimately rejected a ban on race discrimination with respect to civil rights, a ban on race discrimination with respect to the suffrage that would take effect on July 4, 1876, and a provision reducing the basis of representation in the House of Representatives for any state that, prior to that date, disenfranchised its citizens on the basis of race. P. 83. In addition to the race-free language of Section 1, the Fourteenth Amendment as proposed by the Joint Committee, submitted by Congress, and ratified by the states contains a race-free suffrage provision. Section 2 reduces a State’s representation in the House to the extent that suffrage “is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . . .” U.S. CONST. amend. XIV, § 2.

14. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), although effectively erasing the Privileges or Immunities Clause, emphasized that the Fourteenth Amendment was aimed at race discrimination. Pp. 89-90. Strauder v. West Virginia, 100 U.S. 303 (1880), invalidated race discrimination in jury selection, while Railroad Co. v. Brown, 84 U.S. (17 Wall.) 445 (1873), read an antidiscrimination statute that arguably permitted separate-but-equal facilities as forbidding them. Pp. 91-94.
races were equally subject to it.  

Those decisions set the stage for the now infamous *Plessy v. Ferguson*, 16 which Kull sees as the font of modern equal protection jurisprudence: “[T]he broad holding as opposed to its particular application, *Plessy* has never been overruled, even by implication. On the contrary, it announced what has remained ever since the stated view of a majority of the Supreme Court as to the constitutionality of laws that classify by race” (p. 113). Having shocked us with this observation, Kull ascribes to the Court in *Plessy* a two-part doctrine of equal protection. The first part, derived from the historical context of the Fourteenth Amendment rather than its text, banned a “limited class of racial classifications — those that created an explicit legal inequality” (p. 114). Such classifications the Court was prepared to eradicate root and branch, without ever explaining why the text required this action.  

By the time of *Plessy* the southern states had repealed the Black Codes: the first part of the doctrine thus was of little practical consequence. The burning question was the status of race-respecting laws that treated people of different races symmetrically and, hence, in ostensibly equal fashion. Segregation was the classic instance, although antimiscegenation statutes provided another important example. The second part of the *Plessy* doctrine required that such classifications, like all others, be reasonable.  

The really interesting issue in *Plessy*, Kull suggests, is the confrontation between the majority’s two-tier approach and Justice Harlan’s color blindness rule. Especially noteworthy is Justice Harlan’s extratextual rationale for his proposal. The Court’s second tier was a

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15. The Supreme Court of Ohio sustained school segregation, explaining that because, at most, “the 14th amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State,” separate schools were permissible: “a classification of the youth of the State for school purposes, upon any basis which do[es] not exclude either class from equal school advantages, is no infringement of the equal rights of citizens.” P. 95 (quoting State *ex rel.* Games v. McCann, 21 Ohio St. 198, 211 (1871)). Finding that the school facilities were equal, the court upheld the segregation. Similarly, the New York Court of Appeals sustained school segregation in Brooklyn, finding that “[e]quality and not identity of privileges and rights is what is guaranteed to the citizen.” P. 111 (quoting People *ex rel.* King v. Gallagher, 93 N.Y. 438, 455 (1883)). It is not clear whether Kull thinks that the courts that upheld segregation applied a reasonable classification requirement or instead a variant of the color blindness rule that forbade unequal race-respecting laws but permitted racial laws that ostensibly retained equality. He does not discuss the difference between the two possible requirements for race-respecting laws in any depth.  

16. 163 U.S. 537 (1896).  

17. “Laws that created an express inequality between the races, exemplified by the southern Black Codes, were the one indisputable instance of what the equal protection clause was intended to eradicate; and the Court never hesitated to give it that much effect.” P. 115.  

18. Pp. 115-16. The reader who remembers that there is a constitutional doctrine, other than equal protection, according to which all classifications — indeed, everything the government does — must be reasonable, has come upon one of the most fascinating aspects of the history of equal protection law. (The doctrine is substantive due process.) That would be a good subject for another review of Kull’s book, or indeed for another book.
reasonableness test. The problem with that, Harlan said, was that judges generally had no business passing on the reasonableness of public policy. Aware that some may find Harlan's argument naively pre-Realist, Kull reformulates it in a passage that epitomizes his book:

If we ought to refuse to let judges distinguish the reasonable from the unreasonable racial classifications, it is largely because history, Plessy included, shows that the courts are not to be trusted on the subject and that we would be better off with a per se prohibition. If on the other hand, when all is said and done, we are willing or even relieved to let judges decide these matters, then Harlan's syllogism falls, and much of the argument for a color-blind Constitution falls with it. [p. 124]

Who will decide on the reasonableness of the reasonableness-deciders?

Insofar as it stands for the proposition that "those racial classifications will be constitutional that a majority of the Supreme Court considers to be 'reasonable,'" Kull makes Plessy the Marbury of modern equal protection law. But as a practical matter, he notes, the case had no generative force; it merely constrained what the Court could do in moving toward an elimination of segregation. After Plessy, the Court waged an undeclared war on race-based laws, ostensibly permitting "equal" race classifications but actually treating all race-respecting laws as if they "went against the constitutional grain" (p. 143).

Toward the end of this period, in the face of a declared world war, the Court sustained a racial classification in a case to which the Fourteenth Amendment did not even apply only after admitting that such groupings were "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." The stage

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19. Reasonableness entered the picture in response to hypothetical cases urged by counsel and Justice Harlan, who sought to prove that, by permitting some forms of race-conscious laws, the Court admitted absurdity. Justice Brown, after reciting some of these hypotheticals, such as a law requiring that people of different colors walk on different sides of the street, said: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion [of] the public good, and not for the annoyance or oppression of a particular class." 163 U.S. at 549-50.

20. Harlan, after adducing the parade of horribles (which presumably had to proceed down one side of the street or the other, depending on the color of the horribles), said this of the Court's assurance of reasonableness in all exercises of the police power:

A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable.

163 U.S. at 558.

21. P. 118. Kull never makes much of the disappearance of Plessy's first-tier ban on racially unequal laws. Such a doctrine would decide many of our hardest cases, and, if it really was in Plessy, it is still good precedent, as it was certainly never overruled. I will have to leave this issue for the monkeys.

22. Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943). Kull says that Hirabayashi and its successor, Korematsu v. United States, 323 U.S. 214 (1944), represent a triumph for the color blindness principle:

There is, realistically, no constitutional guarantee that is not subject to qualification if a majority of the Court conceives that the country faces imminent peril. If racial distinctions are "irrelevant" and therefore inadmissible in all but such extreme circumstances as "the
was set for race distinctions to be repudiated and eradicated, for *Plessy* to be overruled, and for Justice Harlan to be vindicated.

Instead, the Court decided *Brown v. Board of Education*. As Kull puts it, “when the Court was finally prepared to declare that ‘racial segregation as such’ was unconstitutional, it found itself incapable of explaining why” (p. 150). It is no secret to students of American constitutional law that the Court in *Brown* did not say race discrimination was impermissible, it did not say segregation was unlawful, and it did not even straightforwardly overrule *Plessy*. Instead, the Chief Justice simply said that in the area of education separation was inherently unequal.

The story of *Brown* is at once uplifting and disappointing, and Kull tells that story in a way that captures both aspects while emphasizing the latter. Although he praises the Court for having “finally come to grips with the enduring moral and political problem of the nation,” he is disappointed that “[t]he opinion written to mark this watershed in the nation’s history was designed not to illuminate but to disguise the road being traveled” (p. 155). The Court did not approach desegregation cases after *Brown* with very much candor either. Instead, the Court struck down segregation in public facilities other than schools on the authority of *Brown* without ever explaining why a case that was so clearly about education suddenly was about everything else too (pp. 159-63).

But while *Brown* turned out to have outlawed segregation, it did not outlaw race-respecting laws. Although the Court flirted with that possibility during the early 1960s, the romance was never consummated (pp. 164-70). Instead, the Court produced the doctrine elaborated (slightly) in *Loving v. Virginia*, which finally invalidated an antimiscegenation law. Chief Justice Warren indicated that “invidious racial discriminations” are forbidden and that “state statutes drawn according to race” bear a “very heavy burden of justification.”

Evidently, a racial classification is not invidious if, under scrutiny, it is “necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.” The upshot is that there are

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24. 347 U.S. at 495.


26. 388 U.S. at 8-11.

