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LAW, MINORITY, AND TRANSFORMATION: A CRITIQUE AND RETHINKING OF CIVIL RIGHTS DOCTRINES

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> "The black revolution is much more than a struggle for the rights of Negroes. It is forcing America to face all its interrelated flaws—racism, poverty, and militarism. It is exposing the evils that are rooted deeply in the whole structure of our society. It reveals systematic rather than superficial flaws and suggests that radical reconstruction of society itself is the real issue to be faced."
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> —Martin Luther King, Jr., 1968[1]

INTRODUCTION

Americans share a common history of formal, inter-communal subordination in which African Americans, forcibly brought to the American continent as slaves, were treated as legally inferior.[2] This formal subordination, embodied by slavery through the Jim Crow laws, was curtailed in the modern era following the 1954 United States Supreme Court decision of *Brown v. Board of Education* and its progeny.[3]

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1. Martin Luther King, Jr., *A Testament of Hope*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 315 (James Washington ed., 1986).

2. *See generally* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000).

3. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955); *see also* RICHARD KLUGER, SIMPLE

The *Brown* decision suddenly turned a cultural heritage of officially mandated racial discrimination into a social wrong. Today, there is almost an American consensus that formal racial discrimination falls outside the most commonly held American values.

This article is devoted to a critical examination of the African-American experience as a minority group that has used legal strategies to promote equality in the United States. Because the United States Supreme Court is the final arbiter of American constitutional law,[4] this article traces landmark judicial developments in equal rights cases involving African Americans.[5] More specifically, this article explores how modern judicial doctrines concerning equality have dramatically emptied this principle of its promised substance.[6] It observes that a systematic retreat by the Supreme Court since the mid-1970s has essentially curtailed the constitutional Equal Protection Doctrine's ability to bring about meaningful advancement in African Americans' living conditions,[7] while maintaining traditional societal privileges and powers.

This article is divided into two key parts. Part I presents the theoretical framework for the discussion in Part II. It explores the main perspectives of two opposing civil rights theories on equality: the transformative group-based theory and the liberal individualist theory. Part I examines which theory is more sensitive to issues of racial equality and explores the different role that each theory suggests for both the constitutional principle of equality and the judicial branch. It also discusses the consequences each role may have on the *de facto* reality of the minority group. This discussion seeks to identify how to restore true equality in a society with an undisputed history of discrimination against a minority group.[8]

Following this theoretical discussion, Part II critically explores the legal and social consequences of the African-

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JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (rev. and expanded ed. 1976).

4. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).
5. *See* discussion *infra* Part II.
6. *See* discussion *infra* Parts II.B.2, II.C.
7. *See* discussion *infra* Parts II.B.2, II.C.
8. *See* discussion *infra* Part I.

American civil rights movement in the 1950s and 1960s. The discussion explores the emergence of the liberal individualist doctrine within the judiciary through analysis of landmark Supreme Court decisions, and subsequently demonstrates how this doctrine has become the prevailing judicial approach in addressing racial discrimination.[9] Throughout, Part II looks at the main critiques of scholars in response to Supreme Court doctrine and demonstrates how the individualist approach has been harmful to equal protection jurisprudence. Responding to both specific Supreme Court cases and general conceptions of race and equality, this article forms a compelling, opposing doctrine based on the transformative approach for inter-group equality.[10]

This article argues that the transformative approach is the only effective way for minority groups to overcome the established supremacy of the dominant group, achieving a just and fair society.[11] This is not only a *civil rights* discussion, but a *human rights* ideology. The article concludes that the transformative approach offers the only hope for the long journey to realizing true human dignity and freedom for all.[12]

I. A TALE OF TWO IDEOLOGIES

A. *Introduction*

Contemporary civil rights discourse in the United States has revealed a growing tension between the liberal individualist and transformative group-based theories[13] regarding how to best address racial discrimination and racism.[14] The liberal individualist approach views the task of

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9. *See infra* Part II; *see also* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 131-270 (4th ed. 2000).

10. *See* discussion *infra* Part II.

11. *See* discussion *infra* Part I.E.

12. *See* discussion *infra* Part II.D.

13. *See* Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 822 (1995) [hereinafter Lawrence, *The Jurisprudence of Transformation*].

14. Racial discrimination has been officially outlawed through U.S. Supreme Court rulings, culminating with *Brown* and its progeny, as well as through federal anti-discrimination statutes, such as the Civil Rights Act of 1964. For the purposes of this paper, "anti-discrimination law" refers mainly to federal constitutional law, as interpreted by the Supreme Court, defining the

anti-discrimination law as passive, formal, and non-substantive.[15] Its purpose is merely to outlaw race-conscious practices and neutralize their concrete effects.[16] The transformative group-based approach views anti-discrimination law as positive, transformative, and substantive.[17] Its purpose is to eradicate the subordinate conditions of the minority group.[18]

As a result, the two theories differ in the roles they prescribe to the judiciary. The individualist approach restricts the role of courts to merely eliminating particular, proscribed discriminatory actions.[19] The transformative approach, on the other hand, expands the role by seeking to enlist the institutional power of the judicial system to transform society.[20] In terms of rights, the former suggests that the constitutional demand for equality secures only a right to government neutrality with respect to race: it is the right to be free of government consciousness of race.[21] The later advocates a broader mandate for the project of equality

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constitutional liability of states and public bodies for racially discriminatory conduct, including what constitutes a violation and the scope of its remedy. The Supreme Court is the final arbiter of what the law is, and it is supreme in the exposition of the constitution. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

15. Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 822-25 & n.26; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1988); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053-54 (1978).

