REVIVING THE DREAM: EQUALITY AND THE DEMOCRATIC PROMISE IN THE POST-CIVIL RIGHTS ERA

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INTRODUCTION: EQUALITY AND THE TWIN PILLARS OF THE DEMOCRATIC PROMISE

One of the fundamental tenets of democracy is the equality of all citizens. The earliest consideration of the meaning of democracy included the recognition that equality lies at its heart.[1] Yet, in the twenty-first century, the idea that fundamental equality is the foundation of American democratic structure is axiomatic. In American political rhetoric and the legal innovations we celebrate by

1. Aristotle, in probably the first treatise in the western canon on political theory, explained that equality and majority rule are essential to the meaning of democracy. He also went further to suggest that the poor can overpower the rich in a democracy, which has been a central frustration to the democratic experiment. *See* ARISTOTLE, THE POLITICS bk VI, at 190 (Benjamin Jowett trans., Oxford Univ. Press 1885) (c. 350 B.C.E.) ("Every citizen, it is said, must have equality, and therefore in a democracy the poor have more power than the rich, because there are more of them, and the will of the majority is supreme. This, then, is one note of liberty which all democrats affirm to be the principle of their state."); *see also* J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY 9 (1979) (noting equality, individual worth, and autonomy as key facets of democratic functions).

commemorating *Brown v. Board of Education*[2] and the Civil Rights Act of 1964,[3] this idea of equality—that all citizens ought to have an equal opportunity to participate in the workings of the republic and ought to hold equal opportunity to fully participate in the economic, social, and personal opportunities the republic provides—is beyond question and the foundation of why these civil rights enactments matter.[4]

The American conception of equality is a modern invention.[5] It is a product of the long civil rights movement in the United States.[6]

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2. 347 U.S. 483 (1954).

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

4. Though the idea of equality is not in question in and of itself, the idea of what equality should mean and what kind of equality should be pursued is hotly contested. Put generally, the idea of equality described above, equality of opportunity, represents the form of equality which has been established in American law. However, there are those who would argue for a vision of equality that focuses on equality of outcome. For at least one example that puts the tension between these two positions in relief, see C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983). Though Professor Baker was writing about equal protection, the tension between these two approaches to equality, and the extent to which they bind the obligations of government under law, underlies the larger question of the civil rights project.

5. As will be discussed in Part II, equality as a norm in American political thought did not exist as a stated constitutional norm until the passage of the Reconstruction Amendments to the Constitution.

6. While the decision in *Brown* and the enactment of the Civil Rights Act of 1964 are arguably the two high-water marks of the civil rights transformation of the mid-twentieth century, this Article sets out to articulate an account of the evolution of civil rights rooted in a long legal history of the ongoing attempt to root out the influence of slavery, Jim Crow, and their legacy from American society. While *Brown* and the civil rights legislation of the 1960s transformed American society, it is a mistake to think of the civil rights movement (and the legal reform inspired thereby) as purely a product of just the 1950s and 1960s. As historian Jacquelyn Dowd Hall has explained, the civil rights movement is larger than the mid-twentieth-century campaign; that to do a true rendering of the movement, one must see it in a larger context than the period of *Brown*, the protests that featured Martin Luther King, Jr., and the legislative enactments therefrom. *See* Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1234-35 (2005) (noting that the twentieth-century movement really should be rooted in the activism of the 1930s in reaction to various social forces). Moreover, historians locate the beginning of the civil rights movement at the end of the Civil War and the effort to reconstruct American democracy on a basis that eschewed slavery. The work of the Reconstruction Amendments forced the United States to confront the problem of how to be inclusive of all its citizens. *See*, *e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 101 (2000) (explaining that the Civil War helped to fuel a new thinking about suffrage and rights in general). This Article

One hundred fifty years of constitutional, statutory, and cultural change, forced by movements and counter-movements, shaped the American notions of equality. This formation began with the Reconstruction Amendments in the aftermath of the Civil War. The Reconstruction Period offered a unique opportunity to shape post-slavery America on the basis of equality, but it ultimately ended with the forestalling of the legislative changes made in the era of the First Reconstruction and the emergence of Jim Crow.[7] The decision in *Brown*, the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965,[8] and the several other critical civil rights statutes of the 1950s and 1960s[9] all substantially shaped the American notion of equality. In celebrating *Brown* and the civil rights legislation of the twentieth century, we celebrate the "Second Reconstruction"[10] and the transformation of American society that it produced. It is to say that that the civil rights jurisprudence of the mid-twentieth century overthrew what can fairly be called de jure white American apartheid.[11] This occurred, in part, as a result of a racial oligarchy's

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proceeds from the premise that legal transformation in civil rights began in Reconstruction, and thus sees the judicial and legislative transformations of the mid-twentieth century as fulfilling the promises first made in the mid-nineteenth century. Additionally, this Article takes the position that the movement is incomplete in substantial respects, and this battle for civil rights continues.

7. This tension between social change created by the political branches of government and the limitation of that change by the judicial branch, especially when it comes to civil rights reform, is a long enduring problem for American democracy. For a penetrating recent analysis of this problem, see STUART CHINN, RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE 3 (2014).

8. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

9. In addition to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the other legislative actions of the era included the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (establishing the Commission on Civil Rights and forbidding interference with exercising the right to vote), and the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (forbidding interference in efforts to register to vote). All of these statutes focused on voting and signify the importance that political equality plays within the broader context of civil rights.

10. The phrase, now ubiquitous, was coined by historian C. Vann Woodward to describe the civil rights movement of the 1950s and 1960s and its impact on American society. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 134-35 (commemorative ed. 2002). The phrase has been used frequently to describe the work of this era, and some have gone so far as to argue that contemporary actions by the Roberts Court have arguably ended the Second Reconstruction. *See, e.g.*, Luis Fuentes-Rohwer, *Is This the Beginning of the End of the Second Reconstruction?*, FED. LAW., June 2012, at 54, 54.

11. The term "apartheid" is used mainly to refer to the policies of segregation and white supremacy in South Africa. *See Apartheid Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/apartheid (last

willingness to end its tyranny and to extend political and economic sovereignty to a class who was, up until the mid-1960s, excluded from full status in the polity.[12]

This long civil rights transformation, and its long arc from the Civil War through *Brown* and to the twenty-first century, promised that there would be no status of enslavement in the United States. It also promised that the government would enforce equality before the law and that the government would ensure that all full citizens would be able to participate within the political life of the state. The promise of Reconstruction—of political equality for people regardless of race and the equal protection of the laws—lies at the heart of our conception of equality and is fundamental to our perception of democracy.

Yet, our conception of equality (and, therefore, our democratic structure upon which it is premised) is incomplete. If we premise our notion of equality upon co-equal ownership of the democratic process for all American citizens, co-extensive protection of the law for all people in the United States (without regard to status hierarchies), and full opportunity of participation in the material structure of the state, the history from the post-Civil War era to the present reveals tremendous progress in terms of formal equality but only marginal progress to the ultimate end of ending the subordination of minorities and instituting substantial

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visited Oct. 10, 2014). Yet, apartheid is a term that also generally refers to racial segregation. *Id.* Moreover, scholars have drawn direct parallels between segregation in the American South and in South Africa. *See, e.g.*, JOHN W. CELL, THE HIGHEST STAGE OF WHITE SUPREMACY: THE ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH, at ix (1982); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 15-16 (1993).

12. For there to be a democratic consensus among the majority about transforming society is remarkable, and for it to happen without outright insurrection is equally remarkable. This facet of the transformation was discussed at the symposium. Kenneth Teasdale, former counsel to the Senate Majority Leader in 1964 and key drafter of the Civil Rights Act of 1964, described the efforts to which the congressional leadership went to in order to craft the Civil Rights Act. In an interview with the author, Mr. Teasdale reflected on the fact that in the 1960s, many in Congress and their constituents (except the Southern segregationists) had recognized that the United States had not lived up to its promise of providing equal opportunity for everyone in American society. It was this recognition that spurred the leadership to work towards passage of the Civil Rights Act. Telephone Interview with Kenneth Teasdale, Former Counsel to Senate Majority Leader Mike Mansfield (Mar. 26, 2014). This consensus, likely spurred by the activism of the civil rights movement, is remarkable given the radical transformation in society that resulted.

equality. Though formal American apartheid has been overthrown, the full equality that advocates have hoped for has not been achieved. The idea of equality itself has been continually limited and opposed, even in the twenty-first century.[13] It is this concern that must necessarily frame our consideration of the civil rights jurisprudence and legislation that is the hallmark of the Second Reconstruction.

This Article seeks to engage in this inquiry through the lens of equality as a theoretical and constitutional construct, the ends of which are the fulfilling of the twin promises of equal democratic citizenship. Thus, this Article aims to put the question of "fulfilling the dream" of the twentieth-century transformation in civil rights law in the broad historical context of achieving the conceptual aims of equality in democracy.

This Article will argue that the civil rights model created as part of the two efforts at Reconstruction in the United States followed a specific form based on a limited conception of equality rooted in formal opportunity rather than a substantive effort to include all citizens in full political and material status in the polity. Put another way, the end of the civil rights model was to provide formal opportunity rather than to abolish white supremacy. This limited doctrinal equality, as contained in the federal constitutional and statutory interventions made to limit states from discriminating against their citizens, ultimately is doomed to remain incomplete and unsatisfactory.

This Article argues that a re-conceptualization of the meaning of equality is necessary if American equality law is to come more closely to fulfilling a broad vision of equality and civil rights. The civil rights model needs to be revitalized through reconsidering how the norm of equality should be applied and what the doctrinal foci of civil rights should be, and this Article makes an attempt at doing this.

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13. As this Article will discuss below, the promise of equality has been reshaped, redefined, and hotly contested throughout post-Civil War American history. The contest for equality and the fulfillment of the dual promise of citizenship, taken to its ultimate extent, is radical. When taken to its logical extreme, an ideology of equality demands a fundamental reshaping of social relations, substantive participation in not only the means of citizenship, but also the redefining of the meaning of citizenship itself. Equality requires acknowledgment of a hierarchical social order and a re-ordering of that hierarchy so that full inclusion is on top of the hierarchy in that social order. The achievement would represent the fulfillment of the Reconstruction Era. Whether we have reached this point—and how much more must be done to reach that point—remains a hotly contested issue. *See infra* Section II.A.

This Article will argue that the civil rights model may be revitalized through recommitment to the core racial-equality meaning of the model as well as an added focus on modern racially segmented socioeconomic inequality, a focus that was not an explicit element of the racial-equality jurisprudence of the civil rights era. By shifting to focus substantively on the intersection of new racial inequality and socioeconomic inequality, twenty-first century civil rights advocacy may ultimately return to the core vision of the twentieth-century civil rights movement.[14]

To this end, this Article will proceed in four Parts. First, this Article will articulate the normative premises upon which it proceeds. This Part will discuss and attempt to extend democracy-reinforcement theory originated by John Hart Ely in relation to basic notions of equality and how they should apply to the question of including formally excluded minorities into a body politic. Part II then will discuss the long history of the civil rights model and discuss how the civil rights model succeeded and failed to measure up against the measuring sticks of democracy-reinforcement theory and the substantive equality. To that end, this Article will explore the meaning of the civil rights model from its original genesis in the first Reconstruction to *Brown* and the civil rights legislation of the mid-twentieth century.

Historical and doctrinal shifts marked the time after the *Brown* era and have mustered forces that today have greatly transformed the civil rights model. Moreover, some argue that the Second Reconstruction was and *is* still based on a limited premise[15] and is of

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14. While many of us focus on the dream of complete equality articulated so well in the civil rights movements and the formal equality sought after by the legislation and jurisprudence of the Second Reconstruction, what often gets lost is that the core vision of civil rights equality was not only political and civic; it was also a vision based on *economic* equality, through both formal opportunity and organized struggle. To point to but one example of the rhetoric of the 1960s: Dr. Martin Luther King, Jr., in his last book, argued that in light of the achievements of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, attention ought to be directed towards the elimination of poverty as a problem in American society. *See* MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 161-66 (1967). He recognized that poverty created vulnerabilities for the poor and destabilized communities. *Id.* at 163-64. He went so far as to advocate for a guaranteed income for Americans as a way to both benefit society generally as well as provide stability to the African-American community in particular. *Id.* at 162. Specifically, King said that "[i]f democracy is to have breadth of meaning, it is necessary to adjust this inequity" of overdistribution to the upperclasses. *Id.* at 165.

15. Okianer Christian Dark, Lisa Crooms-Robinson, and Aderson B. Francois have argued that *Brown*, in its anti-segregation holding, was incomplete to

limited success,[16] while others argue that the efforts to affect equality for black America are inauthentic and stymie the work of the Second Reconstruction.[17] And still others argue that the Second Reconstruction overreaches and therefore should be abandoned.[18] This debate is partly doctrinal, partly ideological, and partly about the nature and extent to which America has and has not changed.

Accordingly, Part III of this Article will explore the challenges posed by America in its efforts to become a post-apartheid, post-racial society and how that has limited (or should limit) the civil rights model. Part IV of this Article will look forward to consider the future of the doctrinal and policy meanings of civil rights. This Part

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the extent that it fails to actually address the larger issue of ending white supremacy, that is, the systemic structures that allow advantage to white persons while subordinating persons of color. *See* Aderson Francois, Okianer Christian Dark & Lisa Crooms-Robinson, *60 Years Later,* Brown v. Board*'s Shortcomings Still Reverberate*, NAT'L L.J. (June 2, 2014), http://www.nationallawjournal.com/id=1202657542604/60-Years-Later-Brown-v-Boards-Shortcomings-Still-Reverberate.

16. A number of commentators have opined that *Brown* failed in its core effort to truly desegregate public schools. *See, e.g.*, Sarah Garland, *Was 'Brown v. Board' a Failure?*, ATLANTIC (Dec. 5, 2012, 12:42 PM), http://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939/; Ronald Brownstein, *How We're Still Failing, 60 Years After* Brown v. Board of Education, NAT'L J. (Apr. 24, 2014), http://www.nationaljournal.com/political-connections/how-we-re-still-failing-60-years-after-brown-v-board-of-education-20140424.

17. In a three-part essay, *The Massive Liberal Failure on Race*, Tanner Colby seeks to critique not only the massive resistance that conservative America has had towards integration but also to critique the inauthentic and half-hearted efforts that liberal America has made towards race concerning school integration, affirmative action, and economic integration. To conclude this analysis, he says:

> Fifty years later, we still have a society that is desegregated but not integrated. The principal blame for this lies, yes, of course, with the massive white resistance to integration, but that fact shouldn't stop us from criticizing the ways in which racial justice advocates have failed to adequately challenge that resistance, and one of the single biggest failures has been the inability and unwillingness to resolve the conflicts that sundered the civil rights movement in the first place.

Tanner Colby, *The Massive Liberal Failure on Race: Part III: The Civil Rights Movement Ignored One Very Important, Very Difficult Question. It's Time to Answer It*, SLATE (Feb. 27, 2014, 11:38 PM), http://www.slate.com/articles/life/history/features/2014/the_liberal_failure_on_race/madison_avenue_the_failure_of_integration_in_advertising_and_what_it_says.html.

18. For example, Senator Rand Paul has argued that the Civil Rights Act of 1964 too constrains individual liberty and that the appropriate approach to remedying discrimination should be through individual action rather than legal intervention. *See* Ashley Killough, *Can Rand Paul Break Past Controversy over Civil Rights Act Comments?*, CNN (July 3, 2014, 9:10 AM), http://www.cnn.com/2014/07/02/politics/rand-paul-civil-rights-act/.

will consider what normative direction ought to be explored to make the civil rights model both responsive to the political and social realities of the twenty-first century and, at the same time, keep fidelity with its century-and-a-half long original purpose of providing a race conscious intervention on behalf of politically and economically disenfranchised racial minorities.