27. 388 U.S. at 11.
good racial classifications and bad ones, and the Court must look very carefully to tell them apart. "In place of a rule of color blindness, Loving announced a pledge of the Court's assiduous oversight of the politics of race" (p. 171).

Kull suggests that the Court jilted the color blindness principle because it decided that the nation's public schools did not need an end to the overt use of race in pupil assignment, but rather something more like practical racial integration.\(^{28}\) With the federal administrative apparatus in the lead, the standard for success in implementing Brown became the actual creation of racially mixed public schools (pp. 177-81).

After describing the political victory of the color-blind principle in the Civil Rights Act of 1964, Kull maintains that the principle was almost immediately abandoned.\(^{29}\) Instead, according to Kull, judges and administrators, acting without any political mandate, erected a system of race-based preferences that abandoned the color-blind principle without doing any appreciable good for poor blacks.\(^{30}\) Kull discusses three instances: school desegregation, economic preferences, and voting rights.

With respect to schools, the judges and especially the justices pursued their goal of integration to the extent that they thought it politically feasible, fudging the legal analysis as necessary (pp. 191-200). "The results were incoherent as constitutional law, but the policy

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\(^{28}\) Pp. 171-72. Kull gives two reasons:
The first was the rapid development of the argument that the benefits of racially integrated education might be claimed as an affirmative constitutional right. The second was the gradual discovery . . . that "desegregation" even in its original meaning could scarcely be achieved unless recalcitrant school boards were ordered to assign pupils on the basis of race. P. 174.

\(^{29}\) Kull's language suggests that the title of his last chapter, "Benign Racial Sorting," p. 182, is missing a pair of sneer-quotes:
The color-blind consensus, so long in forming, was abandoned with surprising rapidity. By the end of the first Nixon administration, a significant part of the "civil rights" being enforced by the federal government could be described more plainly as a system of compensatory preferences for racial and ethnic groups. The transformation was accomplished without resuming the great national convention on civil rights that produced the 1964 act after eighty-three days of Senate debate. It was brought about instead by judges and administrators, who gave effect to a profound and sudden change in the views of liberal policymakers regarding the utility of race-specific government action. It is ironic but understandable, in retrospect, that this revolution took place just when Charles Sumner's vision of "equality before the law" had finally become the law of the land. P. 183.

\(^{30}\) Kull attributes this change of course to the inner-city riots of the mid-1960s and the Viet Nam buildup, which together convinced policymakers to pursue equality of results between blacks and whites with measures that would work immediately and impose no costs that would show up on the federal budget, because "[t]here was no time; there would be no money." P. 188. The accuracy of this claim would be a good subject for a review by someone who, unlike me, is equipped to evaluate it. Kull stresses that the means available to courts and administrators (as opposed to Congress) are far too weak to confront a problem as enormous as black deprivation in America. Pp. 189-90. Courts and agencies emphasize enforcement "not because illegal discrimination is central to the nation's profoundest racial problems — it is not — but because these are the only policies that courts and agencies can carry out by themselves." P. 190.
limits established by the Court in this difficult area were no more arbitrary than the comparable lines necessarily drawn by the overtly political branches of government” (p. 200).

The new tools of economic preference included government contracting policies that encouraged employers to achieve a certain racial composition within the workforce. To similar effect was the interpretation of discrimination under Title VII of the Civil Rights Act of 1964 as including the use of job criteria that result in an undesirable allocation with respect to race — what we now call a “disparate impact.” These new incentives created a problem. Employers could most easily reach affirmative action goals and avoid disparate impact problems through race-conscious decisions. Title VII, however, appears to prohibit race discrimination.32

The Supreme Court helped resolve this tension in United Steelworkers v. Weber,33 in which a white worker was denied admission to a training program because of his race.34 According to Kull, Justice Brennan, writing for the Court, did not deny that the language of Title VII forbade the discrimination to which Weber had been subjected, or that Congress had intended such a prohibition: “His central contention was rather that the color-blind means chosen at the time did not serve the underlying congressional objective, which he identified as the desire to improve the economic position of black workers. It followed that the statute’s true purpose would be served by refusing it enforcement” (p. 207). So much for statutes.

The last form of economic preference, government largess distributed on a racial basis, takes the Court back to familiar territory — the infinitely malleable Constitution that, unlike the Civil Rights Act of 1964, does not forbid race discrimination by name (other than with respect to voting). Some preferences have been upheld, some struck down, in a blizzard of phrases, such as “compelling governmental interest,” “important governmental interest,” “narrow tailoring,” and “substantial relationship,” that have lost contact with reality as Kull knows it: “the result of such deliberations is ‘constitutional law’ only by default” (p. 210).

Discussing the revolution in politics under the Voting Rights Act

32. It is an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1988).
34. A Title VII provision deals specifically with training programs. The Act declares it an unlawful employment practice “to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.” 42 U.S.C. § 2000e-2(d) (1988).
of 1965, Kull maintains that the courts and the U.S. Department of Justice in effect have required states to promote the electoral representation of blacks and Hispanics. Such a regime results in cases like United Jewish Organizations of Williamsburgh, Inc. v. Carey, in which a number of Hasidic Jews from Brooklyn maintained that a districting scheme designed to ensure a certain level of representation for blacks “diluted” their political influence by dividing the electorally cohesive Hasidim between two different districts — a step allegedly taken because the Hasidim were not black (pp. 216-20). Kull complains that the Court’s standard for what it called “benign racial sorting,” as explained most lucidly in Justice Brennan’s concurring opinion, was no more than a requirement that benefits be maximized and costs minimized, both as measured by the Justices (p. 220).

Despite his obvious distaste for what the courts and the executive have done in the past thirty years, Kull’s endorsement of the color-blind principle is hesitant. He is gravely disturbed by the possibility that America is coming to evaluate social outcomes primarily by their racial and ethnic pattern, and frustrated by the inability of race-conscious affirmative action programs to help the poor people who are most in need of help (pp. 221-23). Still, the claim that preference for the descendants of American slaves works “rough justice — unjust, but less unjust than doing nothing — cannot easily be dismissed” (p. 223).

But while Kull is not so sure whether strict color blindness is the ideal rule, he is sure about how government works. According to Kull, if we want to limit the way in which the political process, including the Supreme Court, uses race as a criterion, only a constitutional rule of color blindness will work. Requiring racial classifications to be reasonable merely ensures that the judges will assess them on political grounds. After quoting a passage from Harlan’s dissent in Plessy that characterizes color blindness as “[t]he sure guarantee of the peace and security of each race,” Kull concludes that Harlan’s “judgment is essentially pessimistic: that tools of government we know to be capable of much harm, and that we cannot confidently use for good, should be abjured altogether. The experience of the intervening century has not yet proved Harlan wrong” (p. 224).

II. THE SANCTION OF THE FRAMERS

Kull does not much like the contemporary constitutional law of equality, but he blames its flaws as much on the framers of the Four-

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35. "Since 1970, a combined effort by the three branches of the federal government has required states and municipalities to alter election districts and systems of representation so as to facilitate the election of black and Hispanic candidates." P. 210.
teenth Amendment as on the Supreme Court. He maintains that the Republicans who proposed the amendment rejected a rule of color blindness and instead drafted the Equal Protection Clause, a ban on all unreasonable classifications by state governments under which the Supreme Court is the ultimate arbiter of reasonableness.\(^{38}\) Kull's conclusion might be right, but his argument is not adequate. His attempt to blame the framers works only if they understood the Equal Protection Clause the way we do today. His case for that claim is doubtful.

A. Shaw and Hale

Kull thinks it fairly clear that in 1866 the Republicans had available to them a concept of general equality that required reasonable classifications but that did not flatly forbid race discrimination. Such a requirement of equality would permit reasonable classifications based on race. I think this is a much harder issue than Kull supposes; the evidence he presents is less persuasive than he thinks. First, we should take another look at Kull's proposed *locus classicus* for his concept of equality-as-reasonable-classification, Chief Justice Shaw's opinion in *Roberts*. Although Kull's account of Shaw is natural for most modern readers, a close study of the opinion casts doubt on Shaw's status as a modern.