16. *See* Freeman, *supra* note 15, at 1053-54; Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 822-24.

17. *See* Crenshaw, *supra* note 15, at 1336, 1341; Freeman, *supra* note 15, at 1053; Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 766-67 (1994); Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 824-25.

18. *See* Freeman, *supra* note 15, at 1053; Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 824-25.

19. *See, e.g.*, Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 89-92 (1995); Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 746-47 (1974).

20. Crenshaw, *supra* note 15, at 1341. *See also* Peter Charles Hoffer, *"Blind to History": The Use of History in Affirmative Action Suits: Another Look at* City of Richmond v. J.A. Croson Co., 23 RUTGERS L.J. 271, 289-95 (1992); Charles R. Lawrence III, *Segregation "Misunderstood": The* Milliken *Decision Revisited*, 12 U.S.F.L.R. 15, 48-54 (1977) [hereinafter Lawrence, *Segregation Misunderstood*].

21. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10-11 (1966); McLaughlin v. Florida, 379 U.S. 184, 188-93 (1964); Strauder v. West Virginia, 100 U.S. 303, 305 (1879).

that suggests an anti-subordination principle, as opposed to a mere anti-discrimination principle.[22] Under this view, the right protected is a right to be free of the conditions of group subordination.[23]

"Each [theory] defines the injury of [racial discrimination] differently."[24] Individualists view the injury inflicted by racial discrimination and racism as suffered by an individual or a group of individuals.[25] In contrast, transformativists view the injury as having been suffered by society as a whole.[26] Only fundamental societal change may heal the injuries inflicted by the dominant group. Thus, while individualists target current individual harms, transformativists focus on remedying group-level injustices. The main contentious perspectives of those two ideologies will be discussed in the following three subsections.[27]

B. Liberal Individualist Theory

Liberal individualist theory advocates an ideology of formal egalitarian norms. It insists that Equal Protection rights created by the Constitution "'are, by its terms, guaranteed to the *individual*'" and are established as "'*personal rights*.'"[28] The theory reiterates that the Constitution commands equality by being "color-blind."[29]

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22. Crenshaw, *supra* note 15, at 1377; Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 150-51, (1976); Freeman, *supra* note 15, at 1052-53.

23. Fiss, *supra* note 22, at 150-51; Freeman, *supra* note 15, at 1053.

24. Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 825.

25. *Id.*

26. *Id.*

27. *See infra* Part I.B-D. Although this discourse has developed in the context of racial discrimination against African-Americans, I have tried to frame it carefully within a universal language of race-based discrimination exerted by a dominant majority against a disadvantaged minority.

28. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (emphasis added) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)) (striking down the Richmond affirmative action plan that required the city's prime contractors to subcontract at least thirty percent of their work to minority businesses); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (striking down a federal affirmative action program, emphasizing that the Fourteenth Amendment protects "*persons*, not *groups*").

29. The term "color-blind" was first explicitly used by Justice Harlan in his powerful dissent in *Plessy v. Ferguson*: "Our Constitution is color-blind and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). However, Professor Aleinikoff, among others, argues that Justice Harlan did not believe that racial

Hence, protecting the individual citizen is the paramount concern of equality.[30] Under this approach, legal recognition of group-based actions and identity politics undermine the democratic principle of equal citizenship, mandating that group affiliation be irrelevant to civic status.[31] Only this group neutrality, as the argument goes, recognizes the unique human individuality of a person and guarantees each citizen the freedom of self-definition and the human dignity of self-fulfillment.[32] Furthermore, judging a person based on group membership contradicts our humanness and inflicts injury on each person by ignoring her individuality.[33]

Naturally, the colorblind approach rejects race preference programs. It argues that all racial classifications are deeply suspect and, therefore, subject to the highest judicial review of "strict scrutiny,"[34] whether intended to prejudice or benefit the minority group.[35] This is so because racially classified

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classifications are unconstitutional as such, and that he viewed segregation as unconstitutional because it expressed white supremacy and African-American inferiority. T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in* Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 969 (1992).

30. *See Adarand Constructors*, 515 U.S. at 227; *Croson*, 488 U.S. at 493.

31. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 642-43 (1992); J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 997-98 (1995); *see generally* THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984).

32. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-91 (1977); Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

33. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 859 (1995) ("How can a group-based policy be reconciled with the strong tradition of liberal individualism in American political thought?").

34. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("All legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and should be subjected to "the most rigid scrutiny"). Strict scrutiny requires that the racial classification be narrowly tailored to serve a compelling public interest. *See* McLaughlin v. Florida, 379 U.S. 184, 188 (1964) (overturning a conviction that only criminalized conduct by an interracial couple, the Court stated such a racial classification "constitutionally suspect," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose); Loving v. Virginia, 388 U.S. 1 (1967) (Virginia statutory prohibition of interracial marriage is unconstitutional). Yet, facially neutral laws and policies that have a racially disparate impact must be proven to have been adopted with intent to discriminate racially before they elicit strict judicial scrutiny. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146-50 (1980).

35. *See Adarand Constructors*, 515 U.S. at 228. In striking down a federal affirmative action program, the Court stated that strict scrutiny should be

programs designed to benefit members of a minority constitute reverse discrimination against innocent members of the majority.[36] Further, the colorblind approach views societal discrimination as both "too amorphous"[37] and an "insufficient and overexpansive" basis for imposing affirmative action programs.[38] It is concerned that these programs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[39] Thus, preferential racial classifications may "promote notions of racial inferiority and lead to a politics of racial hostility."[40]

The individualist approach acknowledges at the same time that "genuine differences in ability," "private choices," and regular "economic forces" may perpetuate group disparities in society—but in an egalitarian system these

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applied whenever public bodies, at any level, employ race in their decision-making process. *Id.* at 228-29.

36. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-76 (1986) (invalidating a racially classified affirmative action plan imposed by the school's board because it interfered with the school's seniority system to the detriment of white workers). The Court described the plan as "discriminatory legal remedies that work against innocent people." *Id.* at 276. *But see* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993) (arguing that "[w]hites have come to expect and rely on [the privileges that accompany the status of being white], and over time these expectations have been affirmed, legitimated, and protected by the law"); Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 7-9 (1999) (arguing that racial equality cannot be achieved unless whites give up the advantages they hold over minorities).

37. *See* City of Richmond v. J.A. Croson Co, 488 U.S. 469, 497 (1989) (invalidating Richmond's affirmative action program in the construction industry despite Richmond's long history of discrimination against African Americans). Justice O'Connor described the historical discrimination against African Americans in the construction industry as an "amorphous" basis for imposing affirmative remedies designed to benefit minority-owned businesses. *Id.* at 499.

38. *Wygant*, 476 U.S. at 276 (noting that "societal discrimination is insufficient and overexpansive" as a basis for imposing affirmative action plan).

39. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1997) (plurality ruling that a university admission policy that set aside sixteen percent of its admissions seats for disadvantaged minorities violated the equal protection rights of non-minority applicants).

40. *Croson*, 488 U.S. at 493. *Accord* Brest & Oshige, *supra* note 33, at 858 ("Remedies based on race or ethnicity are in tension with the liberal ideals of our society, they may encourage divisive identity politics, and they may stigmatize and foster antagonism toward members of the groups they are intended to benefit.").

disparities have nothing to do with government actors.[41] Therefore, remedies based on a group impact approach would allocate benefits to individuals as group members, to which they would otherwise not be entitled under the Constitution.[42] Furthermore, benefits for individual minorities would come at the expense of "innocent people" who bear no responsibility for the existing imbalance in conditions.[43] Result-based remedies and race-conscious policies are, as further stressed by this view, political distortions of the law.[44] They have been deemed by some as "political apartheid."[45]

Moreover, individualist theory views race-conscious policies as a betrayal of the basic ideal of the civil rights movement: namely, that race is irrelevant to public policies.[46] It argues that *Brown v. Board of Education* stands for the principle that race is not "a relevant characteristic for public decisionmaking at all."[47]

C. *Transformative Group-Based Theory*

Transformative theorists[48] argue that the individualist

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41. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 250 n.2 (1991) (approving the lower court's finding that the racial imbalance in Oklahoma City was due to "private decision-making and economics").

42. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995) (striking down a federal affirmative action plan, the Court ruled that the plan might burden innocent non-minority businesses while at the same time benefiting minority businesses that might not have suffered from discrimination).

43. *See Wygant*, 476 U.S. at 276 (invalidating an affirmative action plan imposed by the school board because it works against "innocent people"); *see also Bakke*, 438 U.S. at 305; *see generally* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299-305 (1990).

44. SOWELL, *supra* note 31, at 119-20.

45. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) ("A . . . plan that includes . . . individuals who belong to the same race, but . . . who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."). *Shaw* struck down a reapportionment plan that defined a majority African-American district in North Carolina. *Id.*

46. SOWELL, *supra* note 31, at 109-10.

47. Wilkinson III, *supra* note 31, at 997-98 (1995). *But see* BELL, *supra* note 9, at 147 (arguing that "the central tenet of *Brown*, however, is not merely that race is an irrelevant variable in most cases of government decision making, rather it is that racial classifications, when used for the specific purpose of subordinating individual members of a particular racial category, run counter to the equal protection guaranteed in the Constitution.").