It will argue that although racism and its pernicious effects have ameliorated in the time since the 1960s, insufficient grounds exist to take a wholly post-racial approach to the problems of political and economic subordination in American society. Rather than shift to a structural, class-only approach (which would then ignore the enduring problems generated by an erasable racial ideology), this Article will argue that attending to racial remedies, class remedies, and the intersection of the two in particular is the direction in which conceptualization of new civil rights policy should head. Yet, to reach this conclusion, we must first consider the idea of equality in both the abstract and to the extent to which it was—and was not—imbedded in the Constitution and laws. To this analysis, the Article will now turn.

I. EQUALITY, DEMOCRACY REINFORCEMENT, AND MINORITIES

The idea of equality among all citizens has been subject to significant debate in western thought and the law.[19] In particular, American law has paid a great deal of attention to the meaning and the scope of the idea of equality as imbedded in American constitutional text and the substantive laws designed to give that idea expression.[20] The main expression of this quest for equality has been the pursuit of civil rights in the United States. The civil rights judicial and legislative interventions of the 1960s have been probably the greatest expression of that quest.[21]

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19. *See, e.g.*, JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 573 (2d ed. 2007) (posing the fundamental question about equality: whether the equality doctrine should apply to individuals through an idea of formal equality or if it should apply to groups under a post-modern vision, which takes into account connections between how different races treat each other).

20. *See, e.g.*, *id.*

21. As acknowledged above, the collective effect of the civil rights laws created in both the nineteenth and twentieth centuries have transformed America from a formal apartheid state. *See supra* text accompanying notes 11-13. And yet, as Colby pointed out, we are "a society that is desegregated but not integrated." *See* Colby, *supra* note 17.

This Article seeks to deploy a broad account of this quest for equality by paying attention to what "equality" means conceptually within a republic governed by democratic values and then how that idea evolved within the context of American civil rights law in particular. In this Part, the Article will provide a brief theoretical account of the idea of equality in relation to democracy as a means of structuring the American republic and as a conceptual tool for racial reconciliation within a pluralistic society.

A. Equality and Democratic-Reinforcement Theory

This Section proceeds from what for most is an uncontroversial premise—equality among all citizens is a necessary prerequisite to an egalitarian democratic republic.[22] While this might seem uncontroversial to the reader, it is certainly a concept that has caused tensions for the idea of democracy generally[23] and the conception of the American republic in particular.[24] This is because the legal institution of the modern *egalitarian* idea of equal status for all persons who meet the standards of citizenship (without reference to suspect or arbitrary characteristic, e.g., their race, sex, or other defining characteristics of legal personhood) is a wholly modern invention[25]: an invention shaped by precedents like *Brown* and the civil rights legislation of the nineteenth and twentieth centuries.[26]

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22. *See* ARISTOTLE, *supra* note 1, at 190 (discussing how it is axiomatic and fundamental to the democratic state that all citizens should be considered equal to each other).

23. In commenting on the beginnings of the American republic, Alexis de Tocqueville observed that democracy—and in particular, American democracy—was believed by some to be a revolutionary and novel development, while at the same time others believed it to be "irresistible" because it represents "the most continuous, the oldest, and the most permanent fact known in history." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

24. *Id.* (observing that democracy is not only a revolutionary and new movement but also a new movement some believed should be "stop[ped]").

25. Though this Article tacitly acknowledges the birth of the idea of democracy in ancient Greece, modern egalitarian democracy among white men was a product of the Constitution of the United States. That this would include all persons without regard to race or sex is a product of the evolving constitution. U.S. CONST. amends. XIII, XIV, XV, XIX; *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 145 (2012) (noting that the Reconstruction Amendments were created to abolish caste and to recreate the republic "on principles of free and equal citizenship").

26. The entirety of the work of the long civil rights movement was to include the dispossessed and disenfranchised into the American republic, especially

This egalitarian idea of equality—that all persons should be considered as possessing the same status of legal personhood from the perspective of the state—is obviously related to a basic conception of democratic rule. For while in a democracy, all citizens of the same status collectively control the state, in a republic, all citizens of governing status collectively delegate through elections the power to rule to a group of elected officials.[27] Thus, whether one is discussing a pure democracy or a democratic republic, the heart of the idea is that the citizenry is the ultimate authority of the state.[28] Thus, it follows that each citizen is allowed a say—a vote—in that decision-making process.[29]

My view is that democracy is both a political process that requires treatment of people equally and a political organization that substantively embodies the value of equality. To the extent this analysis represents the former, a political process, it rests—at least initially—upon John Hart Ely's democracy-reinforcement theory and the ways it has been extended by legal scholars.[30] Ely, in his seminal work, *Democracy and Distrust*, articulates the idea that the Court is obligated to reinforce representation and enhance participation in the processes of democratic government and the government's distribution of benefits.[31] At the heart of Ely's discourse is the idea

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those disenfranchised on the basis of race. While the focus in this Section is on how equality intersects with the idea of republican democracy and equal citizenship, these premises should not be read separately from the fact that America, up until the 1960s, did not function in this regard in relation to racial minorities. Thus, this focus on first principles is necessary to frame the breadth and shortcomings of the long civil rights movement.

27. *See generally* ARISTOTLE, *supra* note 1.

28. *See generally id.* This is the core of the definition of democracy as political process. The question then turns to who should and who should not be included in the democratic process.

29. The denial of this recognition in equality of the vote is prevalent throughout the history of the United States before the Voting Rights Act of 1965 and acted to "legally brand" individuals as unequal, which invited others who were allowed the franchise to belittle those without it and to disregard their welfare. *See* PENNOCK, *supra* note 1, at 153-54.

30. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, at vii, 73-74 (1980). As has been discussed in numerous places, Ely's ultimate intellectual project in *Democracy and Distrust* was to provide an intellectual defense of the work of the Warren Court, including *Brown* and its anti-segregation cases as well as the political equality cases which it decided, including *Baker v. Carr*, *Reynolds v. Sims*, and *Harper v. Virginia*. *See id.* at 73-74. Thus, it is appropriate as part of a collection commemorating the impact of *Brown* and the Second Reconstruction.

31. *Id.* at 73-74, 87.

that the Warren Court—with its rulings in *Brown* and the political process cases, and upholding the civil rights legislation of the 1960s—is following through on its obligation set out in Chief Justice Stone's footnote four of *Carolene Products*, which sought explicitly to bring heightened judicial scrutiny towards laws that are directed "against discrete and insular minorities" which, in effect, curtail the political process and thus "may call for a correspondingly more searching judicial inquiry."[32]

On this basis, Ely justifies the work of the Warren Court as engaged in judicial review directly concerned with the process of decision[33] and thus upholding a form of process consistent with the process-oriented nature of the Constitution.[34] Ely's theory, as Cass Sunstein has explained, is based ultimately on the notion that the Court is obligated to improve the political process to effectively enable its democratic character as well as (and most importantly here) protect minorities who are vulnerable in the democratic process.[35] What is important to note is that this theory is based upon a process orientation related to how the Court ought to manage democracy. The Court is to act as referee in interpreting the broad provisions of the Constitution.[36] As such, the Court serves the role of preventing existing power holders from subverting process in order to protect the status quo.[37] And this refereeing is meant to protect minorities from the tyranny of majorities that might withhold protection from those minorities.[38]

Sunstein stresses that this process-oriented democracy-reinforcement approach is necessary "to protect political outsiders from political insiders."[39] William Eskridge also noted that Ely's theory is based on the premise that democracy is the premise of the Constitution, and therefore to maintain democratic accountability

32. United States v. Carolene Prods. Co., 304 U.S. 144, 154 n.4 (1938).

33. ELY, *supra* note 30, at 87.

34. *Id.* at 90.

35. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 13 (1996) ("[T]he Court should act to improve the democratic character of the political process itself. It should do so by protecting rights that are preconditions for a well-functioning democracy, and by protecting groups that are at special risk because the democratic process is not democratic enough.").

36. *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1282 (2005).

37. ELY, *supra* note 30, at 73-74.

38. *Id.* at 103.

39. Sunstein, *supra* note 35, at 13.

and to prevent the suppression of one class of citizens over another, all citizens should be able to participate in the democratic process.[40] The process orientation democracy-reinforcement as expressed through judicial decisions is designed to protect minorities by regulating the political process.[41]

Jane Schacter has built upon this view by arguing that democratic reinforcement is meant to enhance democracy by orienting democratic values and judicial decision making meant to raise the quality of democratic process.[42] Schacter discusses two different manifestations of democratic reinforcement. One line is "accountability reinforcement," which mandates ensuring fair elections as a means of preserving a reliable democratic process.[43] Schacter notes that this principle is focused on the process of democracy expressly and means to protect the majoritarian ability to govern by holding political authorities accountable to the majorities which put them in place.[44]

The other approach Schacter derived from Ely's theory is "horizontal democracy," which looks beyond merely ensuring the democratic voting process and addresses the need to develop what she calls "a broad democratic notion of *social* enfranchisement" to ensure equality in both the formal enfranchisement sense and equality in the broader context of social democracy.[45] Specifically, Schacter stresses that this approach requires "accessible, broadly based opportunities for citizens to participate in the various arenas in which collective policies are forged, values are debated, and social knowledge is shaped, acquired, and transmitted."[46] It is an approach that is wholly different than matters concerning the franchise; it speaks to "the more diffuse social and cultural processes that inform,

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40. *See* Eskridge, *supra* note 36, at 1282 (noting that the root of John Ely's democratic reinforcement theory was the notion that democracy is the premise of the Constitution—that "[a]ll adults must have the right to vote and to engage in expressive activities; freely elected legislators are accountable to We the People and open to criticism; and legislatures cannot indulge in class legislation, censorship, an established church or other activities that undermine the conditions for robust democracy") (citing ELY, *supra* note 30, at 88-100)).

41. *See* ELY, *supra* note 30, at 103.

42. *See* Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 746 (2004).

43. *Id.* at 742, 745.

44. *Id.* at 744-45.

45. *Id.* at 746-47.

46. *Id.* at 747.

frame, and shape politics."[47] Relying on de Tocqueville, Schacter articulates the ultimate vision of the horizontal-democracy approach as one that looks to "a community of citizens whose collective interactions with one another are in many ways as important as the precise institutional agreements by which the state itself is constituted."[48] Her logic then follows upon Ely's original concern about discriminated-against minorities to observe that bias-driven structural inequalities effectively marginalize such minorities and prevent their full democratic engagement.[49]

It follows then that this democracy-reinforcement norm is expressed in modern American jurisprudence in two senses relevant to the twin aims of American equality underlying our civil rights inquiry: (1) in the accountability-reinforcement sense, there must exist an unfettered right to vote for each citizen[50] (with the assurance that the vote will count exactly as any other citizen's right to vote)[51] and (2) in the horizontal democracy sense, the opportunity to access the opportunities that lay within the community bounded by the democratic process, including civil participation, economic participation, and individual autonomy to form one's own communities on the same basis as any other citizen.[52] This kind of political and social equality is, as a rhetorical and conceptual first premise, often taken for granted in modern American society, but as we will discuss, it is at the heart of the civil rights struggle.[53]

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47. *Id.*

48. *Id.*

49. *Id.* at 748.

50. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that poll taxes in state elections violate the right to vote).

51. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that state legislative districts must be of equal proportion, which has become known as the "one person, one vote" doctrine).

52. *See infra* Part II.

53. Indeed, it is the suggestion of this Article that Schacter's vision of horizontal democracy in and of itself is too narrow and should be expanded to include socioeconomic class as a real determining factor when it comes to the consideration of equality before the law in both the accountability-reinforcement and horizontal-democracy aspects of regulating democracy. While this vision could be taken to its logical extent to, for example, equalize incomes nationally, as King suggested in his proposal for guaranteed income, KING, *supra* note 14, at 162-65, it is the view of this Article that such a radical transformation of American society lies beyond the scope of the modern American pluralist civil rights conception. It is highly unlikely that a political consensus could emerge to redistribute income on a large scale, especially when compared to reactions to other, milder forms of redistribution of social goods represented by the implementation of Affordable Care Act (ACA) to require all Americans to possess health insurance. *See generally* Nat'l

While the underlying notion of democracy as a political process requires that citizens be treated equally within that process, it is, as I stated above, also a political organization that substantively embodies the value of equality. This notion is reflected by Schacter's horizontal-equality idea. Indeed, it lies at the heart of the substantive meaning of democracy as shaped by the provisions in the Constitution, as Schacter herself suggests.[54] It follows then that each citizen should have the opportunity to participate in the relational, communal, and economic structures provided and regulated by the state.[55] To ensure the status of the citizen, there must be embedded within the citizen's relations with the state limitations and expectations by which the state is governed in relationship to its power to coercively impact the life of individual citizens.

It follows from this concept that the state must be limited in the way that it impacts the private lives of each citizen.[56] The state

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Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (resolving constitutional claims concerning the ACA); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (declining to enforce the ACA employer mandate for contraception coverage for closely held corporations as a burden on free exercise of religion under the Religious Freedom Restoration Act). However, I take the position that this problem of socioeconomic marginalization represents an opportunity and creates an imperative to provide protections against invidious discrimination for citizens who find themselves at the intersection of both racial discrimination and vulnerability due to their low socioeconomic status. Indeed, this is the heart of the proposal of this Article. *See infra* Part IV.

54. She points out that the Constitution itself provides resources for not only the courts, but also the political branches and the people to define democracy. *See* Schacter, *supra* note 42, at 754-55 (noting that because the Constitution singles out values like equality, liberty, and citizenship for protection, it forms resources for the political branches and the people themselves to define American democracy). Indeed, she singles out the Civil Rights Act of 1964 as one of those shaping forces. *Id.*

55. The contours of the Bill of Rights particularly allow citizens to enjoy the freedom to associate, to exercise religious liberty, and to enjoy the ability to exclude and include persons from their property and to exclude the state from invading their property except through a warranted, reasonable search. These freedoms guarantee a level of autonomy in their daily lives concerning matters that were deemed (at the time of the founding) to be fundamental to an individual's sense of self. Moreover, through the powers enumerated to Congress, it has the ability to regulate the scope of matters like interstate commerce to affect a broad sense of horizontal democracy and substantively reinforce the democratic values of the United States. As we will see, this lies at the heart of the Civil Rights Act of 1964. *See infra* Section II.C.

56. The Bill of Rights in this sense not only provides autonomy for the individual citizen, but it also limits the power of the state and forces it to justify certain actions that would deprive the citizen of life, liberty, or property. Moreover,

cannot arbitrarily intrude in the citizen's dwelling,[57] ability to own property,[58] or ability to determine the occupants of one's dwelling[59] unless there is a justifiable reason for the intrusion.[60] And in the context of criminal prosecution, each citizen is guaranteed such process concerns as the presentation of an indictment,[61] the right to avoid self-incrimination,[62] and a speedy and public trial that accompanied with process guarantees allow the citizen an adequate defense.[63] All of these constitutional protections limit the power of the state for the sake of enabling the citizen.

This idea of limited government is necessary to create an equal democracy for two reasons. First, the idea of limitation is necessary to ensure that each citizen may have a voice so that they may engage in activities that he or she may deem fundamental,[64] including activities in relation to the governing and control of the state.[65] By not being able to exclude one "type" of citizen from activities like voting,[66] jury service,[67] or participation in the economic[68] or

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the guarantee of procedural due process in the Fifth and Fourteenth Amendments guarantees generally that such deprivations are governed by due process. *See* U.S. CONST. amends. V, XIV, § 1.