Having stated the case and explained Sarah Roberts' claim, Chief Justice Shaw turned to the constitutional equality provision on which Roberts relied. Though agreeing that the provision means that "all persons . . . are equal before the law,"\(^{39}\) he explained that it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.\(^{40}\)

At first, this may sound like equal protection orthodoxy. Each person

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38. Kull apparently means to assert that the framers of the Fourteenth Amendment knowingly adopted a requirement of reasonable classification that applies to all government decisions but that does not include a per se ban on race discrimination. He says that although Stevens sought to forbid all racial classifications, "Bingham wished to prohibit only the unreasonable ones" (p. 4), and Bingham's text ultimately prevailed. That claim, I will try to show, is very likely false, and, in any event, Kull has not dealt with the contrary evidence. It is also possible to argue that the Republicans made a serious conceptual error. Most importantly, it may be that they believed that there is a coherent notion of general equality — of giving all citizens the same civil rights — which includes a flat ban on race discrimination, but that they were wrong. That would be another book (and another review).


40. 59 Mass. at 206.
must have the rights appropriate to that person's condition. The legislature may make adjustment for legitimate differences between people, such as those based on age, but must ignore differences that do not matter.

But that reading makes it extremely difficult to account for Shaw's statement that the equality requirement is limited to the protection of rights, as if protection were different from content, and for his statement that the allocation of rights according to people's different conditions depends on the laws. Those laws will come from the legislature, and although it may seem obvious to us that Shaw must have meant that the legislature is subject to constitutional constraints when it decides what people's rights are, he never said that. Instead, he seemed to limit the constitutional provision to the protection of rights, whatever those rights may be (and whatever protection may consist of).

In the next paragraph, Shaw at first seemed to take back the concession that the content of rights is up to the legislator, only to reaffirm it later. So we are back to looking at the law in order to determine Sarah Roberts' rights: "We must then resort to the law, to ascertain what are the rights of individuals, in regard to the schools." Shaw took some time to describe the discretion given to school boards and the various choices they had to make in deciding, for example, whether and how to assign their students into different districts. He then came to the use of race in pupil assignment:

In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive.

Shaw found that he could not "say ... that their decision upon it is not founded on just grounds of reason and experience, and in the re-

41. Shaw said:

Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

Legal rights must, after all, depend upon the provisions of law; certainly all those rights of individuals which can be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of the legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make.

59 Mass. at 206-07.

42. 59 Mass. at 207.

43. 59 Mass. at 207-09.

44. 59 Mass. at 209.
sults of a discriminating and honest judgment." He concluded that the regulation was neither unreasonable nor illegal.

Maybe Roberts is a harbinger of modern equal protection law, but I doubt it. Shaw went from the constitutional requirement of equality, which he said meant that the legal rights of all must be equally "protected," to an inquiry into Sarah Roberts' rights under the education statutes. Those statutes, he found, granted the school committee ample discretion. That discretion had been exercised reasonably, so Roberts had no ground for complaint. At no point did he say that the Massachusetts Constitution required reasonable classification. Rather, he inquired into reasonableness only after saying that he was interested in Roberts' statutory right to an education. My best guess is that he thought the requirement of equal "protection" meant that the court, which has the job of protecting people's rights, must protect everyone's rights with the same zeal. Once he had made sure that the plaintiff's statutory rights had been vindicated, his duty was done.

In short, Charles Sumner is an apt Laertes for Kull's dueling scene, but Chief Justice Shaw looks like the Prince of Denmark only when viewed in modern lighting. I do not think that he invented our equal protection law.

Neither, despite Kull's suggestion, did Representative Robert Hale employ the Court's modern doctrine during the debates in the Thirty-ninth Congress. Hale objected to Bingham's February proposal, which would have enabled Congress to secure to all persons equal protection in life, liberty, and property. Hale said that it would give Congress too much power. According to Kull, Hale's argument was that the amendment would give Congress plenary authority to displace state law because a power to ensure equal protection is a power over

45. 59 Mass. at 209-10. I do not know enough about Chief Justice Shaw to tell whether his use of the word "discriminating" was deliberately droll.

46. 59 Mass. at 210.

47. Similarly, Sumner claimed that segregation was unreasonable in the part of his argument that dealt with the statutory powers of the school committee. 59 Mass. at 202. According to Sumner, "[t]he regulations and by-laws of municipal corporations must be reasonable, or they are inoperative and void." 59 Mass. at 202. While Sumner probably also thought that the constitution required reasonable decisions, I doubt whether either Sumner or Shaw connected the constitutional question with the inquiry into reasonableness.

48. If this idea of protection seems completely bizarre, read on. Apparently it is too bizarre for Kull; if I am right, it is here that he goes most seriously astray in reading Shaw. According to Kull,

[w]hen [Shaw] says that "the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law," he is saying, among other things, that the classifications by which the individual's rights are "settled and regulated" must be reasonable ones.

P. 50. It is possible that if Shaw had meant that he would have said it. Kull may know he is engaging in anachronism here; shortly before the sentence just quoted, he explains that "Shaw's analysis, recast in modern terms, makes a readily acceptable account of the working of the equal protection clause." P. 50. A wheelbarrow makes a readily acceptable container for cold beverages if you recast it in modern terms by bolting a refrigerator to it.
all legislative classification, and all laws classify. Kull is right about the thrust of Hale's argument, but his account of Hale's reasoning is wrong.

Hale's primary claim was that Bingham's amendment would overthrow American federalism by giving Congress power "to secure to all persons in the several States protection in the rights of life, liberty, and property . . . with the simple proviso that such protection shall be equal." Life, liberty, and property are the primary subjects of the common law. Such authority therefore would enable Congress to enact its own civil and criminal code, overthrowing the principle of enumerated powers reflected in Article I, Section 8 and the Tenth Amendment.

That was Hale's principal objection. He recognized, however, that Bingham and Thaddeus Stevens construed the proposal differently. They maintained that it was limited to authorizing Congress to redress inequalities in state laws. Hale thought that even that interpretation would "introduc[e] a power never before intended to be conferred upon Congress." After all, he explained, for good or for ill the laws of the states were riddled with inequality. He gave as an illustration the widespread distinction in property rights between married women and "femmes sole."

It was then that Thaddeus Stevens interrupted to say that a distinction between married women and "femmes sole" was not premised on inequality, but that one between two married women would be. Hale responded that this was foolish. If you could treat married women differently as a class you could treat blacks differently as a class, which would make Bingham's proposal pointless. This meant that the distinction between married women and unmarried women would

49. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). To emphasize the distinction between Bingham's proposal and the power to require equality in state laws — a power that would suffice to support the then-pending civil rights bill — Hale continued:

It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms — a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.

Id. at 1063-64.

50. Id. at 1064.

51. Id.

52. Id.

53. On that point, Hale was unequivocal:

[P]robably every State in this Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property. It may be a fault in the States that they do not do it. A reformation may be desirable, but by the doctrines of the school of politics in which I have been brought up, and which I have been taught to regard was the best school of political rights and duties in this Union, reforms of this character should come from the States, and not be forced upon them by the centralized power of the Federal Government.

Id.

54. Id.

55. Id.
have to collapse when Congress wanted to eliminate it.\textsuperscript{56} Hale then returned to his praise of federalism and rejection of any involvement by Congress in "matters of a municipal nature, or matters relating to the social or civil rights of citizens."\textsuperscript{57}

I think it difficult to conclude that Hale's point in the colloquy with Stevens was that an equal protection provision is a requirement of reasonable classification as opposed to a per se ban on various forms of discrimination. His concern was that equality extended beyond racial equality, that it forbade discrimination on grounds other than race, such as marital status or possibly sex. If his point had been that equality is an utterly protean concept, it is hard to imagine that he would have casually mentioned that the proposed new power was subject to the "simple" proviso that the legislation be equal, as if he knew what that meant. Rather, he would have stopped to argue that the power was subject to a restriction with no fixed meaning and, if he had been as modern as Kull indicates, that the content of this new power therefore would be up to the courts. But Hale had nothing of the sort in mind. He admitted that the equality power was narrower than total control over life, liberty, and property, while arguing that it was still too broad.

The Prince of Denmark has yet to appear on stage.

B. Politics and Racial Equality in the History of the Fourteenth Amendment

The foregoing discussion of Shaw and Hale undermines Kull's assumption that the Equal Protection Clause was understood in 1866 as the Supreme Court understands it today — as a general requirement of "reasonable classification" that applies to all government activities, permitting some race-respecting decisions and forbidding others. That assumption about the meaning of the clause, combined with the rejection of explicitly color-blind provisions in the drafting of the Fourteenth Amendment, leads Kull to conclude that the Republicans who framed the amendment did not mean to give us a rule of color blindness.