48. This discussion refers here mainly to the growing body of legal scholarship known as "Critical Race Theory," which emerged in the American

approach fails to foster meaningful racial equality largely because it misunderstands the social construction of race in society.[49] The individualist approach mistakenly addresses race as if it were a synonym for the way one looks.[50] Instead, race, according to the transformative view, "is much more than a fact of superficial physiology. It is, instead, one of the dominant characteristics that affects both the way the individual looks at the world and the way the world looks at the individual."[51] Race "carries with it a complex social meaning."[52] In a society founded on formal racial exclusion, race is constructed in a history and culture dominated by the

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legal academy in the late 1970s. "Critical Race Theory embraces a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole." *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter THE KEY WRITINGS]. For a discussion of historical, political and intellectual origins, see *id.* at xiii-xxxii, and MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1-15 (1993) [hereinafter WORDS THAT WOUND]. Critical Race Theory may be situated as a race-conscious intervention on the left of Critical Legal Studies. The latter is a predominantly white academic organization established in the late seventies as a left intervention against liberal legalist tradition that viewed law as an objective mediator of social conflict. THE KEY WRITINGS, *supra*, at xvii-xix. Critical Race Theory shares the Critical Legal Studies emphasis on how law, while perhaps producing apparent victories in the short run, functions to legitimize social oppression and is incompatible with a broader vision of social change. Yet it has developed as a distinct scholarship mainly through developing and incorporating a progressive critique of racial oppression into the Critical Legal Studies analysis. The term "Critical Race Theory" reflects the fact that this scholarship locates itself in the intersection of critical theory and race, racism, and the law. Critical Race Theory's oppositional vision of racial justice offered the alternative theoretical framework for the Supreme Court's departure from its earlier, relatively progressive decisions during the civil rights era toward a jurisprudence which not only condones, but rationalizes the current systems of racial oppression. For a discussion on the relationship between Critical Race Theory and Critical Legal Studies, see THE KEY WRITINGS, *supra*, at xvii-xxvii.

49. *See generally* Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 677-727 (1993).

50. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581, 585 (1970).

51. Wasserstrom, *supra* note 50, at 585-86. *See also* Harris, *supra* note 17, at 774 ("'Race' is real, and pervasive: our very perceptions of the world . . . are filtered through a screen of 'race.'").

52. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 18 (1991).

ideology of racial hierarchy.[53] Under this social construction, there are "whole, complete, entitled human beings"—the dominant majority group—and there are "others"—the excluded minority group—who are "fundamentally inferior [and] less completely human."[54] The deep-seated cultural definitions of race are so pervasive that they cannot be addressed today merely by prohibiting reference to them in law and public policy.[55]

Transformative theory suggests, then, an alternative way to think about racial equality: "This is to think of racial equality as a substantive societal condition rather than as an individual right."[56] It views the eradication of perpetual conditions of injustice and inequality as the paramount concern. Consequently, "the disestablishment of ideologies and systems of racial subordination" that produce these conditions is seen by the transformative approach "as indispensable and prerequisite to individual human dignity and equality."[57] In a society founded upon the maintenance of racial discrimination, "the primary and fundamental goal of a struggle for human dignity and equality must be the complete transformation of . . . society."[58] "The end of racial oppression requires fundamental societal transformation, not just adjustments within established hierarchies."[59]

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53. Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 836.
54. *Id.*
55. *Id.*
56. *Id.* at 824.
57. *Id.*
58. *Id.* at 825. Professor Lawrence states:

> Critical race theorists offer an alternative to the colorblind "just-don't-talk-about-it" approach to race and racism. We name it and talk about it; the more conversation the better. Rather than attempt to avoid demeaning constructions of race by acting as if they don't exist, we call for direct engagement with white supremacy in the battle over meanings that define us and our place in the world. We choose to be active combatants in the struggle over how to name and understand our lived experience.
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> . . .
>
> Giving names and meanings to our own lived experience is central to transformative politics . . . .

Id. at 838-39.

59. Charles Lawrence III, *Foreword: Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY xi, xviii (Francisco Valdes, Jerome M. Culp and Angela P. Harris eds., 2002). Eliminating racial oppression is viewed by Critical Race Theory as "part of the broader goal of ending all forms of

Transformative theory presumes that "racism has contributed to all contemporary manifestations of group advantage and disadvantage along racial lines, including differences in income, imprisonment, health, housing, education, political representation, and military service."[60] It presents "racism not as insolated instances of conscious bigoted decisionmaking or prejudiced practice, but as larger, systemic, structural, and cultural, as deeply psychologically and socially ingrained."[61] Race is "a political reality."[62] Thus understood, it becomes "a tool of resistance"[63] against the racially demeaning cultural meaning and social construction of both overt and covert racism.[64]

Consequently, transformative theory advocates a positive remedial approach to racial discrimination. Efforts to change the situation through identity politics, including affirmative action programs, are required to remedy the conditions of racial subordination.[65] Under this view, there can be no symmetry between racial classifications that foster the subordination of disadvantaged groups and those designed to remedy the effects of historical subordination.[66] Taking race into account for good and important reasons is compatible with the constitutional mandate of equality.[67] Accordingly, the task of anti-discrimination law is to carry out this societal transformation.