57. *Id.* amend. IV (prohibiting unreasonable searches and seizures).

58. *Id.* amend. V (prohibiting takings of property by the government without just compensation).

59. *Id.* amend. III (prohibiting the quartering of solders in private residences in peacetime and regulating such quartering in times of war).

60. *Id.* amend. IV (prohibiting unreasonable searches and seizures and requiring a warrant for governmental intrusion).

61. *Id.* amend. V.

62. *Id*.

63. *Id.* amend. VI.

64. *Id.* amend. I.

65. In this sense, the freedom of speech, and specifically political speech, allows for citizenry to fully participate in the democratic process. *See id.*; McCutcheon v. FEC, 134 S. Ct. 1434, 1440-41 (2014) (delineating the right to political participation to include running for office, voting, urging others to vote, volunteering for a campaign, and contributing money to a campaign). While the Court's conflation of the right to vote with the right to contribute raises a number of troubling realizations, analysis of such problems must be left for another project.

66. The Constitution forbids discrimination on the basis of race, U.S. CONST. amend. XV; gender, *id.* amend. XIX; ability to pay, *id.* amend. XXIV; Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966); as well as age, U.S. CONST. amend. XXVI.

67. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 142 (1994).

68. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201, 701, 78 Stat. 241, 243, 253 (preventing discrimination in public accommodations, employment, and other manifestations of interstate commerce).

associational[69] spheres in which they wish to participate, the state respects the status of the citizen and ultimately effects their equality.

Thus, such limitations are ultimately necessary because it allows citizens to enable themselves in relation to their choices in how they control the government. Implicit in this limitation principle is the idea that the government treat citizens with equal dignity and respect.[70] Arbitrary exclusion may take place directly by explicit bars[71] or by implicit treatment due to a disrespect of one's personhood or status even if they are nominally allowed most privileges in society.[72] This dignity requirement then follows upon the idea of the state's equality limitation.

This idea also suggests that the state is obligated to ensure that citizens treat each other with dignity and respect in relation to the exchanges and communal activities that take place in society.[73] In this sense, this notion of restraint not only applies to the government but also to individuals in the society as well—and the government by law may enforce this norm.[74] As much as the preceding norm of equality in direct treatment by the government affects social order, this norm of equality of treatment as between individual citizens also—and quite possibly more so—affects and shapes the social order, particularly in the realm of economic exchange.

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69. *See* U.S. CONST. amend. I (guaranteeing freedom of association).

70. *See generally* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011) (exploring three variations on the idea of dignity in constitutional law: inherent worth of the individual, enforcement normalization, and recognition and respect).

71. Within the voting context, for example, laws that prohibit formerly incarcerated felons from voting would violate the intrinsic dignity of these persons from the point of view of their status as a citizen—to the extent such status is conferred by inherent personhood and not by designation by the state. *See, e.g.*, Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 512-17 (2010) (arguing that that the severity of collateral consequences in the United States is rooted in racial marginalization and the narrow dignity interests afforded to individuals with criminal records in the United States).

72. In the voting context, exclusion from the polls based on an arbitrary characteristic such as the ability to pay or one's age (above and beyond the age of majority) may result in such disparagement of dignity even though there may be a rational basis for such laws. *See*, *e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that ability to pay is irrelevant to exercising right to vote).

73. As Rao explains, such dignity interest becomes a means by which an individual's life may be defined by a communal norm, and such norms would then be enforced by the state. Rao, *supra* note 70, at 187-88.

74. *Id.*

The second form of expression of the norm of limitation as an expression of the value of equality is that it allows for individual autonomy. Each citizen can have the same expectations as all other citizens as to the extent the government may (or may not) invade the autonomy of the citizen over their person, their possessions, their expression, or their behavior.[75] Thus, the norm of equal treatment of each citizen by the law enables the citizen to determine what expectations they ought or ought not to be entitled. With this baseline in place, the citizen can then have settled expectations by which she can determine how to govern her life. Thus, equality is an autonomy promoting value.

B. Equality as Socially Contingent Construct

The liberty and autonomy components of the idea of equality described above are immensely important, as they prevent arbitrary interference by the state in the lives of its citizens, and they allow the citizens space to exercise their lives both in relation to the state and in relation to each other and themselves. Yet, the proper scope of what is an appropriate sphere where this equality value ought and ought not to be enforced is often based upon societal consensus dictated by those who have greatest control over the governing process.[76] In this sense, the practice of equality is socially contingent.[77] For example, the recent increase in interest concerning the rights of homosexual couples illustrates the shift from a group whose expressive and interpersonal autonomy was not accorded

75. Professor Laurence Tribe noted that there are certain areas of law that are well settled, such as the protections of "political speech, searches executed without a warrant, and physically coercive interrogations [that] are clearly covered by the Constitution." Laurence Tribe, *The Roberts Court: New Frontiers in Constitutional Doctrine*, VOLOKH CONSPIRACY (June 6, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/06/by-prof-laurence-tribe-the-roberts-court-new-frontiers-in-constitutional-doctrine/. It would follow that such areas are settled (if at the same time complex), and a reasonable scope of expectations about those areas may be anticipated.

76. This again reaches the underlying concern of democracy-reinforcement theory's concern that majoritarianism may wrongfully exclude vulnerable minorities from the political process. *See* Eskridge, *supra* note 36, at 1281.

77. Such social contingency has been recognized by critical-theory scholars as a dilemma for the ultimate progress of rights for racial minorities. Derrick Bell, in particular, rejected the arguments that *Brown* lacked neutral principles and instead recognized "that the convergence of black and white interests" influenced the result. *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 526 (1980).

dignity or respect, but over the course of recent court cases has been accorded respect.[78] This represents a shift not in the intrinsic status of those who are homosexual but a shift in the ways society sees homosexual individuals.[79] Thus, where there is a component of equality that relies on the view of how the person is perceived, that view relies on societal consensus and norms of determining who is entitled to equality to determine the application of the restraint norm.

Because equality in this sense is socially contingent, the idea of equality can be manipulated by the political forces of the day to exclude particular members of the society on a particular basis or to limit the inclusion of certain members of society on a particular basis.[80] Derrick Bell discussed this dilemma in relation to *Brown* specifically in recognizing that the interests of whites and blacks converged not due to a recognition of the inherent rights of African-Americans but due to the interests of whites in protecting the political and economic capital that came with preserving equality.[81] Given this need for consensus, it follows that where consensus is lacking, advances will not be obtained for the benefit of minorities. Where proponents of democracy-reinforcement theory acknowledge as a theoretical matter this problem of majoritarian tyranny, Bell and the long line of scholars who relied on the interest-convergence thesis bring to the fore the problem of the contingency of equality due to the inherent problems created by the white-supremacy status.[82]

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78. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013); *see also* De Leon v. Perry, 975 F. Supp. 2d 632, 639 (W.D. Tex. 2014); Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1258 (N.D. Okla. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014).

79. *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (June 13, 2013), http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/.

80. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (explaining that the legal system evolves to continue to enforce social stratification while the legal system is premised on a static notion of discrimination).

81. Bell, *supra* note 77, at 524-25.

82. Bell raises a deeper problem concerning the race dilemma—the question of whether racism is permanent as a social construction due to the inability of whites as a group to identify with the interests of blacks and form a lasting interest convergence concerning civil rights. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 61-62 (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 4 (1992). While scholars in the critical race theory school take varying positions on the permanence thesis, George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 321 n.389 (2004) (exploring various scholars' positions on the permanence thesis), to the extent race as a social

As we will see in our discussion of the evolution of the civil rights model as a means to disestablish hierarchical treatment and enforce norms of equality, this social contingency allowed the way we defined equality to shift and manipulate the status of racial minorities in the United States, so that their oppression could be continued despite the creation and evolution of the civil rights model. As Reva Siegel has explained, shifting interpretations of laws centered around antidiscrimination often lead to the law merely reinforcing discriminatory hierarchies rather than ultimately eradicating them as well as the forms of discrimination themselves evolving to evade enforcement of the law.[83] As a result, though antidiscrimination laws may come into place to prevent discrimination or remedy one species of discrimination, other forms take their place that may evade the law.[84]

C. Equality and Remedies for Exclusion for Minorities

Yet, at key moments, American society has overcome the prisoner's dilemma that is the interest-convergence thesis. Its representatives extended the socially contingent nature of equality to persons excluded from it by law and custom. By making the choice to shift to a more egalitarian and inclusive democracy, it raises a question important to our inquiry: what specific steps should be taken to ensure full inclusion of excluded minority groups? As a normative matter, when it is decided that one group that was formally excluded should not be subject to such exclusion, then what remedy, if any, ought to be given by the majority so that, in all ways practicable, true inclusion into the democratic community of those persons formally excluded is achieved.[85]

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construction is enduring for the foreseeable future, it raises the question of the need for a race-conscious antidiscrimination model that would protect minorities from the potential of majority tyranny.

83. *See* Siegel, *supra* note 80, at 1116.

84. *Id.* at 1130.

85. This raises the question of the extent to which substantive reparations ought to be used to materially advantage persons harmed by societal exclusion. In the American context, these questions often turn around whether and how to remedy the economic harms of the slavery past. *See, e.g.*, Kaimipono Dave Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J.C.R. & ECON. DEV. 697, 705-06, 735 (2011) (discussing radical arguments about restructuring society and practical arguments for reparations meant to provide specific compensation).

It would follow from this that political and societal equality would necessarily require—from a practical perspective—that some of the following issues be addressed when bringing excluded minorities into the political community. First, as a conceptual matter, the ideology of exclusion that justifies the marginalization of outsiders in society should be curtailed.[86] This, in and of itself, is a contested issue where it is difficult to find agreement.[87] Second, assuming one can agree on the need for reparations, there should be, conceptually, remediation for the material disadvantage that came with the original lack of equality and exclusion from full status in society.[88] This is necessary, the argument goes, to ensure full participation in the political and transactional relationships in the democratic social order.[89] Third, there should be an affirmative obligation to include the disenfranchised to promote participation in the deliberative-democracy elements of the democratic social order.[90] This would require addressing the societal policies that police the boundaries of actions that would re-establish political and transactional exclusion on the personal, communal, and societal level.

While political and societal equality on these theoretical terms is often taken as a given, often, some find objectionable the idea of the obligation of the state to remedy the problems of inclusion; there are objections to the scope of these ideas.[91] For example, one objection is that the pursuit of these goals ultimately interferes with individual autonomy, which, as I said before, is an intrinsic value in

86. I have discussed this problem of excising the ideology of white supremacy in Atiba R. Ellis, Polley v. Ratcliff*: A New Way to Address an Original Sin?*, 115 W. VA. L. REV. 777, 791-92 (2012).

87. *See* Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1209-10 (2004) (identifying in the reparations context how directly addressing the legacy of slavery is divisive among Americans).

88. This claim lies at the core of reparations discussions: the idea that the enduring "status and cultural harms done by long-term racism" must be repaired. Ellis, *supra* note 86, at 800 (citing Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1676-83 (1995)).

89. *Id.* at 799-800.

90. Put another way, claims of reparations or other sorts of policies have the great potential to disturb the social order.

91. The doctrinal objections include failure to establish standing, causation, and the attenuated nature of the claims. *See* Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 280-82, 296-98 (2006).

and of itself as well as a value related to equality.[92] The claim, put simply, is that enforcing norms that may impinge on personal beliefs or opportunities that constrain personal discretion are directly harmful to the value of autonomy.[93] Therefore, so the argument goes, enforcement on the scope described above requires justification beyond the ordinary.[94]

This objection has force when seen within this conceptual context, especially one that can assume that formal equality is sufficient to address the question of inclusion and remedy the effects of long-term exclusion.[95] It requires assuming that there is sufficient formal *and* substantive equality as between the included and excluded person so that a formal remedy would be sufficient. In other words, to the extent of granting formal status to persons formally discriminated against may adequately address the discriminated person's exclusion from formal institutions as a normative claim, this is the end of the obligation by the state.[96]

In the case of race-conscious remedies for discrimination, however, this normative argument fails when considered from the perspective of the lived experience of structural discriminatory mechanisms where the nature of the exclusion functions as a subset of ideological justifications for exclusion in and of themselves.[97] By this, I mean that the nature of discrimination functions not only on a formal level, but also on levels that are informal and structural.[98]

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92. To this extent, this form of objection recognizes how the underlying liberty interest may conflict with the value of equality as defined as a need to materially remedy prior exclusion from equal status. *See* Killough, *supra* note 18 (noting Rand Paul's liberty objection to civil rights laws).

93. *Id.*

94. *Cf.* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2618, 2624-27 (2013) (holding that the concept of equal sovereignty of state governments requires the showing of extraordinary circumstances to diminish the power of states to regulate elections).

95. This idea of formal equality is centered on the "proposition that likes should be treated alike." PENNOCK, *supra* note 1, at 143. But this form of equality does not take into account the difference of history and of people, which can thus lead to further discrimination. *Id.* at 143-44.

96. *Id.*; *see also* PEREA ET AL., *supra* note 19, at 572-73 (explaining that formal equality embodied in American jurisprudence requires comparisons of individuals).

97. In this sense, racism has an ideological component that both explains subordination and reinforces discovered subordination, thus forming an ideological feedback loop concerning its persistence.

98. *See* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 4-6 (2014) (explaining the "lock-in" structural theory for systemic racism).

These discriminatory actions then are reinforced by ideological forces that serve to both enable and make invisible the discrimination.[99] This would merely re-create the inequality that society had sought to remove by agreement.[100] It is in these multiple, complex ways that discrimination functions.

Moreover, these issues, precisely because they are complex and fluid, are subject to political and judicial recalibration.[101] Thus, enforcing norms of equality, especially as a remedy to past discrimination, the enforcement ought to be most effective when enshrined as a constitutional norm specifically insulated from all but the greatest of political consensuses.[102] Thus, as Ely has argued, there is a need for counter-majoritarian enforcement of such norms to preserve their integrity and to protect minorities from the majority.[103] Also, there is a need for enforcement as a practical matter to resolve disputes between citizens about exclusion from the status of equality (by express discrimination)[104] and to facilitate inclusion into equal citizenship.[105]

Yet, when the republican institutions established to create and police these norms are captured by the ideological forces that are

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99. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 21-23, 36-37 (1991) (explaining how the Court's use of racialized language obscures the Court's "own role in perpetuating racial subordination").

100. *Id.* at 68.

101. Stuart Chinn has deployed the concept of "recalibration" to argue that "*the Supreme Court possesses an institutional interest in promoting stability*" that limits radical transformations in the social order and, therefore, will calibrate broad-based reforms to re-entrench the previously existing social order. CHINN, *supra* note 7, at 40-43.

102. However, as Chinn points out, such norms when expressed as broad commands are most subject to re-entrenching recalibration. *Id.* at 26. While Chinn focuses on the history and dynamics of the Supreme Court in performing this analysis, this Article, and in particular this Part, offers an account of re-entrenchment framed by normative concerns to supplement Chinn's concerns. The aim is to offer a fuller account not only of the evolution of the law, but also to open normative and policy questions about how civil rights law may evolve.

103. ELY, *supra* note 30, at 7-8 (expounding on the importance of protecting minorities from discrimination from the majority).