Now I want to present evidence about what the Framers' understanding of the Equal Protection Clause and Section 1 of the Fourteenth Amendment actually was. That evidence, and the reading of Section 1 that it supports, makes it possible to give an account of the politics underlying the framing of the Fourteenth Amendment, and in

\textsuperscript{56} The language of the section under consideration gives to all persons equal protection. Now, if that means you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.

\textit{Id.}

\textsuperscript{57} \textit{Id.}
particular of the rejection of explicit bans on the consideration of race and color, that undercuts Kull's conclusion.

The reading of Section 1 that I will use as the framework for this discussion was first enunciated in this century by David Currie. It maintains that the main antidiscrimination provision of Section 1 is the Privileges or Immunities Clause, not the Equal Protection Clause, and that the Privileges or Immunities Clause performs the primary function of Section 1 by providing the constitutional basis for the Civil Rights Act of 1866. According to this view, the privileges and immunities of citizens of the United States include the privileges and immunities of state citizenship, such as the right to make contracts and hold property. To deprive one citizen of the privileges or immunities accorded to another is to abridge the former's rights in violation of the clause. The Black Codes thus violated the Privileges or Immunities Clause because they qualified the rights of freed slaves relative to those of others. By this reading, the Equal Protection Clause is limited to the "protection of the laws," those activities of government that secure primary rights against invasion. Taken together, privileges and immunities and the protection of the laws include the most important rights of everyday life, but they do not include all the rights a citizen might have; in particular, they do not include political rights.

For present purposes, I am not trying to convince the reader that Currie's and my view is correct so much as to present a little of the evidence that underlies it, and thereby call into question Kull's account of the drafting history. Because Kull does not confront this evidence, his account is incomplete, and his indictment of the framers for our doctrinal predicament is to that extent unpersuasive. One way of putting this is to say that Kull is too much the partisan of color blindness. His view of Reconstruction leaves out some of the colors of the rainbow and therefore prevents him from seeing and discussing evidence that is inconsistent with his assumptions.

1. The Scope of Section 1

First, Kull takes it virtually for granted that Section 1 of the Fourteenth Amendment, and indeed the Equal Protection Clause, apply to everything a state government does. As of 1866, at least, that was very likely false. On the contrary, it is likely that in 1866 most Republicans thought that the "protection of the laws" constituted a subset of the functions of government. Specifically, the protection of the laws consisted principally of those substantive provisions and government activities that shield people's rights from invasion. As Blackstone put it,

the "remedial part of a law... is what we mean properly, when we speak of the protection of the law."\(^5\) Similarly, the privileges and immunities of citizens referred to in the Privileges or Immunities Clause, although they encompass basic rights, like making contracts and owning property, were not generally understood as including all rights someone might have.\(^6\) In particular, when the Fourteenth Amendment was adopted most people probably thought that neither privileges and immunities nor the protection of the laws included voting or other political rights.\(^6\)

It is surprising that Kull does not consider this point, because the possibility that one could ban race discrimination with respect to a limited class of rights not including the franchise is well known to students of the Fourteenth Amendment, Kull included. As he explains, during the drafting of the Civil Rights Act of 1866, a provision including "civil rights or immunities" generally was deleted in order to avoid any implication that the franchise was covered.\(^6\)

Antidiscrimination protection for a subset of people's legal rights was very much an option in 1866.\(^6\)

\(^5\) WILLIAM BLACKSTONE, COMMENTARIES *56. Similarly, Chief Justice Marshall found that Marbury's right to his commission implied a remedy by which he might obtain it, because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This limited concept of the "protection of the law" is well known among students of the original understanding. See, e.g., CURRIE, supra note 58, at 348-50; Alfred Avins, The Equal "Protection" of the Laws: The Original Understanding, 12 N.Y.L.F. 385 (1966); Earl A. Maltz, The Concept of Equal Protection of the Laws — An Historical Inquiry, 22 SAN DIEGO L. REV. 385 (1985); see also Harrison, supra note 58, at 1433-51.

\(^6\) See Harrison, supra note 58, at 1416-20. The principal privileges and immunities of citizens were those listed in the Civil Rights Act of 1866, although the concept is not necessarily limited to those rights. Id.

\(^6\) During the debates on the Fourteenth Amendment, John Bingham denied that it gave Congress any power over the suffrage. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). When he introduced the amendment in the Senate on behalf of the Joint Committee on Reconstruction, Senator Jacob Howard of Michigan said Section 1 did not give anyone, black or white, the right to vote. Id. at 2766. A few years later Howard again denied that the Fourteenth Amendment gave anyone the franchise. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869). Specifically, Howard maintained that the privileges and immunities of citizens did not include voting, pointing to practice under the corresponding language of Article IV, which requires that States grant visiting Americans from other states the same privileges and immunities that they grant their own citizens, but which generally was thought not to apply to political rights. Id.; see Harrison, supra note 58, at 1417, 1438-40.

\(^6\) Pp. 76-79. This happened in the House. Representative James Wilson of Iowa, Chairman of the House Judiciary Committee, explained that the civil rights or immunities language had been deleted in an abundance of caution; he thought that there was a generally understood distinction between civil rights, such as owning property, and political rights, such as voting, but was prepared to remove the offending phrase in order to allay the fears of some of his colleagues. CONG. GLOBE, 39th Cong., 1st Sess. 1366-67 (1866).

\(^6\) At one point Kull suggests that the tendency in the nineteenth century to exclude the suffrage from the scope of the Equal Protection Clause rested on its legislative history and the existence of the Fifteenth Amendment, and not on its text. Pp. 263-64 n.7. The possibility that the "protection of the laws" does not include political rights seems never to have occurred to him. To be sure, this puts him in excellent company. See, e.g., William W. Van Alstyne, The
2. The Concept of Equality

There is another color in the Reconstruction rainbow to which Kull is blind. The principle of general equality, we have come to assume, must amount to a prohibition on unreasonable classifications; it cannot include a ban on race discrimination per se. Many Republicans, however, apparently subscribed to a principle of general equality that is unfamiliar to us, one that encompassed but was not limited to the elimination of racial distinctions. Consider, for example, a constitutional amendment proposed by Thaddeus Stevens, an amendment that Kull characterizes as being "in substantially the terms [Wendell] Phillips had recommended" (p. 67): "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." Stevens seemed to think that the latter rule was an instance or application of the former.

Other Republicans also moved easily from the language of general equality — often the principle that all citizens should have the same rights — to language that disapproved of race discrimination, as if the latter was an application of the former. Senator Lyman Trumbull, introducing the Civil Rights Act of 1866, rested it on equal citizens' rights without referring to race discrimination per se. Speaking of the Black Codes, he explained "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." A few days later, Trumbull said of the proposed civil rights legislation that it "declares that all persons in the United States shall be entitled to the same civil rights." Many Republicans derived a ban on race discrimination from a requirement that all citizens have the same rights.

Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 SUP. CT. REV. 33.

64. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865). While it is not entirely clear how to interpret Stevens' draft, it is certainly plain that, as far as he was concerned, some requirement that all citizens be treated the same — that the laws be "equally applicable to every citizen" — was closely connected to a prohibition on racial distinctions. Perhaps Stevens' use of "and" indicates that he thought the former did not include the latter, so that it was necessary to add an antidiscrimination provision to the general equality provision. Although such a reading is grammatically possible, it leaves us to wonder why Stevens included the first phrase at all. More likely he regarded the clause about race discrimination as an application or clarification of the general language.

65. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Trumbull was concerned with liberty and badges of servitude because he argued that Congress could pass the bill pursuant to the congressional power to enforce the Thirteenth Amendment's abolition of slavery.

66. Id. at 599.

67. Senator Henry Lane of Indiana argued that the Civil Rights Act of 1866, which explicitly banned race discrimination, should be adopted because the freed slaves were "entitled to all the privileges and immunities of other free citizens of the United States." Id. at 602. Representative Henry Raymond of New York explained that, although he doubted the Act's constitutionality, he supported its policy because he "was in favor of securing an equality of rights to all citizens of the United States." Id. at 2502. Representative William Lawrence of Ohio explained that the
While it is not easy to define this principle of equal citizens' rights, it almost certainly was not Kull's (and the Supreme Court's) requirement of reasonable classification, because the Republicans spoke as if it included a flat prohibition on race discrimination. For present purposes, all we need to know is that a principle of equal citizenship existed that included but was not limited to racial equality.