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oppression." *See* WORDS THAT WOUND, *supra* note 48, at 6.

60. WORDS THAT WOUND, *supra* note 48, at 6.

61. WORDS THAT WOUND, *supra* note 48, at 5.

62. Hayman & Levit, *supra* note 49, at 721.

63. Harris, *supra* note 17, at 774.

64. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-381 (1987) [hereinafter Lawrence III, *Reckoning with Unconscious Racism*] (thoroughly explaining the ways unconscious racism operates to demean and subordinate African Americans).

65. For a thoughtful discussion of affirmative action, see generally CHARLES LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

66. BELL, *supra* note 9, at 145-47.

67. *See* T. Alexander Aleinikoff, *First Class*, *in* OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 30 (Joshua Cohen & Joel Rogers eds., 1999) [hereinafter A COMMUNITY OF EQUALS] (arguing that a group-based approach offers an explanation as to why racial classification policies, such as affirmative action programs to enhance subordinated groups, ought to be judged by different constitutional standards than racial classification policies that prejudice subordinated groups).

D. Conflicting Aspects of Individualist and Transformative Approaches

1. Unconscious Racism v. Intentional Discrimination

Central to the individualist approach is the concept of explicit intent.[68] Under this concept, decisions and practices of racial discrimination are only those adopted with the race-conscious intent to discriminate.[69] Such intent might be inferred either from a direct reference to race, facial classification,[70] or from a showing of a discriminatory purpose that underlies facially neutral actions.[71] Accordingly, facially neutral decisions and practices that happen to burden minorities disproportionately are not deemed to be racially discriminatory unless proven to have originated with a conscious objective of adversely affecting a particular racial group.[72] Strict judicial review is warranted only when such intentional discrimination is established,[73] regardless of whether the classifications are designed to harm minorities or benefit them.[74]

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68. *See* BELL, *supra* note 9, at 137.

69. Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)); Washington v. Davis, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

70. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (Virginia statute prevented marriage between persons based only on racial classifications); McLaughlin v. Florida, 379 U.S. 184, 188 (1964) (Florida statute treated "the interracial couple made up of a white person and a Negro differently than it does any other couple").

71. *See, e.g.*, *Hunter*, 471 U.S. at 223 (invalidating a provision in the Alabama Constitution that was racially neutral on its face because it was proved that it was enacted with the purpose of discriminating against African Americans).

72. *Davis*, 426 U.S. at 239.

73. *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269-70 (1977) (the Court found no constitutional liability under the equal protection clause because the petitioners failed to prove that the zoning decision was consciously undertaken with the purpose of excluding African Americans).

74. As Justice Scalia put it, "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring)). He continued, "[U]nder our Constitution there can be no such thing as either a creditor or debtor race." *Id.* (Scalia, J., concurring).

Proponents of the transformative approach respond that requiring explicit intent is not only ineffective in changing the real-life inequalities suffered by minorities, but in fact perpetuates these inequalities.[75] They explain that overt racial bias in present society is rare because it is no longer socially acceptable,[76] but the racist social messages remain. The myths and stereotypes that produced overt, racist manifestations continue to play a dominant role in society, although in subtle and sometimes unconscious ways.[77]

The racist myths and stereotypes have been internalized by society and continue to interfere with thoughts, ideas, and beliefs.[78] As a result, while decisions and practices might be undertaken without clear race-conscious intent, they are nonetheless influenced and directed by these myths and stereotypes.[79] This culturally ingrained, unconscious racism hurts minorities today no less than conscious racial discrimination and, therefore, must also be legally recognized.[80]

Instead of relying exclusively on the intent principle, transformative theorists explore the broader social construction of facially neutral decisions and practices that have a disproportionate adverse effect on minorities.[81] They

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75. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993) (arguing that "retaining the intent requirement in the face of its demonstrated failure to effectuate substantive racial justice is indicative of a complacency concerning, or even a commitment to, the racial status quo that can only be enjoyed by those who are its beneficiaries—by white people").

76. *See* Eduardo Bonilla-Silva, *The New Racism: Racial Structure in the United States, 1960s–1990s*, *in* RACE, ETHNICITY, AND NATIONALITY IN THE UNITED STATES: TOWARD THE TWENTY-FIRST CENTURY 55, 60 (Paul Wong ed., 1999).

77. Unconscious racism and subtler forms of race-consciousness are the focus of Professor Lawrence's seminal work *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, *supra* note 64. Professor Lawrence thoroughly explains how unconscious racial motivation influences a large part of the behavior that produces racial discrimination. *Id.* at 328-44.