104. In this sense, the antidiscrimination doctrines like those contained in 42 U.S.C. §§ 1981 and 1982 and the employment and public accommodations provisions of the Civil Rights Act of 1964 serve to remedy intentional acts of discrimination. *See* 42 U.S.C. §§ 1981-1982 (2012); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101, 201, 301, 78 Stat. 241, 241-46.

105. Affirmative action and school integration may be thought of as a direct effort to include discriminated against persons into the full economic benefits of society.

skeptical or disfavoring of such equality-enforcement actions, such enforcement will not happen.[106] Indeed, as we will see, the equality norms advocated for are interpreted narrowly even when the idea is constitutionalized. Moreover, the protections for minorities are limited to the extent allowed by the doctrinal and theoretical constraints of the substantive constitutional text.

It is to this dynamic to which we now turn. Yet, it is first worth turning and considering the ultimate utility of the conception of equality within democratic society as extended here in this Article. Equality re-enforces the status of citizens in relation to the state and towards each other. It serves as a means of aiding the citizen's control of their state (thus enabling democracy) as well as promotes individual autonomy (and thus ultimately self-actualization). In these senses, the idea of equality, enforced through constitutional norms and then recorded as positive law, reinforces democracy.[107]

Yet, the realpolitik truth is that our ethical, philosophical expressions of an equality ideal depend on the political will of the majority. And in this sense, the expression and implementation of our equality norms—particularly in regard to racial justice—are socially contingent and therefore subject to political whims.[108] Moreover, because of the permanence of racism, it is both difficult to imagine the circumstances where equality norms may be enforced without a counter-majoritarian force to prevent the suppression of political (or racial or any other type of) minority. And yet, this too is often politically and socially contingent given the status-reinforcing recalibrations in which the Court engages. We turn to this problem of social contingency and the incompleteness of American equality in the next Part.

II. FROM THREE-FIFTHS TO *BROWN*: THE EVOLUTION OF THE CIVIL RIGHTS MODEL

In Part I of this Article, we framed normative conceptions of equality and democracy as they relate to democracy-reinforcement theory, and explored how this idea can be of intrinsic value in a democratic republic. We acknowledged that equality is an essential norm, and yet its social contingency may leave excluded minorities,

106. *See supra* note 82 and accompanying text.

107. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966); Reynolds v. Sims, 377 U.S. 533, 568 (1964); Rao, *supra* note 70, at 187-88.

108. *See supra* Section I.B.

even when there are counter-majoritarian norms designed to prevent such exclusion.

In this Part, the Article will turn to providing a description of how the "civil rights model" as a mechanism to enforce the consensus developed after the Civil War to articulate an equality norm and enforce it in the American state. The Article will provide this account based on the historical work of the legislature and courts in creating this equality norm, as well as illustrate the social contingency of this notion of equality through the retrenchment which took place at the end of Reconstruction and the beginning of Jim Crow. It will then point to *Brown* and the legislative movement towards civil rights in the 1960s as a triumph over entrenched white supremacy. This analysis will also note the core issues that were *not* considered in the development of the model—class equality and the hierarchical roots of American racial inequality.

As we will see in this Part, the failure to consider these issues, coupled with a conception of "equality under law" that narrowly frames the idea of equality ultimately and necessarily limited the ultimate scope of civil rights in the United States, from its beginnings, through the interventions of *Brown* and the civil rights legislation of the 1950s and 1960s.

A. Equality and the Antebellum Constitution

Our twenty-first century idea of civil rights as a mechanism of providing justice to the marginalized is premised on the ideas of equality and opportunity. The simplest form of this premise—now embedded in modern American political and cultural expectations—is the rhetorical claim that our state will uphold fundamental equality as between citizens despite differences that might be used to enforce inequality.[109]

The natural follow-up to this question is the question of how exactly is this mandate of equality to be enforced. What is the range and extent to which the government is obligated to enforce this democratic promise? Moreover, to what extent will the government allow its individual citizens the opportunity to pursue this promise

109. This claim can be seen in every major period in the American state. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring without differentiation that the people are the authority of government); ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS para. 1 (Bliss 1863) ("Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.").

for themselves through the process of the courts? It is these questions that lie at the heart of the meaning of the civil rights model and the places where it has expanded and contracted over the past one and one-half centuries.

Nonetheless, at the core of the civil rights model is the idea that all citizens are deemed to be of equal worth within the society and thus before the law. This idea has a particular history and was espoused in various ways throughout the course of American history. As the idea of equality evolved to become more inclusive, so did the legal mechanisms of civil rights. Indeed, the process of articulating these laws created the vision of civil rights. It is this process (and the theory that was created and that accompanies this notion of civil rights), which this Section will discuss.

1. *Social Status and the Antebellum American State*

The evolution of the American notion of equality is, from a historical perspective, a journey that is full of fits and starts, which ultimately made substantial progress, but is nonetheless inconclusive, even to this day. And, to acknowledge the obvious, equality at the beginning of the United States did not mean nearly the same thing as what it means today.

As a substantive matter, the meaning of equality within American society at the time of the founding was based on an avowedly rigid hierarchical structure.[110] The men who arrived from the Judeo-Christian, white, Anglo-Saxon nations in Europe that settled the land that became the original United States dominated the social and political relations in the original thirteen colonies. These men dominated the structure of politics from colonial times forward. Their political structure dominated the discourse about the status of themselves and others—including the status women, persons of African descent, and indigenous persons—during the bulk of this historical period.[111] By holding the reigns of political, economic, and social power, they dominated society. This view is widely known as white supremacy.[112]

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110. *See* Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315, 319 (1999).

111. *See* EDIBERTO ROMÁN, CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE 83-118 (2010).

112. Wendy Brown Scott defined white supremacy as "the system of racial subordination instituted to perpetuate the domination of African-Americans and people of color generally." Scott, *supra* note 110, at 321 n.27 (citing Frances Lee

Thus, our account must begin with the recognition that white supremacy mediated the meaning of equality within the American context.[113] As such, equality was, as a functional matter, reserved for white men of sufficient status and privilege, and therefore, a hierarchy of persons entitled to rights existed in the United States at the time of the founding.[114] These men were recognized as the persons who could participate within society in its full measure. They could form contracts, hold and exchange property, participate in popular sovereignty, and pursue full legal remedies allowed when those rights were infringed upon.[115]

In contrast, those who did not possess this status were, for the most part, excluded from opportunities to participate in the political and economic life of the republic.[116] In the South in particular, many if not most African-American slaves were wholly excluded by their status as property.[117] Though there were also free blacks in both the South and the North during the antebellum period, few if any of these persons had status that rivaled that of free, land-holding white men, though they were free to enter into contracts and involve themselves in commerce to the extent the law allowed.[118] Women, as well, were given subjugated status.[119] During the period before the Civil War, and for half a century thereafter, women were considered property to the extent that they were under the control of their fathers

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Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989) (defining "white supremacy" as "a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings")).

113. The white male patriarchy defined citizenship and who would and would not be admitted to it despite the rhetoric of equality upon which the United States was founded. *See* ROMÁN, *supra* note 111, at 83-118 (examining the de jure subordinate status of minorities and women in nineteenth century America).

114. Cheryl Harris frames this full legal status as "whiteness," a status that correlates with white appearance but represents self-identity and personhood and a privileged status as to property. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1734-36 (1993).

115. *Id.* at 1731.

116. *Id.* at 1717-18 (describing the racialized process that degraded Blacks to the status of property).

117. *Id.* at 1718-19.

118. *Id.*

119. Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 733-34 (2011) (describing the political personhood and its limitations of freed women in American society); *see also* ROMÁN, *supra* note 111, at 112.

and, upon marriage, of their husbands.[120] And indigenous Americans were treated as members of a foreign country—which they were—but nonetheless their tribal communities were subjugated by the policies of a hostile United States government.[121]

2. *Equality and the Antebellum Constitution*

Though this was the state of affairs and represents the legal hierarchy of the time, it is important to focus on the theory of equality that existed in the Constitution prior to the Civil War and the Reconstruction Amendments. The word "equality" is nowhere in the original text of the Constitution. Indeed, the Constitution addressed issues related mainly to the functioning of the coordinate branches of government and relied on the states to enforce the equality as between citizens.[122] As to the specific rights of the people, little is said in the original document. Where specific rights are guaranteed, reference is made to the states as the guarantors of those rights.[123]

Indeed, the lack of any guarantees or protections of individual citizens created concern for the passage of the Constitution.[124] A bill of rights was deemed necessary to protect citizens from the potential overreach of federal authority, and passage of these constitutional amendments became a condition for the ultimate Constitution to be passed.[125] Thus it could be said that individual rights and liberties did exist expressly at the founding of the republic (though they were assumed to be in force by the founders) and that the protection of those liberties was intended to be against the overreach of the government itself.[126] Yet, this solution to the problem of fundamental rights also suggested that in the realms not discussed or covered by

120. ROMÁN, *supra* note 111, at 112-13.

121. *Id.* at 87.

122. The main components of the Constitution focus on the powers of each branch of government and their respective interrelationships. *See* U.S. CONST. arts. I-IV.

123. For example, to the extent that the right to vote for representatives is alluded to, that right is framed as one to be mediated by the dictates of the state governments to determine which citizens ought to be entitled the franchise. *See id.* art. I, § 4, cl. 1. Certainly, bills of attainder and other specific guarantees are made to the citizenry of the United States, but those are limited.

124. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.5(a), at 1268 (8th ed. 2010).

125. *Id.*

126. *See id.*

the federal Constitution, the states were left to shape and govern. Indeed, it was not even clear at the time of the founding whether the rights reserved in the Bill of Rights were applicable to the states.[127]

The question of state authority and individual rights prior to the Civil War presumed that a set of liberties and rights were to be protected and were inherent in the status of the full members of the civic community.[128] Oftentimes, the state constitutions laid out a far more extensive set of rights and liberties than did the federal Constitution, the assumption implicit in this that the states would protect those rights and liberties deemed important for individual citizens.[129]

3. *Slavery, Inequality, and American Constitutionalism*

While this was often the case, the states,[130] as well as the federal government,[131] promoted slavery, and other structural inequalities were protected within the state government system as well. Slaveholding states had elaborate structures by which the institution of slavery was protected.[132] Along with those structures came legal regimes based on the idea that those persons held in the condition of slavery had fewer rights (if any rights at all) than those persons deemed free.[133] Accompanying that legal regime was the principle that the intrinsic worth and moral dignity of those persons was also suspect. By the time of the creation of the republic, that

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127. Not until after passage of the Fourteenth Amendment was it made clear that the protections of the Bill of Rights applied to the states. *See* Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (articulating the latest standard for incorporation).

128. *See* NOWAK & ROTUNDA, *supra* note 124, § 16.5(a), at 1268.

129. For example, state constitutions articulated specific right-to-vote doctrines, and rights to education and other social goods, where the federal Constitution did not. *See, e.g.*, PA. CONST. arts. II, VII, XII, XVI. Thus it follows that state constitutions safeguarded these rights.

130. For discussion of this, see DERRICK BELL, RACE, RACISM, AND AMERICAN LAW §§ 2.4-2.5, at 27-31 (6th ed. 2008) (describing the general background concerning slavery in the early United States).

131. *Id.* §§ 2.7-2.8, at 36-40 (describing the role of slavery at the Constitutional Convention).

132. *Id.* §§ 2.4-2.5, at 27-31; *see also* Ellis, *supra* note 86, at 779 n.8 (describing the legal doctrines interlaced with emancipation trials in the nineteenth century).

133. Though this was the state of affairs in slaveholding states, the definitive realization that slaves were property came in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451-53 (1857).

view of the lesser moral dignity of the slave tended to correlate with that of the "race" of the enslaved person.[134] That is to say that the lack of moral dignity that was accorded slaves was also given over to people who were not white Europeans as well.[135] In this sense, government and society enforced a norm of racial hierarchy.[136] And any reading of the notion of rights that existed prior to the Civil War has to be read through the lens of sanctioned racial hierarchy, especially if that reading is based on an "original" understanding of the Constitution.[137]

While slavery defined specifically the plight of many Africans in America, it did not define the plight of all persons who were considered minorities. Yet even there, it is fair to say that the rights guaranteed free blacks and indigenous Native Americans were equally conditioned on the existence of a racial hierarchy in the United States. In the period prior to the Civil War, the United States government formed a series of treaties and structures to effectively contain the power and remove the territory held by various Native American tribes.[138] This led to a number of atrocities and horrors that have defined American history.[139] Similarly, those African-Americans who had "free status" in the United States were often legally and culturally considered second-class citizens.[140]

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134. *See* GLORIA J. BROWNE-MARSHALL, RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT 5, 8-10 (2d ed. 2013) (explaining the centrality of slavery and the political economy created by it as the defining lens through which questions of African-American citizenship were viewed prior to the Civil War).

135. *See id.* at 2.

136. *See id.* at 8-10 (discussing *Dred Scott* and how it confirmed the rights-less status that African-Americans had in light of the decision); *see also* GEORGE KATEB, HUMAN DIGNITY 74 (2011) (discussing *Dred Scott* and noting that "[w]hen, as in the *Dred Scott* decision, there is no distinction between a person of the black race and a piece of property, human dignity is completely effaced, just as it is when categories of human beings are treated as if they were subhuman—a thought not far from the *Dred Scott* decision—or noxious vermin").

137. Such an original understanding was, as discussed in this Section, based on the validity of slavery and the lower status of people of color generally in the republic.

138. *See* Harris, *supra* note 114, at 1721-24 (describing the dynamic of Native American land seizure and the conflicting nature of Native American and European conceptions of property); *see also* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 13-29 (2010) (describing the impact of colonialism in defining legal relations between Native Americans and the United States).

139. *See id.* at 15-29 (describing how the doctrines of colonialism and settlerism oppressed Native American peoples).

140. *See* BROWNE-MARSHALL, *supra* note 134, at 9-10.

B. The Theoretical and Historical Evolution of Civil Rights: The First Reconstruction and Its Aftermath

All of this changed with the Civil War. Though the war started originally as an effort to quash a rebellion of the southern states, it ultimately became a war to liberate the slaves. This is true despite the resistance of those leaders at the time to name it as such. Nonetheless, the moral and constitutional dimensions of slavery were the ultimate contest of the Civil War, and by defeating the South, the North asserted once and for all the validity of the constitutional structure and the moral injustice of the South's "peculiar institution" of slavery.[141]

The Civil War ultimately forced the United States to confront the question of what rights and status the former slaves should be accorded. It is in this period that we see the beginnings of the notion of civil rights, as we currently understand it. The first mission of the post-war America was to face the fact that while given their freedom, the former slaves would nonetheless have to adapt to the political, social, and economic challenges of having become free.[142] The ultimate changes in our constitutional text and laws established a notion of equality as a matter of law,[143] and that idea of equality has come to define civil rights. This Section will briefly explore that text and related cases to discern the idea of equality in American constitutionalism.

1. *Reconstruction and the Creation of the Civil Rights Model*

The Reconstruction Amendments were designed to allow the former slaves political and civic participation in the democracy. Specifically, the Thirteenth Amendment guaranteed the abolition of slavery throughout the United States,[144] and it was a precondition for the readmission of the Ex-Confederate States to be part of the Union. The authority granted under the Thirteenth Amendment sought not

141. The phrase "peculiar institution" is a euphemism for the word slavery. The phrase was meant to evoke the idea that Southern chattel slavery was unique to the American South of the nineteenth century. It was often evoked to defend slavery as a way of life for the South. *See, e.g.*, John C. Calhoun, Speech on the Reception of Abolition Petitions: Revised Report (Feb. 6 1837), *available at* http://users.wfu.edu/zulick/340/calhoun2.html (defending slavery from petitions for its abolition in the United States).