3. The Political Picture

With these new colors on the palette, we can paint a picture rather different from Kull's. He suggests that the Republicans, afraid to propose anything that would smack of black suffrage, retreated to a requirement of reasonableness in classification, albeit one that extended to all government decisions. The evidence I have just discussed, however, reveals the possibility that its drafters understood Section 1 of the Fourteenth Amendment as requiring the states to give the same privileges and immunities of citizenship and the same protection of the laws to all citizens. That regime would include, but not necessarily be limited to, a requirement that black and white citizens have the same rights in those two categories.

Such a provision would have two important political advantages for its proponents. First, it would not involve suffrage at all, so there would be no question of requiring black voting. In this it would resemble the Civil Rights Act. Second, it would enable the Republicans to embed their rule of racial parity in a more general rule of universal parity — the same privileges and immunities, the same protection, for all citizens. This second feature would be an excellent response to the frequent criticism that the Republican party was given to, and its Reconstruction program consisted largely of, special pleading for blacks.

Embracing a more general concept of equality would enable the Republicans to say that they were engaged not in narrow interest-group politics on behalf of an unpopular and largely disenfranchised interest group, but in securing equal rights for everyone. To understand the attraction of such a maneuver, suppose the leaders of a political party believed that economic recovery would best be served by a tax reduction for high-income Americans. Although people with high incomes are scarcely disenfranchised, saying they should have more money is rarely popular. The party in question then might decide that a tax reduction for everyone is ideal. They would embed the measure they most wanted in a more general provision, one with the politically attractive feature of including all voters. The fact that politics had driven them to a more general provision would not lead us to conclude that they had abandoned their original goal, as long as we know that there is a general provision that logically includes the goal.

Act required that "whatever of certain civil rights may be enjoyed by any shall be shared by all citizens." *Id.* at 1832.
This interpretation of Section 1 has two advantages over Kull's. First, it rests on a careful reading of the text of the Fourteenth Amendment as it was probably understood in 1866. Both privileges and immunities and the protection of the laws meant more specific things then than they mean to us today. Second, my reading matches what we know about the Republican program. One thing we know about the Fourteenth Amendment is that its drafters drew back from requiring black suffrage. Section 1 reflects this strategic choice; its subject matter does not include voting any more than that of the 1866 Act did. Not only would Section 1 as I read it accommodate the principal constraint under which the Republicans operated, it would also accomplish the principal object of Section 1 — making the Black Codes unconstitutional.

The same cannot be said for Kull's reading. On the one hand, if the Equal Protection Clause refers not to the "protection of the laws" as it was commonly understood in 1866, but rather to "equal protection" as we now understand it, then it extends to voting, and unreasonable classifications respecting the franchise are forbidden. So Congress or the Supreme Court might extend the suffrage to blacks. On the other hand, if the Reconstruction concept of equality was one of reasonableness, rather than a requirement of equal rights that included racial equality, then some later Congress or Court might decide that racial classifications with respect to property holding are reasonable and uphold a Black Code. If Kull is right, the Republicans neither met their constraint nor accomplished their purpose.

One possible objection is that I have underestimated the Republican fear of Northern racism, a fear that would have kept them from proposing anything that was understood to ban race discrimination, even if it also banned other kinds of discrimination. That argument ignores the Civil Rights Act of 1866, which explicitly forbids not unreasonable discrimination, but race discrimination.68 When the Joint Committee on Reconstruction proposed the Fourteenth Amendment, the Republicans had recently enacted that law over the President's veto. Presidential vetoes and congressional overrides are the most public events known to the Constitution. The President must state his reasons for the veto, and, when the override vote is taken, "the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively."69 A leading purpose of Section 1

68. The Act provided that American citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" should have the same rights of property, contract, and so forth "as is enjoyed by white citizens." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. It was no defense to say that any difference in rights was reasonable. Kull may mean to argue that, to the Republicans, racial discrimination with respect to the rights listed in the 1866 Act was unreasonable, while discrimination with respect to other rights like voting would be reasonable. He presents no direct evidence for this claim, and I am aware of none.

of the Amendment was to put the Civil Rights Act into the Constitution (p. 75). The Republicans were dead set on eliminating certain distinctions based on race and color. The suggestion that they would back away from proposing a constitutional amendment because it was understood to accomplish that very goal cannot be sustained.  

Kull is quite right that the Republicans desired to establish only "a selective and partial equality" (p. 87), but he is quite wrong about how they thought they did it. They sought partial equality, not by replacing a ban on race discrimination with a vaguer equality requirement, but by banning discrimination, including race discrimination, only with respect to a limited set of rights—the privileges and immunities of citizens and the protection of the laws. If Kull means to accuse John Bingham and company of knowingly adopting modern equal protection jurisprudence, on the evidence he presents they would be acquitted. Whether they were negligent is another question.

III. FORMALISM, OF ALL THINGS

This, I think, is a good way of capturing Kull's overall argument: the purpose of a constitution is to take certain issues out of politics. But our form of constitutionalism relies heavily on judicial review, and judges act politically if given the chance. Accordingly, the only way really to constitutionalize an issue, to take it out of politics, is to formulate a constitutional provision that minimizes the judges' opportunity to read their own views into the law. A rule of color blindness would minimize judicial policymaking in the area of race, but a requirement of reasonable classification maximizes it. Whether one thinks that the Republicans actually intended to confer such discretion, or merely permitted it by bad drafting (or lazy thinking), is really beside the point.

In other words, for all his professed legal realism, when it comes to point and edge, Kull is a formalist.

The preceding sentence may amount to libel when written about an American law professor, but it nevertheless gives us an excellent way to understand Kull's critique of equal protection law. To reach that understanding, we first need a crash course in legal formality. Legal formality is a conceptual grid that assumes law consists of rules that are adopted for certain reasons.  

70. It is also difficult to see how a requirement of reasonable classification would appease Northern racists, given that everyone knew that the principal example of an unreasonable classification was a Black Code. Kull's argument about politics, then, comes down to the claim that the Republicans were terrified to utter the words "race" or "color" in a constitutional provision, and that they thought that there was no way to forbid race discrimination without doing so.

and the reason for having the rule. A lemma of this claim is that rules usually do not serve their purposes perfectly, because they rest on generalizations that are not true in every case.

The second fundamental insight concerning legal formality is that provisions can be more or less rulelike. That is, the content of the rule can be more or less transparent to the reason underlying it. For example, the Constitution's rule that every state have two senators is opaque to the underlying purpose of protecting the smaller states. We need to know nothing about Delaware's relative political power in order to know that it gets two senators. Some legal provisions, by contrast, can be understood only through substantial inquiry into their underlying reason. For example, in order to tell whether some procedure constitutes due process under one of the Due Process Clauses, we need to inquire closely into the effectiveness of the procedure in securing fair adjudication, fair adjudication being the purpose usually posited for due process. Legal provisions that are largely transparent to their reasons, such as the Due Process Clauses, are often called principles, in contrast to rules.

The lemma to this second observation is that opaque rules and transparent principles have characteristic advantages and disadvantages. The characteristic advantage of rules, which are normally formulated in terms that permit little debate as to their meaning, is relative certainty of application. The disadvantage is the inefficiency, the looseness of "fit," that derives from opacity: the Constitution prevents some mature thirty-four-year-olds from becoming President. Principles, too, have correlative strengths and weaknesses. A legal provision that is completely transparent to its purpose will serve that purpose perfectly, except that the uncertainty surrounding most principles often means they will serve the purpose of the person or institution that applies the principle, which may or may not be the purpose of the law.

The foregoing observations might be called analytical formalism.

72. To give a hoary example, most people think that the reason the Constitution requires that the President be at least 35 is to ensure maturity at the highest levels of state. But whether or not one is 35 is a different question from whether or not one is mature.

73. Thus, some 34-year-olds are mature, and some 36-year-olds are childish. But the Constitution cares about your birthday, not your moral ripeness. (At least, it does as far as most people are concerned.) Imperfect "fit" between rule and reason — or between classification and governmental interest — is, of course, one of the organizing principles of contemporary equal protection law. See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949).

74. A rule-skeptic denies the autonomy of rules, thinking instead that all legal provisions must be interpreted in light of their purpose. An extreme rule-skeptic would say that there are no rules, only reasons.

75. For an important application of this way of thinking — albeit one that refers to "standards" rather than "principles" — see Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 24 (1992).