78. *Id.* at 339-44.

79. *See* Flagg, *supra* note 75, at 957 (arguing that unconscious race-specific decision-making in the American society is so common that it is, in fact, the norm for white decision-makers).

80. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 355 (arguing that the "equal protection doctrine must address the unconscious racism that underlies much of the racially disproportionate impact of governmental policy").

81. BELL, *supra* note 9, at 137-44.

argue that unconscious racism underlies many of these practices and policies,[82] and should therefore also be subject, at the very least, to strict judicial review whenever they carry demeaning cultural meanings for minorities.[83]

2. Material Subordination v. Symbolic Subordination

Because the individualist approach requires proof of explicit intent, its goal might be seen as merely the eradication of "symbolic subordination" suffered by minorities, namely, the formal denial of social and political equality to all members of the minority group regardless of their accomplishments.[84] Such subordination reinforces a group hierarchical ideology that minority members are inferior to the majority and are therefore excluded from the vision of society as a "community of equals."[85] Formal racial classifications operate as symbols that demean and stigmatize the individual in the eyes of society by judging him in accordance with the inferior status of his group, instead of in accordance with his individuality.[86] The legal task under

82. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 355.

83. *Id.* at 355-56 (arguing that instead of relying exclusively on the intent of the government decision-makers in applying judicial strict scrutiny, all facially neutral laws and practices that carry racially demeaning cultural meanings should be subject to strict scrutiny). One author argues for a "group anti-subjugation" approach for the Equal Protection Clause. Fiss, *supra* note 22, at 150. This approach sees the correction of group disadvantages as the central theme of judicial intervention under equal protection. *Id.* Because the harm to the disadvantaged group is done on a group basis, group-based remedies are required. *Id.* Disadvantaged racial or ethnic groups, according to this theory, have group rights to distributive and compensatory justice. *Id.*

84. Crenshaw, *supra* note 15, at 1377.

85. *Id.*

86. *See* Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976). "Racial stigma" is often cited as the principal substantive harm against which the Equal Protection Clause is directed. Lawrence, *supra* note 64, at 349-50. Under this racial stigma theory, the chief objective of judicial strict scrutiny is to target governmental actions that operate to "degrade a class of persons by labeling it as inferior." *Id.* at 350 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361-62 (1978) (Brennan, J., concurring in part and dissenting in part)). The label of inferiority generated by formal subordination demeans the personal wealth of the individual and degrades him in the eyes of the society, establishing a societal barrier that excludes him from the society's benefits and opportunities. *Id.* Early expression of this theory might be found in Justice Strong's opinion in *Strauder v. West Virginia*, 100 U.S. 303 (1880), in which he struck down a West Virginia statute that excluded African Americans from serving on a jury. Writing for the Court, Justice Strong explained that the equal protection clause protects

the individualist view is to remove the formal barriers and symbolic manifestations of subordination, such as "White Only" signs, and to achieve a system of neutral norms and formal inclusion.[87]

In contrast, the transformative approach focuses on the lasting "material subordination" suffered by the minority, not just on the symbolic one.[88] Material subordination refers to the ways in which discrimination and exclusion economically subordinate minority groups to the majority.[89] Eradication of symbolic subordination is a decidedly progressive moment in the political and social life of minority groups, but it should not be the end of the story. It must be a starting point toward transforming real-life conditions and eliminating socioeconomic subordination.[90]

3. Victim Perspective v. Perpetrator Perspective

The transformative view approaches the concept of racial discrimination from the "victim perspective."[91] From the

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African Americans "from legal discriminations, implying inferiority in civil society," and that excluding African Americans from juries was "an assertion of their inferiority." *Id.* at 308. Similarly, in his powerful sole dissent in *Plessy v. Ferguson*, Justice Harlan noted that segregation in public accommodation proceeded "on the ground that colored citizens are . . . inferior and degraded." Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting). *Brown*'s unanimous decision might also be seen as based on targeting this stigma by invalidating segregated public schools that, in Chief Justice Warren's language, "generate[] a feeling of inferiority" as to the status of African Americans in the community. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Professor Lawrence argues that racial stigma theory focuses on the harm racial classification poses to the individual. Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 824 n.23.

87. Crenshaw, *supra* note 15, at 1378. *See also* McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

88. Crenshaw, *supra* note 15, at 1377. *See also* Hayman & Levit, *supra* note 49, at 677-86 (discussing disparities in economic status, health, and educational opportunities between America's white and black citizens).

89. Crenshaw, *supra* note 15, at 1377 ("This subordination occurs when Blacks are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for Blacks that is five to six years shorter than for whites.").

90. For a profound treatment of the socioeconomic stratification of African Americans, see Hayman, & Levit, *supra* note 49, at 677-709.