142. *See* BELL, *supra* note 130, § 2.10, at 46.

143. U.S. CONST. amend. XIV.

144. *Id.* amend. XIII.

only to abolish the practice of slavery in the United States, but also the practices and incidents that constituted slavery and the chattel status of slaves within America.

The guarantee of equality was first established in the Reconstruction Amendments after the Civil War. The Thirteenth, Fourteenth, and Fifteenth Amendments offered a vehicle through which former slaves would be included in the Union.[145] They also created an imperative for inclusion through opportunities for those former slaves to be included equally in the economic and political structures of the United States and to require the government to treat those citizens equally with all other citizens of America. In this sense, Reconstruction created the democratic promise that the years thereafter sought to fulfill.

Moreover, the passage of the Reconstruction Amendments represented an assertion of federal power over the authority of the states to regulate the lives of their citizenry.[146] This assertion of power was, by its nature, limited given the nature of the language of the ultimate framing of the Amendments.[147]

The Thirteenth Amendment, which was adopted on December 6, 1865, declared that slavery was abolished in the United States. Its one-sentence command was that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[148] While this language was

145. *Id.* amends. XIII, XIV, XV.

146. As discussed above, the South used its ability to regulate the lives of its citizens to detrimental effect. The Fourteenth Amendment in particular was placed to insure such abuse would not take place again. *See* AMAR, *supra* note 25, at 102. In this sense, federal law limited the ability of the States to regulate the lives of its citizens.

147. As Angela Harris has pointed out, the Reconstruction Amendments were filled with ambiguities and failed to provide an adequate statutory structure for their full enforcement. *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1934-35 (2000). Similarly, Bruce Ackerman has argued that the Reconstruction Amendments were "doomed from the start" due to their formalistic approach that ignored the economic and social needs of freed African citizens. *See* BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION 156 (2014). Moreover, the limitations of the text of the Reconstruction Amendments ultimately created loopholes through which a re-designed form of political and class-based discrimination would emerge. *See infra* Subsection II.B.2.

148. *Id.* amend. XIII, § 1.

ultimately a compromise[149] and a rejection of a far more expansive vision of anti-slavery based on broad equality language offered by Senator Charles Sumner and Representative Thaddeus Stevens, both leaders of the Radical Republicans in the Congress,[150] this language nonetheless abolished slavery and sought to remedy any discrimination based upon the "'badges and incidents of slavery.'"[151] Ultimately, it was an effort to eliminate all the vestiges of slavery throughout the United States. And importantly, its broad language (and its authorization clause, which directed Congress to affect the law by appropriate legislation)[152] reached both governmental and private actors in regards to activities that might be considered slavery.

Despite this, the problem of equal citizenship loomed large in the minds of the Reconstruction Congress. There were those who worried that freed blacks would nonetheless be treated as second-class citizens despite having been freed from slavery (and may even be relegated back to slavery).[153] Southern planters were able to use the sharecropping system and violence to effectively replicate slavery, thus rendering the Thirteenth Amendment "obsolete" within a decade of its passage.[154] To respond to this problem, Congress passed the Civil Rights Act of 1866.[155] It is the first civil rights statute passed by the United States Congress.[156] It contained language that required all states to recognize the equal rights of all citizens under the law.[157] The statute also provided that every citizen had the right to enter into contracts and to participate in the various

149. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 37-48 (2004) (describing the debates leading to the ratification of the Thirteenth Amendment).

150. *Id.* at 38-42. The Sumner–Stevens version of the Amendment sought to articulate a broad notion of equality as the basis of the Amendment. Their language stated, "'all persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States.'" *Id.* at 40.

151. *Id.* at 70.

152. U.S. CONST. amend. XIII, § 2.

153. BELL, *supra* note 130, § 2.10, at 47.

154. *Id.* It is of import to observe that the vulnerability of poor blacks who had formal freedom but little substantive means to pursue that freedom, laid the groundwork for this result.

155. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

156. *The Civil Rights Bill of 1866*, U.S. HOUSE REPRESENTATIVES, http://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/ (last visited Oct. 10, 2014).

157. § 1, 14 Stat. at 27.

expressions of citizenship in the United States on the same basis as white citizens.[158] This provision also provided statutory authorization for the prevention of discrimination in obtaining housing and property.[159] The law also provided that the federal courts would have jurisdiction to hear cases regarding violations of these provisions.[160] Thus, through the passage of the Civil Rights Act of 1866, Congress created a model for civil rights legislation by basing it on the expansive authority granted it through the Thirteenth Amendment. This legislation provided a race-conscious remedy to prevent discrimination, specifically attacked the badges and incidents of slavery, and provided for the power of the federal government for its enforcement. Most importantly, through these enactments, Congress sought to put in the forefront the notion that equality as between freed African slaves and white people was a paramount goal to be obtained by the law.

Yet, it was not clear that the authority of the Thirteenth Amendment and its statutory products would be sufficient to enforce this idea of equality. Ultimately, the Reconstruction Congress endeavored (and passed) the Fourteenth Amendment to specify the meaning of equality. Section 1 of the Fourteenth Amendment guaranteed the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.[161]

Thus, the Fourteenth Amendment made clear that the former slaves were citizens of the United States, and that those persons were guaranteed the privileges and immunities of citizens of the United

158. *Id.* However, the statute does not define what level of rights would be provided to "white citizens," which has created some conceptual quandaries concerning the act. Nonetheless, this section of the 1866 Act, which is still in force as 42 U.S.C. § 1981 (2012), has had the impact of preventing employment discrimination by providing a federal remedy for racial discrimination in the formation of employment contracts. Yet, as will be discussed below, that remedy was forestalled due to the coming of Jim Crow. Ultimately, Congress supplemented this remedy with the Civil Rights Act of 1964 and its employment discrimination provisions in Title VII.

159. § 1, 14 Stat. at 27 (codified at 42 U.S.C. § 1982 (2012)).

160. § 3, 14 Stat. at 27.

161. U.S. CONST. amend. XIV, § 1.

States, procedural due process, and the equal protection of the laws.[162] Section 2 provided for protections against mass voter disenfranchisement except where persons who were disenfranchised were stripped of their right to vote on the basis of conviction of a crime.[163] Section 5 authorized Congress to implement the Amendment by appropriate legislation.[164]

Even with these statutory provisions deriving from the Thirteenth and Fourteenth Amendments, there still remained two significant problems concerning the nature of enforcing equal citizenship. The first was the terroristic threats that continued in the South in the wake of Reconstruction.[165] Despite the stationing of Union troops in the South during the period, the terrorist organization known as the Ku Klux Klan arose to intimidate freed slaves and to force by violence the subjugation of African-Americans. By 1870, the Klan had solidified its hold in the South through the aid of some state and local governmental authorities.[166] Despite the availability of federal enforcement and injunctive relief, there was lacking nonetheless actual material relief for the damages done by state officials and others acting under the color of state law.[167] To address this situation, Congress passed the Civil Rights Act of 1871 to provide a remedy for persons who have had their rights violated by persons acting under color of state law.[168] From it came what is known as 42 U.S.C. §§ 1983, 1985-1986,[169] which has served in modern times as the prime vehicle to vindicate constitutional rights of all sorts.

The second major concern worth noting here relates to the franchise. As discussed earlier, § 2 of the Fourteenth Amendment laid out a provision that would penalize states by decreasing their representation in Congress for denying the right to vote to ex-slaves.[170] However, there was concern that this provision would be insufficient to guarantee the right to vote to African-American men specifically in as much as the mechanism still existed for states to

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162. *Id.*
163. *Id.* § 2.
164. *Id.* § 5.
165. BELL, *supra* note 130, § 2.11, at 49.
166. *See* Monroe v. Pape, 365 U.S. 167, 170-80 (1961) (explaining the legislative history of the Ku Klux Klan Act).
167. *Id.* at 173-74.
168. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.
169. 42 U.S.C. §§ 1983, 1985-1986 (2012).
170. U.S. CONST. amend. XIV, § 2.

disenfranchise by legislative command.[171] Accordingly, in 1870, Congress passed the Fifteenth Amendment.[172] It ordered that the right of citizens "to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[173] This final text protected against conscious discrimination against voting, but like the other constitutional amendments, this was a consensus measure that declined to prohibit practices like literacy tests and poll taxes.[174]

Ultimately, however, Reconstruction and the Fifteenth Amendment transformed African-American political participation from a mere pittance to a substantial voting bloc that redefined elections in the South during Reconstruction. The pursuit of Reconstruction allowed approximately 735,000 African-Americans registered to vote.[175] Indeed, participation rates for black men ran between 70% and 90% during this time.[176] Their participation resulted in the election of African-Americans to Congress and to the senior levels of state and local governments across the South.[177] From the late 1860s until 1877, African-American economic and political participation had reshaped the civic community of the

171. The Fourteenth Amendment did not create an express right to vote, but as stated above, it did contain a penalty provision that would diminish the representation for states that interfered with the right to vote of male citizens over twenty-one years of age. U.S. CONST. amend. XIV, § 2. This left open the possibility of voter suppression by the Southern states as the Democratic Party was regaining political power in 1868. This prompted the need to pass a third amendment directed specifically towards protecting voting rights. *See* KEYSSAR, *supra* note 6, at 94.

172. U.S. CONST. amend. XV.

173. *Id.* § 1. The Nineteenth Amendment, which came into effect in 1920, some fifty years after the Reconstruction Amendments, made the same guarantee on the basis of sex. *Id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

174. As we will see below, such practices did not directly implicate race and therefore were not forbidden by the Amendment. *See infra* notes 207-13 and accompanying text.

175. *Elections, 1867 and 1868*, HARP WK., http://15thamendment.harpweek.com/HubPages/CommentaryPage.asp?Commentary=05SectFour (last visited Oct. 10, 2014).

176. *Id.*

177. By one historian's estimate, during the First Reconstruction, over 2,000 black men served in elected offices across the South. *See* Eric Foner, *Rooted in Reconstruction: The First Wave of Black Congressmen*, NATION (Oct. 15, 2008), http://www.thenation.com/article/rooted-reconstruction-first-wave-black-congressmen#.

South, and the Radical Republican vision of equality continued to have a chance to be true.

Neither African-American political equality nor social opportunity was to last. Jim Crow would replicate the effective hierarchies of slavery and leave the African-American political and economic community again at the bottom of a second version of American apartheid.

2. *Retrenchment, Jim Crow, and the Betrayal of Equality*

During Reconstruction, the United States had transformed its constitutional law and legal doctrine to provide an opportunity to fulfill the twin promises of democracy—political equality and economic opportunity—for former African-American slaves. The legislative innovations of the Reconstruction-era Congress transformed the Constitution by elevating equality to the status of constitutional imperative. And the legislation that was created based on the constitutional authority granted in these amendments provided the first civil rights mechanisms for enforcing that equality.

Yet, Reconstruction ended in 1877 when President Rutherford B. Hayes ordered home the military regiments that, by the barrel of the gun, guaranteed equal participation for blacks in the South.[178] Its end revealed how the structure for enforcing equality was incomplete and subject to the contingent nature of equality enforcement.[179] There were two reasons for this. First, the constitutional structure in which the notion of equality was imbedded was limited to formalistic commands. The Supreme Court of the post-Reconstruction Era applied strict formalism to narrowly interpret the Reconstruction Amendments and their enforcement legislation.[180] This curtailed the scope of civil right enforcement available. The second reason is that the opening provided an opportunity for the majority in the South to resurrect status hierarchies based upon the socioeconomic status of former slaves. Put simply, the theory of Reconstruction declined to

178. MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945-2006, at 8-9 (Univ. Press of Miss., 3d ed. 2007) (1984); *see also* BELL, *supra* note 130, § 2.11, at 48-52 (explaining that the political and economic gains made during reconstruction were effectively wiped out due to loss of federal support and the wholesale violence and terrorism brought upon the black community at the time).

179. *See* BELL, *supra* note 130, § 2.11, at 48-52.

180. *Id.* § 2.11, at 50.

address how the poverty of freed slaves would leave them vulnerable to discrimination by a tyrannical majority.

a. Equal Protection Narrowed

The prime example of this is the Court's treatment of the Equal Protection Clause of the Fourteenth Amendment. This narrative demonstrates that the Court has both narrowed and expanded the terms of equal protection in such a way as to ultimately make the doctrine available for others beyond race but, at the same time, narrow the opportunities for substantive equality and thus undercut the work of Reconstruction.

The Court expanded equal protection to the extent it recognized that the terms of the Clause and the legislative history ran afoul of explicit discrimination on the basis of race. Accordingly, in *Strauder v. West Virginia*,[181] the Equal Protection Clause required the Court to strike down laws that expressly barred blacks from jury service.[182] And in *Yick Wo v. Hopkins*,[183] the Court struck down laws that expressly discriminated against Chinese Americans in the regulation of laundries in San Francisco.[184] *Yick Wo* is significant as well because it recognized that the Equal Protection Clause extended beyond blacks and was able to be used by all citizens.[185]

The Court, however, qualified the scope of the Fourteenth Amendment during this period as well. In the *Civil Rights Cases*,[186] the Court held that the Fourteenth Amendment did not extend to purely private conduct.[187] In so holding, it narrowly interpreted the scope of the Privileges and Immunities Clause of the Amendment, which made the Clause ultimately ineffective as a means of securing the rights guaranteed under the Amendment.[188]

Probably most significantly, the Court effectively qualified the meaning of equality to sanction segregation—so long as the state provided similar facilities for different races. This "separate but equal" doctrine was established in *Plessy v. Ferguson*,[189] which held

181. 100 U.S. 303 (1879).
182. *Id.* at 310.
183. 118 U.S. 356 (1886).
184. *Id.* at 374.
185. *See id.*
186. 109 U.S. 3 (1883).
187. *Id.* at 10-11.
188. *See id.*
189. 163 U.S. 537 (1896).

that a Louisiana regulation requiring blacks and whites to be given separate railroad accommodations was constitutional.[190] The Court upheld the regulation on the grounds that the Fourteenth Amendment required that only formal equality exist as between racial groups for its equal protection command to be satisfied.[191] It then followed that formal separation of the races did not work a "badge of inferiority" on either race.[192] Famously, Justice Harlan dissented, arguing (again, as he did in the *Civil Rights Cases*) that the Reconstruction Amendments were meant to eradicate "the race line from our governmental systems."[193] Thus, in this sense, Justice Harlan claimed that the American Constitution was "color-blind" so that race could not and should not be a determiner of an individual's rights.[194] Despite Harlan's dissent, such formal equality that allowed the state to condition rights in a race-conscious way, so long as a claim of formal equality as between the races may be made, endured.[195] At the

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190. *Id.* at 540, 550-51.

191. The Court reasoned:

> The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

Id. at 544. Thus, according to the reasoning of the Court, laws that mandated separation were acceptable so long as there was formal equality. What is revealing about the majority's reasoning is that there is a reliance on the idea that the Constitution is out only to provide "political equality" as opposed to status reinforcement. I believe that this is an accurate statement not only of *Plessy*, but it also reflects the dilemma (and the limited nature of) relying upon narrow, formal conceptions of political equality as ultimately limiting of the scope of the civil rights project. It is this Article's view that this narrowness should be reconsidered. More on this in the concluding Sections.

192. *Id.* at 551.

193. *Id.* at 555 (Harlan, J., dissenting).

194. *Id.* at 559-64. It should also be noted that Justice Harlan only spoke to the range of formal equality that ought to be accorded blacks. His argument that the Constitution is "color-blind" begins from the premise that in terms of social equality,

> [t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.