76. See SCHAUER, supra note 71, at 149-55, 158-62.
the main point of which is usually to emphasize the difference between rules and reasons or rules and principles. There is also normative formalism, a preference for rules over principles. At least with respect to the constitutional law of race, Kull has substantial sympathy with normative formalism. Color blindness is much more rulelike than reasonable classification, and Kull maintains that the vice of our equal protection law is the characteristic vice of principles: substantial power transferred from the lawmaker to the case-decider.

Having recast Kull's argument in terms of legal formality, I now want to suggest that the contrast between color blindness and equal protection law presents the clashes between rules and principles and rules and reasons in their most extreme form. The clashes are extreme because the Constitution is a metalaw, a law about laws (or, more generally, about government action). As a result, the contrasts central to formality enter at two stages. First, the state decision targeted by the constitutional prohibition usually has a rule and a reason; second, the constitutional provision itself has both a rule and a reason, and it will be more or less opaque to that reason depending on whether it is taken to be a rule or a principle.

Viewed from this perspective, one of the most interesting aspects of equal protection law as the Supreme Court knows it is its rigorously antiformal character. The Court's Equal Protection Clause is a principle about reasons. To understand what I mean by this statement, we need to look past the doctrines that our common law Supreme Court has erected and examine what underlies them. That underlying approach has been well described by Professor Cass Sunstein: "As I read it, the function of the [Equal Protection] Clause is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another."

According to Sunstein and, I think, most of the Justices, what matters when we assess a law under equal protection is the value it attempts to serve, the view that it reflects. Values and views are reasons, not rules. Equal protection is antiformal at the level of the object law in that it is primarily about reasons, not rules. As a consequence, it is

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77. I realize that the terminology is a little confusing, because, when we contrast rules with reasons, rules include any legal provision, whereas, when we contrast rules with principles, rules mean legal provisions that are relatively opaque to their underlying reason. Jurisprudence is not a science.

78. Cass R. Sunstein, Public Values, Private Interests, and the Equal Protection Clause, 1982 Sup. Ct. Rev. 127, 128. A similar account of the clause is found in Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1030 (1979) ("[S]tate action predicated on the view that one person is by virtue of race inferior to another offends equal protection."). One of the deficiencies in Kull's analysis is that he is too much the Realist to take seriously the possibility that the Justices are using this approach, or one much like it, rather than simply following their own political views.
impossible ever to tell whether a law violates the Equal Protection Clause simply by looking at the law. Consider a federal statute requiring Americans of Japanese descent to report to concentration camps. If we believe the reasoning of Korematsu, that statute would be permissible if it were based on national defense needs but not if it were based on hatred of Japanese Americans. By contrast, a federal statute disenfranchising Americans of Japanese descent would be unconstitutional, period. The Fifteenth Amendment is primarily about the content of legal rules.

A general color blindness rule such as Thaddeus Stevens' proposal would be like the Fifteenth Amendment. We would be able to say that race-respecting laws violate it without any inquiry into their purpose. To be sure, most constitutional provisions that are primarily about the content of legal rules have taken on penumbra, largely to deal with the evasive devices that the formal character of law makes possible. Because more than one rule can usually skin the cat of any specified purpose, if a constitutional provision addressed only rules, evasion might be easy. Still, the mark of a constitutional limitation that primarily concerns rules is that some rules, some laws or statutes, are simply impermissible by their terms.

Contemporary equal protection regulates reasons rather than rules. Moreover, if we accept that the purpose of the Equal Protection Clause is to prevent what Sunstein calls unprincipled allocations — the Court calls them invidious and is forever scrutinizing for them — then the clause, as the Court reads it, is perfectly transparent to that purpose. It is utterly a principle and not at all a rule. If the maximally formal constitutional provision is a rule about rules, then equal protection law is its opposite: a principle about reasons.

In light of that conceptual characteristic of equal protection jurisprudence, its protean nature as described by Kull is not surprising. When it looks at a state law, the doctrine is all about the state's reasons and not at all about its rules. But who knows what those reasons are? Justice Brown said that the reason underlying Louisiana's segregation statute was not the oppression of a particular class. Such a thing may have been hard to say with a straight face, but it would have been even harder to say that the law did not take account of race.

Even if we think we understand a state's purpose, what does it

80. The Fifteenth Amendment provides an excellent example. States that wanted to disenfranchise blacks often would adopt a stringent literacy test, with an exception for persons whose grandfathers had voted. Although such a law nowhere mentions race, and could be applied in a racially neutral fashion, its effect would be to disenfranchise many blacks and few whites, because illiterate whites would be able to take advantage of the "grandfather clause." The Court held that such devices violate the Fifteenth Amendment. Guinn v. United States, 238 U.S. 347 (1915). One serious student of the amendment maintains that it was originally understood to be so formalistic as to permit schemes like the grandfather clauses. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 155-56 (1990).
mean for that purpose to be unprincipled or invidious? Certainly plenty of people think it unprincipled to deny a person a job because the person is white even if that denial reflects not the view that whites are bad, but a willingness to sacrifice the jobs of white workers in the service of other ends. For that matter, who said the reason underlying the Equal Protection Clause was the elimination of unprincipled allocations? The underlying reason could also plausibly have been to constitutionalize the Civil Rights Act of 1866, in which case the principle turns out to be colorblindness with respect to the privileges and immunities of citizens and the protection of the laws.

Principles tend to reflect the views of the people who apply them, and that probably goes double for principles about reasons. Much of Kull's book makes the case that this result is undesirable. But to get back to the process of assigning blame, if a constitutional provision really is a principle about reasons, then it is hard to criticize the judges too much. Rather, the responsibility rests with the constitutionmakers. With respect to the Equal Protection Clause, it is not at all surprising that the law is so antiformal. For one thing, the crucial word equal certainly sounds more like the name of a principle than a rule. Indeed, much of the history of equal protection doctrine shows the impossibility of applying that doctrine without a theory of the proper purpose of government — hardly a subject for rules.

It also seems natural for equality law, even antidiscrimination law, to concern reasons and not rules. If we adopt Sunstein's formulation of equal protection, then in order to tell whether a government action is principled we need to know the value or view underlying the action, and both of those are reasons. Indeed, even if we move from unprincipled allocations to discrimination based on, say, race, we are still dealing with reasons rather than rules. To discriminate on the basis of race is to do something with race as the reason. That is why we talk of "intentional discrimination" and debate whether the Equal Protection Clause has an "intent requirement."

Although I will not claim that Section 1 of the Fourteenth Amendment is the most formalistic part of the Constitution, I do want to suggest that a change in perspective can make it seem more formalistic than I have just made it out to be. First, the more we understand the Reconstruction concept of equality as a list of forbidden criteria, such as race and color, the more Section 1 itself seems like a rule. If race discrimination is forbidden, we do not need to know in any particular case whether some use of race was unprincipled or benign.

That observation, I realize, is of limited comfort. Even if the people who framed the Fourteenth Amendment thought that the concept of general equality included a per se ban on race discrimination, since then it has been the Devil's time figuring out what else that concept may have entailed. So here is another observation, this one about the
object on which the Fourteenth Amendment operates. We generally assume that object to be a decision by a government institution or officer, and when we ask whether that decision was based on race or was unprincipled (whichever formulation we are using), we are asking a question about intent or motivation that is much like the questions about intent or motivation we ask in ordinary life. Inquiry into even an individual's purpose can be difficult; inquiry into the purpose of a governmental institution is more difficult, even assuming that institutions have purposes. There is little room for formalism here.

My suggested change in perspective is that we move away from thinking about a person who makes a decision based on race, whatever that means exactly, and think instead of a decision process that applies rules—a computer program might be a good model. To say that a program takes race into account in reaching its answer is to say that at some point the program asks for an input about race. Programs may be written down so that we can all see them; determining the criteria they employ is much easier than identifying the purpose or intent of a human being.

In other words, it is easier to tell whether a rule takes race or color into account than to tell whether a person takes race or color into account when either of them makes a decision. So we could take as our paradigmatic example of race discrimination not a person who is motivated by race, but a rule that takes race into account. By this way of thinking, the archetypal case of race discrimination in law would be a Black Code, a legal rule that by its terms considers race. If we take the Black Codes as the classic evil at which the framers aimed Section 1 of the Fourteenth Amendment, equality law became more formalistic than we had thought. Whether rule or principle, it is, at least in its primary application, about rules, not reasons.