91. *See* Freeman, *supra* note 15, at 1052-53 (demonstrating how the concept of racial discrimination may be approached from the perspective of either its victim or its perpetrators, and arguing that the U.S. Supreme Court has largely

victim's perspective,[92] "racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass."[93] The victim's perspective "includes both the objective conditions of life—lack of jobs, lack of money, or housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual."[94] This perspective suggests that the problem of racial discrimination "will not be solved until the conditions associated with it have been eliminated."[95]

Conversely, the individualist view approaches racial discrimination from the "perpetrator perspective."[96] This perspective "sees the racial discrimination not as conditions but as actions, or series of actions, inflicted on the victim by the perpetrator."[97] It focuses more "on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class."[98] Consequently, proponents of the individualist theory argue that the problem of racial discrimination would be solved by neutralizing the bad acts of the perpetrator.[99]

Two integral parts to the perpetrator perspective are the

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remained within the perpetrator perspective).

92. *Id.* at 1052. Freeman explains that in the context of racial discrimination "victim" means:

> a current member of the group that was historically victimized by actual perpetrators or a class of perpetrators. Victims are people who continue to experience life as a member of that group and continue to experience conditions that are actually or are ostensibly tied to the historical experience of actual oppression or victimization, whether or not individual perpetrators, or their specific successors in interest, can be identified now. The victim perspective is intended to describe the expectations of an actual human being who is a current member of the historical victim class—expectations created by an official change of moral stance toward members of the victim group. Those expectations . . . include changes in condition.

Id. at 1053 n.16.

93. *Id.* at 1052.

94. *Id.* at 1052-53.

95. *Id.* at 1053. "Among such conditions might be that one race seems to have a hugely disproportionate share of the worst houses, the most demeaning jobs, and the least control over societal resources." *Id.* at 1075.

96. *Id.* at 1052.

97. Freeman, *supra* note 15, at 1053.

98. *Id.*

99. Brest, *supra* note 86, at 49-52.

principles of "fault" and "causation."[100] The "fault" principle attributes exclusively the origin of the racial discrimination to a blameworthy individual perpetrator who takes action with a purpose to discriminate.[101] Under this principle, racial equality will be achieved merely by separating "from the masses of society those blameworthy individuals who are violating the otherwise shared norm."[102] The idea of "fault" draws the line between "those blameworthy individuals" and the "innocent" masses "who need not feel any personal responsibility for the conditions associated with discrimination."[103]

Under the "causation" principle, conditions of racial discrimination are merely those particular conditions "produced by and mechanically linked to the behavior of an identified blameworthy perpetrator."[104] This principle distinguishes between "those discriminatory conditions" and other resulting conditions that are "mere accidents, or caused, if at all, by the behavior of ancestral demons whose responsibility cannot follow their successors in interest over time."[105]

Transformativists, on the other hand, focus more on the "overall life situation of the victim class" than on what "particular perpetrators have done or are doing to some victims."[106] They argue that transforming the conditions of the victim class is the responsibility of the entire society and "will make us all more fully human."[107]

4. *Equality as a Result v. Equality as a Process*

The differences between the perpetrator and victim perspectives represent how individualists and

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100. Freeman, *supra* note 15, at 1054.

101. *Id.*

102. *Id.* at 1054-55.

103. *See id.* at 1054. For a critique of this notion, see Robert T. Hayman, *Recognizing Inequality: Rebellion, Redemption and the Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. C.R.-C.L. L. REV. 9, 56-57 (1991).

104. Freeman, *supra* note 15, at 1056.

105. *Id. See also* Milliken v. Bradley, 418 U.S. 717, 745 (1974) ("[I]t must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial cause* of interdistrict segregation." (emphasis added)). For a critique of "causation," see Hayman, *supra* note 103, at 34 n.91.

106. Freeman, *supra* note 15, at 1053.

107. Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 846.

transformativists view the legal mandate of equality: the former promotes equality as a process and the latter promotes equality as a result.[108] The view of equality as a process advocates a neutral governmental decision-making process that is divorced of any group-based classification.[109] The view of equality as a result argues that equality and human dignity cannot be realized without a comprehensive transformation of the real-life experiences and conditions of disadvantaged minority groups.[110]

5. Structural Inequality v. Meritocracy

The individualist approach maintains that the current plight of minority groups in a "colorblind" society is the result of merit-based competition in a free market.[111] It asserts that society is a meritocracy, and the fact that minorities live typically in a lower socio-economic rung is justified by the natural shape of social and economic forces.[112] Under this theory, minority conditions are "matters of fate" that have nothing to do with racial bias.[113] Furthermore, societal disparities might be attributable to the genetic inferiority of racial minorities or a "culture of poverty."[114]

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108. *See* BELL, *supra* note 9, at 136.

109. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509-10 (1989) (O'Connor, J., dissenting) (suggesting race-neutral alternatives to Richmond's race-based affirmative action plan). For a critique of Justice O'Connor's suggestion, see BELL, *supra* note 9, at 152-54.