Id. at 559. For further discussion of these issues and their application to modern-day colorblindness controversies, see Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

195. The Court, almost by rote, continued to enforce the "separate but equal" requirement in subsequent cases, including *Cumming v. County Board of Education*,

end of the day, in the wake of *Plessy*, while the Court held to formal equality between racial groups, that equality ultimately would be conditioned on the idea that racial segregation would nonetheless be constitutional.

b. Class as Dividing Line

The second major transformation of the civil rights model relates to how the vision of equality offered by Reconstruction failed to consider how the poverty of recently freed slaves would leave them vulnerable to discrimination, which contained a component of socioeconomic bias. Socioeconomic bias coupled with the reemergence of racial caste as an associational matter, rather than a property right as was the case of slavery, laid open the opportunity for Jim Crow and set back the cause of African-American equality for another generation.[196]

The structure of the Reconstruction Amendments themselves created an opening for narrowing interpretations of their meaning and impact. As we saw in the previous Section, as to each of the Amendments, alternatives existed that would have provided a set of positive rights for all citizens (and in particular, African-Americans). Yet, the Amendments themselves are framed as negative commands. The Thirteenth Amendment prohibits slavery but does not identify what specific rights ought to be granted former slaves.[197] The Fifteenth Amendment prohibits racial distinctions in voting, but it does not affirmatively guarantee a right to vote (nor is there a right to vote affirmatively set out anywhere in the federal Constitution).[198] Though the Fourteenth Amendment, by contrast, uses broad

175 U.S. 528, 545 (1899), *Berea College v. Kentucky*, 211 U.S. 45, 57-58 (1908), and *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 162 (1914).

196. *See* BELL, *supra* note 130, § 2.11, at 48-52.

197. U.S. CONST. amend. XIII. While the determination of what the Thirteenth Amendment covers was left for judicial determination, it has been observed that those determinations fail to reach the true scope of economic disadvantage that was created as a result of slavery. Indeed, Professor Dawinder S. Sidhu has argued that the Thirteenth Amendment ought to apply to remedy urban poverty as a constitutional matter as such poverty should be considered a badge and incident of slavery under the amendment. *See* Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 4, 41-42 (2012).

198. U.S. CONST. amend. XV. This is to say there is no full statement of a right creating an obligation specific to voting in the federal Constitution. All state constitutions do have such an affirmative statement. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95, 101 (2014).

language of neutral application that would seem to bind the government,[199] the import of that language was also left to the courts to be interpreted. And such interpretation was subject to the politics of the Court. As we have seen above, the meaning of equality was narrowed to its most formal sense rather than anything that would provide a sense of substantive equality.

Given this narrow notion of equality, what follows is that states had the opportunity to structure the fundamental rights and policing powers in ways that were contingent upon their intent to affect the promise of equality. So long as the structures that they created remained neutral on the negative commands of the Reconstruction Amendments, the structures that the state chose would be respected despite any discriminatory effect. As a result, the states had the power and discretion to shape the meaning of equality in the lived experience of blacks in the late nineteenth century and therefore those states implemented the social structures they saw fit to create—the intent of the Reconstruction Amendments notwithstanding.

The states did this through policies of segregation and hyper-regulation of the electoral process. As observed above, *Plessy* provided license for the states to enforce mandatory separation on the basis of race.[200] And though the *Plessy* doctrine allowed race-conscious separation so long as formal equality was met, in practice this was not the case. Soon after *Plessy*, separate was anything but equal when it came to education, economic opportunity, freedom to participate in interstate commerce, and the whole host of opportunities that ought to have come with full American citizenship.[201] The Court's decisions in this period (up until the World War II era) supported this policy.[202]

This problem of formal equality as a veil for racial discrimination took particular expression in the voting-rights context. Despite the command of the Fifteenth Amendment, the idea of equal participation in the political process quickly ended with the end of Reconstruction. Southern states complied with the command for

199. U.S. CONST. amend. XIV.

200. *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896) (noting that "enforced separation of the races" does not offend constitutional equality).

201. *See* Sidhu, *supra* note 197, at 50-51.

202. For a history that discusses the Court's record in upholding segregation in the era immediately after *Plessy* and long shift to supporting racial equality, see generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

formal equality in the electoral process, yet at the same time created devices that would target poor, largely uneducated blacks for suppression of their votes. And the Court consistently upheld such regulations as within a state's power to condition the franchise. For example, the Court upheld the poll tax as a means of voter regulation in *Williams v. Mississippi*.[203] There, the poll tax was upheld because the plaintiff had failed to show any discriminatory administration of the suffrage provisions of the Constitution, and thus, he failed to state a claim under the Equal Protection Clause.[204] Similarly, the Court of the Jim Crow era upheld gender limitations[205] and literacy tests[206] as being within states' authority to regulate the franchise—notwithstanding their disenfranchising effects.

In contrast, where there was evidence that the regulation functioned as a proxy for discrimination forbidden in the Constitution, the Court struck down such devices. Indeed, the Court did strike down expressly racial election rules in *Guinn v. United States*.[207] There, the Court struck down Oklahoma's grandfather clause, which allowed those who qualified under the clause to be exempt from the literacy test for voting.[208] The clause expressly benefited whites; blacks were denied the exemptions provided by the grandfather clause and thus were subject to the state's literacy test.[209] Thus, by the height of Jim Crow, the Court struck down facially discriminatory election laws but upheld laws that were not facially motivated by forbidden categories (even if the effect was a disparate

203. 170 U.S. 213, 226 (1898).

204. *Id.* at 222-23.

205. Women were denied the right to vote in many state constitutions of the era. This was upheld in *Minor v. Happersett*, 88 U.S. (Wall.) 162, 176-77 (1874). Thereto, the Court emphasized that because the Constitution did not explicitly grant women the right to vote, the decision as to whether or not to grant the right to vote to women was left to the states. *Id.* The Nineteenth Amendment repealed this holding. U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). However, neither that Amendment, nor any other in the Constitution, refutes the basic premise that States have significant power over conditioning enfranchisement. The Elections Clause of the Constitution has been interpreted to grant such power subject to federal intervention in only federal elections. *See* Arizona v. Inter-Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253-54 (2013).

206. Literacy tests were upheld by the Court throughout the Jim Crow and the Civil Rights Eras. *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959). They were only eliminated under the Voting Rights Act.

207. 238 U.S. 347, 367-68 (1915).

208. *Id.*

209. *Id.* at 367.

impact on the basis of race). The Court echoed this support in *Breedlove v. Suttles*,[210] where it upheld the Jim Crow era Georgia poll tax.[211] Importantly, the Court rejected the claim that the poll tax ran afoul of the Privileges and Immunities Clause, as the right to vote was derived from individual states.[212] On this basis, the Court reasoned again that a "state may condition suffrage as it deems appropriate."[213]

This strategy of voter suppression worked precisely because it targeted African-Americans, who were caught in a structure of poverty and lack of education. The strategy set barriers that would require them to overcome those disadvantages in order to participate fully in society but eliminated many of the means by which they could overcome to participate. As I observed in other work, this strategy ultimately "enshrined the status quo of African American subordination through focusing ultimately on the effects of creating" caste and wealth barriers to full citizenship.[214]

C. The Civil Rights Revolution of the Mid-Twentieth Century: Towards Fulfilling the Twin Promises of Reconstruction

At the height of Jim Crow, the system of formal equality coupled with deference to state regulation designed to disenfranchise and delimit African-Americans' opportunities in commerce effectively derailed the promise of Reconstruction to provide political equality and economic opportunity to African-American citizens. This subjugation replicated the relationship of slavery and left the work of the civil rights agenda of the mid-eighteenth century unfinished.

Yet, by the 1930s, another iteration of the long civil rights movement was afoot. It sought to apply another strategy to create equality through shifting the legal interpretations set down in the *Plessy* era through critiquing the notion that there is true equality in

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210. 302 U.S. 277 (1937).

211. *Id.* at 282-84.

212. *Id.* at 283.

213. *Id.*

214. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DEN. U. L. REV. 1023, 1040 n.77 (2009) (discussing the conceptual frame of the poll tax) (citing Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1221 (2007) ("noting how neutrality and equality can support subordination and hierarchy through protecting property rights and status inequalities inherent in the economic system")).

the separate facilities created to accommodate segregation.[215] Through this strategy, Charles Hamilton Houston, Thurgood Marshall, and the NAACP Legal Defense Fund set forward the major challenge to legal segregation.

Their work culminated in the decision in *Brown v. Board of Education*.[216] There, the Court in a 9-0 decision held "that in the field of public education the doctrine of 'separate but equal' has no place."[217] The key to this reasoning was not that *Plessy* was *per se* unconstitutional in the abstract. That is, on its face, separate facilities that are equal do not by themselves violate of the Constitution. It is that the act of separating black children from white children in and of itself "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[218] Racial segregation is "inherently unequal" and therefore violates the Equal Protection Clause of the Fourteenth Amendment.[219]

The immediate impact of this pronouncement was to declare illegal all forms of segregation in the United States. The Court in a wave of opinions brought in the immediate wake of *Brown* held that segregation in a number of contexts was unconstitutional, and cited *Brown* for support without more explanation.[220] Moreover, the South, who had in the century prior to *Brown* established a system of legal, social, and cultural norms based on the premise of segregation and the subordinate institutions for African-Americans as well as the subordinate position of African-Americans, mobilized to resist this declaration that segregation violates the constitutional norm of

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215. This strategy was documented in GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 133-34 (1983).

216. 347 U.S. 483 (1954)

217. *Id.* at 495.

218. *Id.* at 494.

219. *Id.* at 495. This specific definition of how *Brown* violates equal protection has provoked a number of reactions in the scholarly literature. Space constraints prevent a full consideration of the scholarly commentary to *Brown*, but it is important to observe that the social change evoked by *Brown*, as well as the framing of inequality created by the decision, have dominated the conversation about the meaning of equality—especially in relation to race—to this day.

220. The Court struck down segregation in, among other contexts, "public beaches and bathhouses, municipal golf courses, buses, parks, public parks and golf courses, athletic contests, airport restaurants, courtroom seating, and municipal auditoriums." *See* NOWAK & ROTUNDA, *supra* note 124, § 14.8(d)(ii)(4), at 826 (footnotes omitted) (collecting cases).

equality.[221] This retrenchment, and the political and social movement reaction to this retrenchment, exposed the depth of the racial caste system and eventually convinced many that fulfillment of the promise of equality would require more than judicial declarations. It would require the political branches of government to use their powers to provide new civil rights tools to pursue equality.[222]

Enter the civil rights legislation of the 1950s and 1960s. As I stated earlier, the legislation post-*Brown* focused on voting and remedying specific defects in the democratic process. However, a political and moral consensus was reached to address discrimination broadly through new legislation. With this consensus came the crafting of the Civil Rights Act of 1964.[223] The Act was an application of the same legislative model applied during the First Reconstruction, relying on federal remedies in a federal forum and an expansive application of constitutional authority, but this time the approach was modified to accommodate both the precedent of the First Reconstruction as well as the specific nature of the problems faced in the 1950s and 1960s. As Chinn has argued, the Act was more narrowly targeted and thus not subject to recalibration by the Court.[224]

Rather than building directly upon Reconstruction Era constitutional powers, the Civil Rights Act of 1964 used the powers granted Congress over the regulation of interstate commerce as the way to regulate behavior to the end of eliminating discrimination.

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221. *See* KLARMAN, *supra* note 202, at 421-42 (discussing the mass resistance and violence against the *Brown* decision and the civil rights protests that sought enforcement of civil rights).

222. *See* Telephone Interview with Kenneth Teasdale, *supra* note 12 (noting Teasdale's personal reflection that many in Congress in the 1960s recognized America's failure in promoting racial equality, which spurred the passage of the Civil Rights Act). Although this is one data point, and one of the outstanding contributions to living history made by this symposium, it illustrates the larger point: recognition that legislative, executive, and judicial forces were necessary to implement the civil rights project. *See generally* ACKERMAN, *supra* note 147, at 83-104, 329 (arguing in the context of voting rights that public leaders were using statutes to effectively "amend the constitution" to increase political rights); Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1033-40 (2005) (describing the convergence of political elites and grassroots advocacy that secured the passage of the Civil Rights Act).

223. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

224. CHINN, *supra* note 7, at 20-21.

The Commerce Clause[225] was the source of the power used to deal with discrimination in public accommodations, employment, and other grounds related to commerce. These provisions were clearly designed to provide a guarantee of nondiscriminatory equal opportunity to African-Americans. The Civil Rights Act was also designed to provide an enforcement mechanism for the *Brown* decision.[226] Title IV of the Act provided a mechanism by which to measure the degree of segregation in public schools and to devise a means by which to dismantle such segregation.[227] The Civil Rights Act also contained a provision concerning voting and measuring voter registration rates in order to prevent the South from stymieing voter registration.[228] However, Congress realized that these provisions would not be sufficient to reverse the lack of voter participation.

Thus, even after the Civil Rights Act was passed, Congress then spent another year passing the Voting Rights Act (VRA).[229] The VRA has two main provisions. One provides a broad statutory remedy based upon the authority of the Fifteenth Amendment to prohibit practices that either explicitly or by their effect discriminate against minorities.[230] The other provides the authority for the federal government to review and veto changes in the voting rights laws that would have the effect of making worse the position of minorities in regards to their ability to obtain and cast a meaningful vote.[231]

While the Civil Rights Act and the Voting Rights Act focus on different subject matter, it is clear that they are tied together in several significant ways. As this Article has been arguing, these two enactments address the quest for political equality and equality of participation that have been at the heart of the conceptual quest for equality and the practical meaning of equality. They also share the components of the civil rights model in as much as they rely on broad federal enactments and broad interpretations of constitutional

225. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

226. §§ 401-410, 78 Stat. at 246-49.

227. *Id.*

228. *Id.* § 101, 78 Stat. at 241.

229. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

230. *Id.* § 2, 79 Stat. at 437.

231. *Id.* § 5, 79 Stat. at 439. However, as will be discussed in Part III, § 5 of the VRA is effectively ineffective due to the decision in *Shelby County v. Holder*, which declared unconstitutional the coverage formula that would determine which jurisdictions would be regulated under § 5. *See infra* Section III.B.

language, and they create a federal remedy to address this discrimination. In this sense they are designed to enforce the underlying notions of equality, which this Article has been commenting on. And, they suffer the same limitations because the definition of equality in and of itself is limited.

III. THE FALL OF THE SECOND RECONSTRUCTION: IDEOLOGICAL SHIFT AND THE CREATION OF A NEW CIVIL RIGHTS NARRATIVE

To this point, this Article has discussed the history of the long civil rights movement in both a theoretical and a historical frame. It has argued that the idea of equality lies at the heart of the civil rights model, yet that idea is incomplete in as much as it inculcated formal opportunity but has not addressed substantive equality. With that frame, the Article has described how the Reconstruction Era's effort to eliminate discrimination and incorporate freed slaves into society was ultimately incomplete. Those efforts were then stymied through the regression into apartheid that the era of Jim Crow represented: a regression allowed by a focus solely on formal equality coupled with a limited commitment to substantive remediation for freed slaves in post-war America of the nineteenth century.

Nonetheless, the civil rights moment of judicial and legislative intervention represented a period where the federal government intervened to re-enforce the underlying democratic structure of the United States by forcing the entities that sought through state action to reinforce the hierarchies of race to abandon such actions. The Civil Rights Acts of the 1860s and 1870s, the heart of the first Reconstruction, provided remedies to protect against the most egregious acts of white racial domination.