At this point, I cannot resist one more plug for the Privileges or Immunities Clause. It says that no "State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."8 By its terms, the clause is about laws, not government actions generally. If a Black Code is indeed a law that abridges the privileges or immunities of citizens, then the clause was aimed directly at the Codes. In any event, it is easy to understand that the clause relates primarily to the content of laws, that is to say, to rules. The clause reads as if we should be able to apply it to a law simply by reading the law, without any inquiry into its purpose or underlying value. If the Privileges or Immunities Clause were the primary source of our antidiscrimination jurisprudence, that jurisprudence would be more about rules and less about reasons.

Two more observations and we can exit formalism. First, looking

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81. U.S. Const. amend. XIV, § 1.
at contemporary race law through the lens of legal formality suggests that even Kull may be too optimistic. To be sure, he characterizes the requirement of color blindness as the counsel of those who are pessimists about the ability of American politics to sort out good from bad racial classifications. Nevertheless, Kull seems optimistic enough to believe that if the Constitution explicitly required color blindness — if Thaddeus Stevens' proposal had been adopted — then the Supreme Court would require color blindness. Such a faith is inexplicable in anyone who, like Kull, has read *United Steelworkers v. Weber*. 82

*Weber* is the true triumph of antiformalism. In American courts, formalism and antiformalism usually fight through proxies. The proxy for formalism is an emphasis on the constitutional or statutory text, which will often read like a rule. The proxy for antiformalism is legislative intent, which almost invariably turns out to be a reason. In *Weber*, the Court threw the text overboard in service of what the Court thought was the intent. 83 The especially troubling thing about *Weber* for Kull the optimist is that the statute at issue, Title VII of the Civil Rights Act of 1964, was an explicit rule of color blindness. But *Weber* says that Title VII permits race-conscious employment decisions.

The second observation is about the ambition of antiformalism, which aspires to brush aside rules and focus on reasons. 84 Its attraction is fairly clear: government is ultimately about reasons, not rules, so it is better for a constitutional limitation to regulate reasons than for it to regulate rules, and a provision improves the more its own reason is reflected in its content. But the problem with reasons and principles is that people rarely agree on their definition. The virtue of a rule is that, however well it serves its purpose, we can often tell whether someone, including a court, is following it. The attempt to have a perfect constitutional provision can lead to a constitution that is perfect only if you agree with the people who apply it. 85

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83. According to *Weber*, it is a “familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose.
84. This is essentially a normative point, so I offer it to lawmakers, including judges who think that they are or must be lawmakers. Whether those judges are right is another question, one likely to be resolved only by the infinite monkeys.
85. The Socratic teaching appears to be that the perfect regime, a paradigm laid up in the heavens, cannot be achieved in the world and must be diluted in order for the philosopher to give advice that the statesman could actually follow. Compare Plato, *The Republic*, in JOHN L. DAVIES & DAVID J. VAUGHAN, *THE REPUBLIC OF PLATO* (1902) with Plato, *The Laws*, in THOMAS L. PANGLE, *THE LAWS OF PLATO* (1988).
IV. CONSTITUTIONAL TAUTOLOGIES

Maybe Chief Justice Shaw should be the founder of equal protection law after all. As Kull explains, a natural way to read the Equal Protection Clause, or any requirement that all be equal before the law, is as a requirement that likes be treated alike. To continue the time-worn line of reasoning, such a requirement tells us nothing unless we know what criteria of likeness are permissible. The requirement of reasonable classification, the specific content of which varies with the prevailing view of the proper functions of government, is just one way of identifying the permissible criteria.

But the Equal Protection Clause mentions reasonableness no more than it mentions race, color, or previous condition of servitude. Read this way it supplies no criteria. If it truly means that government must classify correctly, that likes must be treated alike, then it is incomplete. It is reminder, not a rule, like a provision in the Constitution saying that the Constitution must be complied with.

If we really believed this, we would have to say that the Equal Protection Clause, because it does not tell us enough, cannot be law. It cannot limit governments and it cannot be the ground of decision of a court. At most, its function would be, as Chief Justice Shaw said of declarations of rights, “to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make.” In modern terms, the clause would be nonjusticiable.

To conclude with the monkeys, they can be relied on to type out a document that is identical with the tragedy of Elsinore except that it has no lines for the son of Gertrude. If the Equal Protection Clause really does mean that likes must be treated alike, then it is missing a crucial part, and it too is Hamlet without the Prince.

86. Kull says that Chief Justice Shaw solved the problem of general equality provisions in Roberts by “declaring, in effect, that legal equality consists in affording like treatment to those situated alike.” P. 3.

87. Much modern equal protection thinking appears to assume that the clause is indeed best read as an empty statement of the principle of justice, but regards as absurd the implication that the clause is therefore not a rule of law. The solution to this absurdity is to make the clause “a rather sweeping mandate to judge of the validity of governmental choices.” John Hart Ely, Democracy and Distrust 32 (1980). To me, this looks like trading one absurdity for another. It might be silly to have a constitution that said “Do justice,” but it would be really ridiculous to have one that said “Do whatever the Supreme Court tells you.”

For what it is worth, I think that the entire enterprise of recasting the Equal Protection Clause as if it were an empty statement of the formal principle of justice is misconceived. Instead, we should be trying to understand what the nineteenth century meant by “class legislation” or by the statement that all citizens should have the same rights. I do not think that this latter inquiry will be easy; I am not even certain it will lead anywhere. I do think that the line of reasoning in which the clause means that likes must be treated alike leads not to reasonableness, but nowhere.

Justice in the polity, Plato argued, mirrors justice in the individual: in both cases, justice consists of a suitable division of labor among different motivating forces. In *Equality and Partiality*, Thomas Nagel recasts this argument in Kantian form. Nagel argues that political legitimacy — a state's rightful claim to exercise coercive power over its members — can arise only from proper integration, through institutional means, of the personal and impersonal standpoints within each individual.

Nagel analyzes the concept of political legitimacy in strongly individualistic terms: “The pure ideal of political legitimacy is that the use of state power should be capable of being authorized by each citizen” (p. 8). This analysis, in effect, imposes a unanimity requirement on political legitimacy: a political system is legitimate if justifiable to every person who lives under it (p. 33). Importantly, the requirement attaches to the system — the “principles, institutions and procedures which determine how that power will be used” (p. 8) — rather than to particular, controversial decisions made within that controlling framework.

Nagel formulates the unanimity requirement in familiar contractualist terms: a legitimate political system rests on principles that “no one could reasonably reject, given the aim of finding principles which could be the basis of general agreement among persons similarly motivated.” According to Nagel, these principles do not merely represent a pragmatic bargain struck among self-interested agents pursuing their own interests but have independent normative and motivational

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3. The underlying idea of the “dual standpoint” is as follows: (1) each person views the world from the personal standpoint of her own particular capacities, beliefs, desires, and commitments; (2) at the same time, each person has the capacity to survey the world from an impersonal standpoint that abstracts from the particular, contingent features of her personal perspective. P. 10.
4. P. 33. In contrast, Professor Wolff applies the requirement of authorization directly to particular decisions and, not surprisingly, concludes that a requirement of individual consent is incompatible with legitimate political authority. ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM 3-18 (1970).
5. P. 36. Nagel explicitly draws on Professor Scanlon’s contractualist account of moral wrongness: “An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement.” Thomas M. Scanlon, *Contractualism and Utilitarianism, in Utilitarianism and Beyond* 103, 110 (Amartya Sen & Bernard Williams eds., 1982).
In particular, mere recognition of the fact that a system rests on principles no one could reasonably reject provides "reason to cooperate voluntarily in the maintenance of such a system and to respect its results" quite apart from any coercive force the system itself brings to bear.\(^7\)

Whether Nagel's test of political legitimacy has any substantive content, of course, remains open to doubt. In the Anglo-American legal tradition, for lack of a better alternative, what the "reasonable" person believes is generally whatever twelve jurors on a particular day happen to say she believes. Such skepticism aside, Nagel himself derives an abstract guideline as to what reasonable people can agree to from his characterization of the dual standpoint within each individual:

Each of us has a primary attachment to his own personal interests, projects and commitments, but this is restrained by our occupation of the impersonal standpoint in two ways: first, by the recognition of the equal objective importance of what happens to everyone, and second, by the recognition of the special importance for each person of his own point of view.\(^7\) [p. 38]

This characterization informs Nagel's general criterion of reasonable nonrejectability: a legitimate political system "reconciles the two universal principles of impartiality and reasonable partiality so that no one can object that his interests are not being accorded sufficient weight or that the demands on him [to satisfy the reasonable interests of others] are excessive" (p. 38).