Yet, with the limitations that came with American apartheid came a new civil rights movement that spanned the twentieth century. With it came a new intervention through *Brown* and through the legislative efforts of the 1950s and 1960s. The product of this interventionism was the Second Reconstruction. To this point, this Article has traced the rise and fall of the First Reconstruction and the rise of *Brown* and the Second Reconstruction.

Yet, if the previous Part of this Article has illustrated anything, it is that the civil rights model has been anything but static. It has evolved due to a fundamental conflict about the meaning of democratic equality, and thus approaches have varied as to how to fulfill its core premises of equal protection of the laws and meaningful and equal participation in the democratic process. As we

have seen, the judicial and legislative revolution whose hallmarks were *Brown*, the Civil Rights Act of 1964, and the VRA represented key moments of fulfilling this democratic promise by fostering formal equality of opportunity for the polity. Yet, this model's intellectual underpinnings have been reframed and arguably eliminated through modern jurisprudence and political shifts. This has happened while, at the same time, the meaning of equality has broadened in a number of ways. It is to this complicated contemporary landscape that this Article will turn.

A. Post-Racialism, Colorblindness, and Ideological Shift

The combination of *Brown*, the Civil Rights Act, and the VRA has certainly transformed American democracy. To the extent the United States was an apartheid country that ended with the completion of the legislative and judicial achievements of the Second Reconstruction. However, the dream of the Second Reconstruction among many has been the hope for a truly egalitarian democracy that would match the idea of equality from which this Article proceeded. While some have argued that the formal equality of the law is sufficient to this end, others contend that the legacy of the Second Reconstruction is woefully incomplete.[232]

Though there are a number of questions and doctrinal and jurisprudential problems that lie at the heart of this large and complicated question, this Section will focus on one of them: the ideological shift that has, in the eyes of some, run the risk of ending the Second Reconstruction. This question of worldview revolves around the idea that equality sufficiently exists to end race-conscious efforts at pursuing civil rights. Underlying this belief is the idea that America ought to be colorblind, and in the beliefs of some, that America has achieved rapprochement concerning race. This Section will lay out this theory, and then the following Sections will examine how post-racialism coupled with the evolving narrative of equality have transformed race-conscious civil rights.

The underlying narrative is that since the legal innovations that created the Second Reconstruction, the United States has progressed to the point where race-conscious governmental intervention must be

232. For a survey of the literature regarding both "formal equality," or equality of opportunity and "adequacy," or substantive equality in the education law context, see generally Joshua E. Weishart, *Transcending Equality* Verses *Adequacy*, 66 STAN. L. REV. 477 (2014).

moderated or concluded altogether on policy or moral grounds. Two principle and interrelated frameworks have been deployed to describe this trend. The first is "colorblindness." Colorblindness is an aspirational concept that takes expression for many as a view that, by force of societal change, race will become irrelevant throughout society.[233] Post-racialism is an ideology that shapes decisions about how the world ought to be viewed and explains choices concerning issues regarding race.[234] The idea of a "post-racial" society relies on the premise that American society has concluded its struggle with race, and therefore, when it comes to the structuring of our laws, there is no further need to discuss issues of race.[235] It is the ideology that claims that America has moved beyond race and that there is thus no need to discuss race as a salient issue.[236]

Post-racialism works as an ideology—it offers a point of view about the world and, thus, allows the adherent to consider and reflect on various issues through this particular lens.[237] In particular, Professor Sumi Cho points out that the power of post-racialism is that of making conversations about race irrelevant to the adherent of

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233. Many scholars have described the nature and evolution of the Court's colorblind jurisprudence. *See generally* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); Gotanda, *supra* note 99. In the election-law context, Spencer Overton has critiqued the notion of colorblindness as ultimately defeating of the ability for jurists and policymakers to make effective law. He has argued that race should be used as "one analytical tool to be considered in conjunction with other factors" when analyzing election law policies. Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 472 (2001). Indeed, Professor Overton points out that "[a] consideration of race allows scholars and legal decisionmakers to avoid the pitfalls of the 'color-blind card,' an ideological extreme that mechanically trumps historical considerations, silences discussion, removes relevant issues from the table, and ignores important problems." *Id.* at 473.

234. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594-97 (2009).

235. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1314 (2011) (observing that "a post-racial America is a racially egalitarian America" where the post-racial discourse is used to "de-historicize race in American society"); *see also* Lawrence Auster, *What Is Post-Racial America?*, VIEW FROM RIGHT (Feb. 25, 2008, 10:56 AM), http://www.amnation.com/vfr/archives/010000.html (discussing the notion of post-racial America during an Obama presidency).

236. Cho, *supra* note 234, at 1595.

237. *Id.* at 1594.

the ideology.[238] Adopters of the post-racialism point of view tend to discount the importance of race as the relevant guidepost for the way society is organized.[239] Conversations about race become irrelevant, and those who wish to discuss race are seen as divisive and destructive.[240]

Post-racialism is more virulent and persuasive because it represents an ideology that converges with enough of the facts of the moment and the hopes of people across the political spectrum to offer a salient battle-is-over analysis of the current state of race relations in the United States.[241] Put more directly, post-racialism offers the point of view that the problem of racial dominance has run its course. Thus, from this point of view, discussions about race are irrelevant to the public policy and legal conversations of our era. Conversations about race are relegated to the past, and those who attempt to raise the issue are seen as irrelevant. This is despite the mountain of evidence of the role race plays in political conversations from day to day.[242] Post-racialism represents the achievement of this goal to those who buy into the ideology. The logical conclusion of such a view is that the issue of race as a framework for organizing preferences and priorities in our society is outmoded. It is the normative aspiration of colorblindness coupled with the belief that the race-conscious ends of integration and formal equality have been achieved that is the driver for the current period of retrenchment by the Court.

B. The Curtailing of Race-Conscious Political Equality

While the Court has narrowed the VRA in a number of ways, the most recent and significant has been in the decision in *Shelby County v. Holder*.[243] There, the Court declared unconstitutional § 4(b) of the Voting Rights Act, which determined which states would

238. *Id.* at 1594-95.

239. *See id.* at 1595.

240. *Id.* at 1595, 1601-02.

241. *See* Sheryll Cashin, *Shall We Overcome? "Post-Racialism" and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L. L. REV. 31, 33-41 (2011) (examining the relevance of race and the "state of race relations" in the "political discourse" in a post-racial America); Cho, *supra* note 234, at 1601.

242. Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 417 (2012) (describing the concept of "racially transcendent diversity" where America has not yet moved beyond race into post-racialism, but "seeks to rise 'above race,' even as it embraces racial diversity").

243. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

be covered by § 5.[244] Chief Justice Robert's opinion for the five-Justice majority relied on two premises. First, the opinion stated that each state is due "'*equal* sovereignty,'" that is each state has power to regulate matters left to the states, including voting, to the same extent as other states.[245] The second premise was that "the conditions that originally justified [the preclearance measures that justified differing treatment of states] no longer characterize voting in the covered jurisdictions."[246] Roberts pointed to substantial progress in voter participation and the increase in minority elected officials in the time from the passage of the Act until now.[247] Yet, Roberts continued, the current coverage formula does not reflect this reality. "Coverage today is based on decades-old data and eradicated practices."[248] "Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity."[249]

Justice Ginsburg wrote a lengthy dissent. It pointed out the majority's failure to properly state both the law and the evidence. As a matter of law, she raised the concern that the Court's decision did not give Congress the deference it is due given its broad authority under the Fifteenth Amendment.[250] She also rejected the notion that the "equal sovereignty principle" commands equal treatment of states because this principle is only applicable to the conditions on states for admission to the union.[251] As a factual matter, Justice Ginsburg disagreed with the majority's laissez-faire attitude toward racially discriminatory practices in the present. She recounted the evidence that Congress had amassed on modern voting discrimination.[252] Finally, as a realistic matter, she observed that, with the preclearance provision effectively gutted, the country now faces the possibility of the erosion of voting rights.[253] *Shelby County*

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244. *Id.* at 2631.

245. *Id.* at 2623 (quoting Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009)).

246. *Id.* at 2618.

247. *Id.* at 2619.

248. *Id.* at 2627.

249. *Id.* at 2627-28 (citation omitted).

250. *Id.* at 2638 (Ginsburg, J., dissenting).

251. *Id.* at 2649.

252. *Id.* at 2642-44.

253. *Id.* at 2651 ("The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that

represents a victory for those who wish to see less federal involvement in elections since, as the law currently stands, § 5 coverage is nonexistent.[254]

The key premise of the *Shelby County* opinion is that the covered jurisdictions—mainly the ex-Confederate South—have changed so sufficiently that the government must reconsider selective preclearance enforcement of race-conscious remedies. The message of the Roberts opinion is that coverage formulas connected to past racial discrimination in voting ignores present racial progress.[255] Indeed, Roberts implied that to retain such formulas amounts to punishment of the states covered for their racial history.[256]

The majority's analysis appears to rely on a post-racialist narrative of racial progress to justify its decision rather than confront the arguments put forward by both sides concerning the degree of progress in voting that has actually occurred.[257] The opinion failed to grapple with exactly how much progress we have made to racial political equality. Instead, the majority simply asserted (again and again) that Congress had no basis in current political reality to rely

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preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself." (citation omitted)).

254. In commenting in the immediate aftermath of *Shelby County*, I opined that because of "the hyper-partisan nature of national politics, it is difficult to imagine how the current Congress or any Congress elected in the foreseeable future would agree on a new coverage formula." Atiba R. Ellis, Shelby County, AL v. Holder*: The Crippling of the Voting Rights Act*, W. VA. U. C.L. (June 28, 2013), http://law.wvu.edu/news/2013/6/28/ShelbyCounty-vs-Holder. While a new formula has not passed yet, as of the writing of this draft, a bipartisan group of congressmen has introduced a bill to answer the concerns raised by the *Shelby County* decision. *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014). The Act would create a new coverage formula for § 4(b), as well as institute other changes to the VRA designed to modernize the Act, in particular, amendments to the bail-in provisions of Section 3(c) designed to expand its scope, and a limited exemption of voter identification laws as a predicate offense for triggering coverage under either § 3(c) or 4(b). *Id.* Even though these amendments are cheered by a number of advocacy groups as providing a needed fix to the VRA, some commentators believe that this expansion may ultimately doom portions of the Act when brought under judicial review. *See* Franita Tolson, *The Importance of Tunnel Vision in Fixing the VRA's Coverage Formula*, HUFFINGTON POST (Jan. 23, 2014, 1:22 PM), http://www.huffingtonpost.com/franita-tolson/voting-rights-act-preclearance_b_4653095.html (arguing that broadening the § 3(c) "bail-in" coverage formula will make ripe reconsideration of disparate impact provisions of both § 3(c) and § 2 of the VRA).

255. *Shelby Cnty.*, 133 S. Ct. at 2627.

256. *Id.* at 2629.

257. *Id.*

on the current coverage formula.[258] Rather than account for the varied forms of second-generation voter intimidation as evidence on which Congress could have based its findings, the majority suggested that increased voter participation as an indicator demonstrated enough progress to effectively scuttle § 5.

From the point of view of a post-racial ideology, § 5 preclearance represents a bludgeon that crushes the ability of the covered jurisdictions to legislate freely concerning the electoral process. The premise of this argument is that America—and especially the jurisdictions covered by § 5—has triumphed over the problem of race and, therefore, should not be constrained by race-conscious remedies. The argument, as it goes, is that the voter suppression that existed in 1965 no longer exists. An America that can elect an African-American President no longer needs to micromanage the election processes of certain states and localities on the basis of race. The claim is that we live in a post-racial world, and a Congress that fails to recognize this has overstepped its constitutional role. In essence, the premise behind *Shelby County* is that we now no longer live in a racialized world, and thus Congress exceeded its power in legislating on the basis of race when the terms of the debate of race have changed.

This racial progressivity account is at odds with the nature of second-generation voter-denial claims and the demographic reality of twenty-first century America. For example, the perception of those who oppose recent election-administration policies (e.g., voter identification laws) is that such policies have the potential to affect negatively the ability of minorities to vote.[259] Similarly, long-standing felon disenfranchisement represents an enduring barrier to the franchise that falls disproportionately on racial minorities.[260]

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258. *Id.*

259. *See* E. Earl Parson & Monique McLaughlin, *Citizenship in Name Only: The Coloring of Democracy While Redefining Rights, Liberties and Self Determination for the 21st Century*, 3 COLUM. J. RACE & L. 103, 110-11 (2013). *But see* Ellis, *supra* note 214, at 1026 (focusing on socioeconomic status as a barrier to voting).

260. For a discussion of felon disenfranchisement laws, see generally JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006); KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (2d ed. 2013); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disfranchisement: A New Viewpoint*, 65

These barriers have bred distrust concerning the electoral process, especially among minorities, despite the race-neutral rationale that these policies promote election integrity.[261] This conflict has created cynicism among some concerning the underlying integrity of the right to vote as it pertains to minorities.

The risk here is that the Court is ultimately failing to reinforce democracy through creating and sustaining an ideology of exclusion for the most marginalized in America. The evidence suggests Congress pointed to, in reauthorizing the VRA demonstrated, continuing racial disparities in voting as it relates to redistricting, voter intimidation, and other areas where the voter interfaces with the electoral system. Moreover, in the 2012 elections and prior to *Shelby County*, § 5 was the vehicle the courts used to identify and mitigate the potentially racially disparate effects that voter identification laws would have had in South Carolina and Texas.[262]

What is important to note about these forms of voter suppression is that they revolve largely around the problems of political control of the mechanisms of voting and the impact of voting within political districts. This present litigation issue ultimately revolves around the question of whether demonstrated disparate impact upon a minority group without direct evidence of disparate treatment ought to be sufficient to win § 2 claims.

What lies under the surface of these claims is the idea that these types of mechanisms not only have an impact on the basis of race, but also they affect the minority group due to their socioeconomic status. To take a clear look at voter-suppression laws, one realizes that they are not just about race. Forms of voter suppression like voter-identification laws, the narrowing of early voting windows, felon disenfranchisement, and other ways minorities are excluded

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FLA. L. REV. 111 (2013); Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389 (2011).

261. South Carolina v. United States, 898 F. Supp. 2d 30, 52 (D.D.C. 2012) (suspending law for 2012 elections but upholding ultimate validity under VRA); Texas v. Holder, 888 F. Supp. 2d 113, 143-44 (D.D.C. 2012) (holding that the Texas voter ID law would have a retrogressive effect and enjoining implementation). Of course, because of *Shelby County*, both opinions were abrogated with the abrogation of § 5.

262. In both of these situations, federal district courts enforcing § 5 used the VRA to block implementation of these voter-identification laws due to their potential disparate racial impact on minorities. *See South Carolina*, F. Supp. 2d at 52; *Texas*, 888 F. Supp. 2d at 143-44. Of course, after *Shelby County*, these injunctions lack force and these states are free to pursue implementation of the law.

from the political process focus expressly on the treatment of poor people of color within the political process.

To take the most obvious example, voter-identification laws: these laws in their strictest form require government-issued photographic identification at both the point of registration and the point of exercising the franchise.[263] While these laws seem innocuous to the vast majority of us who possess valid forms of government-issued identification, the minority of people who necessarily don't would have to face the burden of obtaining such identification in order to register and vote. I have argued in prior work that voter identification laws impose an *indirect* cost of voting on the voter—a cost greater than that of the current regime of voter identification through various verifiable types of governmental or quasi-governmental documentation.[264] Political science research suggests that these indirect costs form a strong disincentive "to political participation for those who are socioeconomically disadvantaged."[265] According to the Brennan Center for Justice, these stringent voter-identification requirements will disenfranchise thousands, including low-income citizens, minorities, and the elderly.[266] Indeed, over 21 million citizens do not possess appropriate government-issued photo ID.[267]

Because the costs are so high to some, the disincentive cannot be overcome simply by transforming one kind of indirect cost of

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263. *See* Ellis, *supra* note 214, at 1034-36.