Nagel gives few examples of actual institutional arrangements that appropriately strike such a balance. Rather, he articulates the general form of a solution. Nagel proposes a moral division of labor between individuals and social institutions: institutions realize the "impartial requirements of the impersonal standpoint" through a proper allocation of social resources, while simultaneously fostering sufficient "private differentiation" as to enable individuals to pursue personal interests (pp. 53, 85).

Social institutions, however, are not free-standing entities. Their existence depends on the support of the individuals they simultaneously shape. Hence, Nagel's proposal faces a crucial motivational problem, namely, whether individuals will both respect and provide continued support to the requisite social institutions. Interestingly, Nagel believes that capitalist society, which he generally praises as superior to any alternative sociopolitical regime, thwarts such motivational development. Democratic politics encourage individuals to treat the political process, and the public institutions subject to its con-

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7. P. 37. Nagel is thus committed to a noninstrumental conception of practical rationality. For Nagel's own earliest effort at developing such a conception, see generally THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM (1970).
trol, as mere means of advancing private interests (p. 91). This result runs directly contrary to Nagel's conception of public institutions as "externalizing" the impartial concerns of agents who occupy both a personal and an impersonal standpoint. Meanwhile, capitalism, despite its economic prowess, also leads to "large and inheritable inequalities" that Nagel considers intolerable from an impartial perspective.\(^8\)

Rather than call for a wholesale political transformation, however, Nagel speculates on the changes in individual motivation that would support the widely redistributive institutions he envisions.\(^9\) Nagel observes that the lines drawn around personal and societal responsibility typically rest on a distinction between what individuals and social institutions do, and what they merely allow to happen (p. 99). For example, we may feel a societal responsibility when the police arrest an innocent person, but not when they fail to arrest a dangerous person who subsequently commits a serious crime.\(^10\) In the latter case, responsibility is ascribed to the criminal alone. Although Nagel recognizes the vitality of such a distinction in some aspects of individual and social conduct, he argues for the abandonment of the idea that there is a morally fundamental distinction, in regard to the socioeconomic framework which controls people's life prospects, between what the state does and what it merely allows. . . . With regard to income, wealth, and social position, health, education . . . it is essential that the society should be regarded by its members as responsible for how things are, if different feasible policies and institutions would result in their being different. [p. 100]

Nagel calls this the doctrine of negative responsibility.

Negative responsibility implies that decisions "not" to interfere with distributive arrangements require the same degree of justification as decisions "to interfere": "Every arrangement has to be justified by comparison with every other real possibility."\(^11\) Hence, popular ac-

\(^8.\) P. 93. Nagel does not object to inequalities in income and wealth per se. The issue, rather, is what inequalities pass the test of "reasonable non-rejectability." This test, of course, pertains to the socioeconomic system that determines distributive outcomes rather than to particular distributions themselves. Large and inheritable inequalities are intolerable, on this analysis, when they result from a distributive scheme that systematically (1) gives short shrift to the reasonable demands of the least well-off, by (2) providing benefits to the better-off to which the better-off cannot reasonably lay claim.

\(^9.\) Nagel's arguments that a legitimate political system must overcome not only inequalities arising from differences in class, but also from differences in natural abilities, suggest their strongly redistributive nature. See pp. 106-16.

\(^10.\) See, e.g., Riss v. City of New York, 240 N.E.2d 860 (N.Y. 1968) (municipality not liable in tort for police failure to protect one individual from another's attack); Davidson v. City of Westminster, 649 P.2d 894 (Cal. 1982).

\(^11.\) P. 100. In the context of constitutional litigation, questions about negative responsibility have surfaced most noticeably in DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989). In that case, the Supreme Court rejected a due process claim against a social service agency based on negligent failure to protect a child from physical harm by his father. The Court reasoned that the Due Process Clause imposes on states only a negative duty not to de-
ceptance of this doctrine is the key to Nagelian egalitarianism, for it will induce the comparatively better off to see social policies, and not merely individual choices, implicated both in their own good economic fortune and the lesser economic fortune of others.

* * *

The brevity of Equality and Partiality is both its virtue and its vice. Nagel develops a clear, simple argument that lays out the basic institutional requirements and complementary political morality of Kantian liberalism. Nagel also deals pointedly, although much too succinctly, with two recurring criticisms of Kantian liberalism. At one extreme, hard-nosed consequentialists such as Professors Hare\textsuperscript{12} and Scheffler\textsuperscript{13} argue, in effect, that a serious consideration of the impersonal standpoint undermines the Kantian notion that individuals may stand on their own moral inviolability to resist pursuit of aggregate social benefit. Nagel responds that Kantian impartiality instead demands pairwise, nonaggregative comparisons founded on "unanimity" or reasonable nonrejectability (pp. 56, 68, 142). At the other extreme, Professor Nozick\textsuperscript{14} has founded a libertarian regime of strong property rights, which block redistributive social policies, partly on Kant's dictum to act so as to "treat humanity . . . never simply as a means, but always at the same time as an end."\textsuperscript{15} Nagel rejects such a regime as not "justified in terms of its effects in the lives of those living under it" (p. 140). Thus, although Nagel repudiates wholesale consequentialism, he finds room within Kantian contractualism for some consequentialist thought as an element of reasonable nonrejectability.

Nagel unfortunately ignores criticism from two other corners. In evaluating alternative institutional arrangements, Nagel focuses almost exclusively on what may be called external goods — physical and institutional resources that may be given to, withheld from, and transferred between individual citizens. An alternative strand of political thought, however, connects the central questions of political theory to what may be called internal goods — aspects of human psychology that affect individuals' ability to realize their deepest purposes.\textsuperscript{16} The

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\item privy persons of life, liberty, or property without due process, but no affirmative duty to provide services of any sort. 489 U.S. at 194-97.
\item 12. R.M. Hare, Ethical Theory and Utilitarianism, in Utilitarianism and Beyond, supra note 5, at 23, 23-29.
\item 13. SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM 84-107 (1982).
\item 14. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).
\item 15. Id. at 149-82.
\item 16. Id. at 32 (quoting IMMANUEL KANT, GROUNDWORK TO THE METAPHYSICS OF MORALS 96 (H.J. Paton trans., 3d ed. 1958)).
\item 17. "Freedom . . . involves my being able to recognize adequately my more important purposes, and my being able to overcome or at least neutralize my motivational fetters, as well as my being free of any external obstacles." Charles Taylor, What's Wrong with Negative Liberty, in THE IDEA OF FREEDOM 175, 193 (Alan Ryan ed., 1979) [hereinafter Taylor, Negative Liberty]. Internal goods necessary for such freedom include self-discipline, self-esteem, self-understanding,
\end{itemize}
development of internal goods, furthermore, fundamentally implicates social relations, not merely institutional design; internal goods theorists stress that issues of class, race, and gender influence self-development as profoundly as the “external” resources an individual commands.18

Kantian programs also have raised longstanding concern about the viability of detaching the theory of the right from the theory of the good.19 Communitarian critiques, for example, argue that we must first determine what sort of people we would like to be before proceeding to the question of social institutional design.20 Hence, communitarians reject Kantian deontology as incoherent, because it seeks to design social institutions without any serious consideration of the human motivations to which such institutions should respond.21

Nagel provides a perfect case in point, for he tries to derive a political institutional framework entirely from considerations of fairness and reasonability, without inquiry into the values and self-understandings of the body politic’s constitutive members.

Nagel’s obliviousness to such critiques is surprising, given their current prominence. Although Equality and Partiality astutely develops a particular strand of Kantian thought, it is ultimately unsatisfying. Nagel tells us how to approach political legitimacy if questions of abstract fairness predominate our political thought. Unfortunately, Nagel does not tell us why such questions should predominate in the face of contemporary anti-Kantian challenges.

— Daniel A. Cohen

18. To take one example, Professor MacKinnon argues that the fundamental social inequality involves the maldistribution across gender lines not of resources, but power. In her view, power is the fundamental determinant of life prospects. See, e.g., Catharine A. MacKinnon, Feminism Unmodified 3 (1987) (“social relation[s] between the sexes [are] so organized that men may dominate and women must submit”).


20. See, e.g., Taylor, Negative Liberty, supra note 17, at 192-93.

21. See generally Sandel, supra note 19.