264. *See id.* There, I explain:

> Indirect costs are the costs a voter has to expend to become eligible to vote, but the costs are not paid directly to the government or otherwise related to the actual casting of a ballot. Those costs include the cost related to a person identifying him or herself, whether through obtaining a government-issued photographic identification card such as a driver's license, passport, employment card, or some other related type of card; proving one's citizenship; proving one's current address; proving one's location of birth; or other requirements that relate to this proof.

Id. at 1035. These costs are imposed not by the state directly, but by the structure created around voting. *Id.* at 1036.

265. *Id.* at 1035.

266. *See* KEESHA GASKINS & SUNDEEP IYER, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1-5 (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf (detailing the economic and racial difficulties in obtaining voter identification).

267. BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

voting into another indirect cost—that is, by putting the burden of verification from the state to the citizen by raising the cost of the citizen through an ID requirement. The cost still remains, and for the voter who does not think that there is a benefit to participating and who is, moreover, overwhelmed by the nature of the cost exacted, that person will be effectively excluded from the electorate because that person will choose not to vote.[268]

This example demonstrates the kinds of impact that lie at the intersection of race and class. These kinds of impacts ultimately might be ignored when one attaches to a view that racial impact is irrelevant because express disparate-treatment discrimination has been virtually eliminated. This is the ultimate blindness created by the ideological trap of post-racial thinking.

C. Affirmative Action at the Brink

This post-racial view forms a lens larger than just voting rights by itself and is directed at the larger civil rights project. This idea is made clear when one looks not only at *Shelby County*, but also at the larger arguments made in the cases concerning race-conscious governmental policies. Certain commentators opposing § 5[269] and the Justices most vocal about its abolition share this post-racial view.[270] When we expand our lens beyond voting to other race-related issues of the term, the scope of this post-racialist view becomes clearer.

To this end, I will consider briefly the recent decisions concerning affirmative action in higher education. As I alluded to earlier, affirmative action is one of the issues about which there is great controversy. Indeed, one of the principle arguments about affirmative action is that race-conscious remedies are not necessary,

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268. *See* Ellis, *supra* note 214, at 1033.

269. *See, e.g.*, Hans von Spakovsky, Shelby County v. Holder*: The* Shelby County *Section 5 Showdown*, SCOTUSBLOG (Feb. 15, 2013, 5:51 PM), http://www.scotusblog.com/2013/02/shelby-county-v-holder-the-shelby-county-section-5-showdown/; Joshua Thompson, *Online VRA Symposium: It's Time for the Court to Review Section 5*, SCOTUSBLOG (Sept. 12, 2012, 11:26 AM), http://www.scotusblog.com/2012/09/online-vra-symposium-its-time-for-the-court-to-review-section-5/.

270. Specifically, I refer to Justice Clarence Thomas, who has repeatedly articulated the view that § 5 of the VRA exceeds the powers of Congress to enforce the Fifteenth Amendment, and therefore should be struck down in its entirety. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 212 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part); Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631-32 (2013) (Thomas, J., concurring).

and they are immoral. In these cases, the conservative majority of the Court has expressed its view that race-conscious affirmative action should be ended to preserve constitutional colorblindness. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[271] Chief Justice Roberts expressed his famous dictum that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[272] This is clearly a stance towards arguing for the irrelevancy of race consciousness and fits within the post-racial mindset. Similarly, in *Fisher v. University of Texas at Austin*,[273] the majority remanded the case to the district court for an application of the strict scrutiny standard to the university's decision to implement a race-conscious affirmative action policy.[274] Justice Clarence Thomas argued in concurrence that all race-conscious affirmative action was unconstitutional.[275] He opined that there was no distinction between state action designed to yield diversity benefits and state action designed to segregate.[276] These cases, taken together, represent the Court's view that race as a grounds for governmental action is disfavored as a practical and a moral consideration; this analysis tracks the colorblindness and post-racialism narratives.[277] That is to say, regulating the democratic process to protect against minorities is no longer necessary because race is now irrelevant. Moreover, as Justice Thomas's narrative goes, race-conscious considerations in admissions are not only unnecessary but also repugnant to the moral philosophy of the Constitution.

The essence of this analysis is that the Court has approached these issues with an underlying post-racial narrative that affects the twin aims of the civil rights model: democracy reinforcement and equal opportunity. Read together, the message is that we are past race. Thus, any democracy reinforcement, whether accountability-based or horizontal, is disfavored if based on race consciousness.

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271. 551 U.S. 701 (2007).
272. *Id.* at 748.
273. 133 S. Ct. 2411 (2013).
274. *Id.* at 2420-22.
275. *Id.* at 2422 (Thomas, J., concurring).
276. *Id.* at 2428-29.
277. *See supra* notes 233-42 and accompanying text.

D. Gay Rights and the New Narrative of Equality

Moreover, if one compares the rhetoric in the affirmative action cases with that of the same-sex marriage cases, one will see that there is not only a triumphalist narrative the Court is portraying where race is concerned, there is also an implicit narrative about the hierarchy of rights needing to turn its attention to the truly marginalized: homosexuals. For example, in *United States v. Windsor*,[278] the majority articulated a dignity rationale for striking down § 3 of the Defense of Marriage Act.[279] The majority recognized that this offense to dignity ultimately doomed the law, and a number of federal trial courts have taken this as a signal that defense of marriage laws ought to be considered unconstitutional.[280] There is a clear irony at play where the civil rights doctrine—specifically the equal protection doctrine spurred by the laws designed to protect freed slaves—not only fails to protect people of color, but also leaves people of color in the dust to protect on a basis not contemplated by the framers of the Reconstruction Amendments. This is not to say that same sex couples (or LBGTQ persons generally) should not receive constitutional protections; this is most certainly not the position of this Article. It is to say that the evolution of the hierarchy of rights to protect LBGTQ persons is expanding while at the same time the evolution narrows the protections for people of color. This is tragic, and represents, as this Article has argued, an ideological

278. 133 S. Ct. 2675 (2013).

279. *Id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.").

280. As of the date of this writing, all federal courts of appeal that have ruled on same-sex marriage bans have found them unconstitutional. *See* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014). The Supreme Court denied certiorari on these cases on October 6, 2014, thus allowing the decisions to become law of their respective circuits. Subsequent to the denial of certiorari, the Ninth Circuit issued an opinion striking down same-sex marriage bans in two additional states. *See* Latta v. Otter, 771 F.3d 456 (9th Cir. 2014). However, federal trial courts in Louisiana and Puerto Rico have recently upheld same-sex marriage bans. *See* Conde-Vidal v. Garcia-Padilla, No. 14-1253(PG), 2014 WL 5361987 (D.P.R. Oct. 21, 2014); Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014). Appeals of these decisions are pending in the Fifth Circuit and First Circuit, respectively.

transformation that specifically disdains race-conscious governmental action.[281]

IV. DREAMING ANEW: REINFORCING DEMOCRACY AT THE INTERSECTION OF RACE *AND* CLASS

This Article has sought to be both theoretical and historical in its examination of civil rights. It has explored how civil rights can be thought of as a means to reinforce democracy, by providing for both accountability reinforcement, and nurture horizontal democracy. Indeed, this Article has argued for an expansion of the meaning of horizontal democracy due to the fact that at pivotal points in the formation of the civil rights model, class issues were not included. The civil rights model has become a means by which individuals may seek to force the state to be more inclusive and democratic through affirming the status of the underrepresented in our country while at the same time causing our concept of civil rights to evolve. As many scholars have observed, the idea of civil rights—as a procedural vehicle to vindicate rights and as a means to achieve substantive ends of justice for underrepresented and mistreated Americans—continues to be truly relevant.[282] This Article's claim is that this relevancy may be framed from the perspective of reinforcing democracy.

And yet, the underlying original substantive focus of civil rights as both model and ideal has been curtailed greatly, and in some respects, rejected altogether. The concept of American legal equality, avowedly race conscious in its origin, has been narrowed significantly, most recently by a skepticism towards race-conscious remedies based on an ideological recalibration, to use Chinn's

281. For a deeper analysis concerning the 2012 Term and the inherent difficulties that such divided notions of equality represent, see generally Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1 (2013).

282. To provide but one law of democracy example on this point: in response to arguments in the voting rights context that equal protection and Voting Rights Act jurisprudence are insufficient to remedy modern-day voting discrimination post-*Shelby County*, see generally Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013). Spencer Overton has argued that the Fifteenth Amendment (and by implication the traditional civil rights model) is nonetheless effective and essential for the vindication of voting rights. *See* Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19 (2013). This particular call and response debate encapsulates the larger discourse about the salience of race-conscious civil rights.

phrase, so that a real discouragement of the use of such remedies now weighs on advocates of race-conscious approaches.[283]

On another level, as this Article has argued, a number of questions about substantive equality have been ignored almost completely in the evolution of civil rights. The problems of socioeconomic class have been an underlying theme throughout the history of the civil rights struggle. An examination of every period of civil rights struggle reveals that the problem of class has intensified, and even served as a proxy for, the creation of the color line. And yet, in constructing remedies concerning civil rights, the model itself has focused on litigation designed to attach direct, purposeful discrimination rather than examine the systemic effects of discrimination coupled with longstanding structural underclass problems. And yet, class issues have been shunted to the side and society has ultimately failed to address them. In some contexts, this was intended to re-affirm an overarching racial structure. In other contexts, it was meant to mollify and transform underlying racial unrest without taking steps to address underlying systemic problems. Ultimately, this gap continues to exist today and lies at the heart of the continuing civil rights dilemma.

In effect, there are two forces at work that stifle the dream of equality. First, there is the ongoing and pernicious effect of race as epistemological concept and mechanism for discrimination. Second, there are the effects of enduring poverty and limited access because of the effects of low socioeconomic status. This dual problem remains effectively invisible. Yet, the effects of these two issues generate persistent racial disparities in voting, housing, education, and all of the issues that the aspirations of *Brown* and the genius of the civil rights legislative drafters sought to remedy. It is this issue that continues to be the shortfall of the twentieth-century civil rights era. And in this respect, the civil rights model, as it has evolved over the past one hundred fifty years, has failed to be equality or democracy affirming.

The question then becomes how to revive the dream in a world where the civil rights model continues to champion equality, but race-conscious equality in the realms of politics and education continues to be narrowly construed. How do we refocus the questions concerning equality in a world where there is recognition of class conflict as well as racial subordination, but there are those

283. *See* CHINN, *supra* note 7, at 40.

that would argue that by solving the latter, one ultimately will address the former?

My view is that the choice presented between race-conscious remedies as a focus for civil rights and class-driven remedies as a focus reveals a false dichotomy. Race and class as categories of subordination each perpetuate and replicate hierarchy.[284] And though in history we have seen that the two are often interrelated, they are also separate and are generated from separate sources.[285] Indeed, it is at their intersection, as the voter-identification case illustrates, which leaves poor persons—particularly poor persons of color—vulnerable. In this sense, the argument that one ought to choose between the two is problematic.

And yet, there is an insight to be gained by the increased call for class-based remedies to the legal and structural problems that come in direct opposition to avowedly race-conscious approaches to civil rights. To suggest that class-conscious remedies would be an adequate substitute for race-conscious remedies is to recognize that race and class intersect in powerful ways for the most vulnerable in our society. It is to suggest that there is a political and economic underclass that suffers the brunt of the long history of racial subordination and poverty, and that cannot necessarily protect itself due to the narrow construction of the remedies surrounding race and the lack of remedies around class altogether.

It follows that race-conscious remedies should not be abandoned. Moreover, such race-conscious remedies should focus on the specific intersections where the members of the racial and class underclass tend to be affected most. To take a law-of-democracy example, the debates concerning the propriety of voter identification laws and expanded voting affect those voters who may find it difficult to absorb the indirect economic costs of voting; arguably, these costs are increased by narrowing opportunities to vote through more stringent identification requirements and narrow voting windows.[286] Similarly, the barriers of felon disenfranchisement affect poor African-Americans and Hispanics.[287] This would suggest that electoral vulnerabilities that affect class and race ought to be subjected to more significant judicial scrutiny.

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284. For a thorough exploration of this question, see generally John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 L. & INEQUALITY 355 (2007).

285. *Id.* at 361-82.

286. *See supra* notes 264-67 and accompanying text.

287. *See supra* note 260 and accompanying text.

Amendments to the Voting Rights Act and new legislation focused on removing structural barriers to voting on a national level should be geared to focus on these issues. Legislation should specifically focus on such laws as they lie specifically at the intersection of race and class. Indeed, it is worth contemplating a form of class-driven indicator in the VRA that would heighten scrutiny for voting practices that directly affect neighborhoods that qualify as sufficiently poor to be vulnerable to voter-identification laws, reductions in early voting, and other ways that the cost of voting is increased. Such a focus would have the impact of addressing the deep structural barriers that impact on the basis of race, and they can, to a certain extent, be also seen as having an impact without regard to race, thus mollifying critics who might attack such change on a post-racial basis. Space constraints do not allow for a full articulation of what the doctrinal parameters will be for such remedies in this Article. The goal of this Article is to argue that such remedies need to be considered to revive the vision of civil rights for the twenty-first century.

This is the challenge and the reality that American society faces. For my part, I hope to articulate the theoretical and doctrinal parameters of such race-plus-class remedies in the law of democracy context in future scholarly work. Moreover, I challenge the academic, legislative, and advocacy wings of the civil rights community to work towards fully conceptualizing remedies that lie at the intersection of race and class as a means to making civil rights remedies more effective and relevant to the twenty-first century.

CONCLUSION

This Article has considered the civil rights model for equality enforcement. The model sought to instill equality as a democratic value through expansive interpretation of the U.S. Constitution, a broad authorization of federal government intervention into state police power and interstate commerce for the vindication of those civil rights, and a corresponding limitation on state control in those areas. As we have seen, the model is expanding to protect the rights of homosexual persons despite it being critiqued and constrained for the original race-conscious remedies for which it was created. Moreover, this Article has argued that the definition of equality that underlies the civil rights project is incomplete as it lacks mechanisms or even attention to the government's capacity to remedy substantive

limitations due to the long history of structural political and economic disenfranchisement.

I have argued in this Article that that the original democratic promise of the civil rights model may be revitalized through recommitment to the core racial-equality meaning of the model as well as an added focus on modern racially segmented socioeconomic inequality. Specifically, attention should be paid to the intersection of race and class and protections should be provided for those who are vulnerable due to the harms that might occur to citizens whose lives are defined by that intersection. This is *not* to say that the government should attempt to wholesale remedy economic disparities; it is simply to say that added scrutiny against discrimination that has an effect on people of color due to their economic status should be added to consideration for the evolution of the civil rights model.

This kind of attention to innovation of race-conscious remedies can address a dual concern regarding race and class that has often stymied their consideration in modern America. This race-plus-class approach can address objections concerning judicial overreach and racial progress while being conscious of the vulnerabilities that may most create disparate racial treatment within the democratic process. It can also further the ultimate end of equality as well as the use of the equality norm as a means of democracy reinforcement. By doing so, we will ultimately promote the dignity and status of every citizen in the American republic—and thus come closer to fulfilling the dream of the long civil rights movement.