110. *See* Fiss, *supra* note 22, at 150-51; *see also* Owen Fiss, *The Immigrant as Pariah*, *in* A COMMUNITY OF EQUALS, *supra* note 67, at 12 (arguing that the constitutional demand for equality "prohibits not only discrimination, but also . . . [the creation of] socially and economically disadvantaged groups that are forced to live at the margin of society").

111. *See Croson*, 488 U.S. at 501-02 (noting that for purposes of demonstrating discriminatory exclusion "where special qualifications are necessary," the relevant statistics must be "the number of minorities qualified to undertake the particular task").

112. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 250 n.2 (1991) (noting that the racial imbalance in the Oklahoma City school system was due to "private decision-making and economics").

113. *See* Freeman, *supra* note 15, at 1054.

114. *See* SOWELL, *supra* note 31, at 42-47; Crenshaw, *supra* note 15, at 1379 (arguing in this context that the "rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority"). *Cf.* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269-315 (1994) (arguing that educational disparities between African Americans and

In a colorblind society, societal disparities that correlate with race are grounded on the individual's insufficient merit and qualifications.[115] Moreover, a group-based approach does not account for genuine differences in ability[116] and contradicts the traditional American ideal of self-reliance.

In contrast, transformativists assert that current disparities and social practices are the result of historically oppressive, formal practices and that the colorblind approach disregards this history of discrimination.[117] They stress that the individualist approach incorrectly "presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity."[118] They further criticize the individualist approach for declaring racial classifications irrelevant and, at the same time, blocking any affirmative steps toward realizing real-life conditions where race is truly irrelevant.[119] The transformative approach therefore advocates that the material plight of minority members be viewed in the context of their historical exclusion.[120]

European Americans reflect genetically and environmentally influenced differences in cognitive ability).

115. In *Croson*, the majority opinion suggests that huge racial disparities in business contracts might have been the result of natural factors such as a preference by minorities for jobs in lower-paying industries. *Croson*, 488 U.S. at 503.

116. *See* SOWELL, *supra* note 31, at 37-48.

117. *See* Hayman & Levit, *supra* note 49, at 721 ("In rejecting . . . the social constructions of race . . . the Court proffers a view that is contradicted by history, inconsistent with the empirical data, refuted by virtually every social science and natural science theorist, and embarrassed by the experience of every American.").

118. Freeman, *supra* note 15, at 1054. *See also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1087 (1991) ("White racism has made 'blackness' a relevant category in our society. Yet colorblindness seeks to deny the continued social significance of the category, to tell blacks that they are no different from whites, even though blacks as blacks are persistently made to feel that difference.").

119. *See* Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 343 (1986) ("To shift from a system of group discrimination to a system of individual performance is to perpetuate the effects of past discrimination into the present and future.").

120. *See* Hoffer, *supra* note 20, at 289-95 (critiquing the *Croson* majority's failure to recognize the historical discrimination suffered by African Americans in Richmond).

6. Legitimization and Rationalization

Transformativists argue that the individualist approach does not rightly address the goal of equality, but actually creates myths that justify the status quo of inequality and legitimizes current conditions of subordination.[121] They stress that the individualist theory creates an illusion that racism and negative stereotypes associated with minority groups are no longer the primary factor responsible for the condition of the minority.[122] In fact, majority supremacist norms do not disappear in colorblind systems; they only "submerge[] in popular consciousness" and persist in unspoken form as an objective standard for excellence.[123] The meanings and consequences of this norm are determined exclusively by those who have the power to do so.[124] Thus, the majority norm serves to legitimatize the continuing domination of those who "fail" to meet it.[125]

Transformativists assert that individualist theory provides an ideological framework that makes the current conditions facing disadvantaged groups appear fair and reasonable.[126] This rationalization makes it difficult for the majority to recognize adverse effects on minorities as illegitimate or avoidable. This rationalizes whatever degree of economic and social distance may have been attained at the expense of the minority.[127]

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121. *See* Gotanda, *supra* note 52, at 53-63 (arguing that a colorblind constitutionalism serves to legitimate, and thereby perpetuate, the social, economic, and political privileges that whites have been holding over minorities in America).

122. *Id.* at 18-19.

123. Crenshaw, *supra* note 15, at 1379.

124. Indeed, the transformative approach seeks to gain equal access for disadvantaged minorities to the "power of the intelligentsia to construct knowledge, social meaning, ideology, and definitions" of these norms. *See* WORDS THAT WOUND, *supra* note 48, at 14.

125. *See* Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 369-79 (critiquing the civil service exam employed for hiring purposes in *Washington v. Davis*).

126. This is done by appropriating the traditional conception of law as rational, objective, neutral, and determinate. Once the conditions are declared by law as legal and legitimate, they are officially declared as divorced from politics, the latter traditionally seen as subjective, discretionary, and open-ended. *See* SOWELL, *supra* note 31, at 119-20; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984) (critiquing formal legal rights discourse).

127. Crenshaw, *supra* note 15, at 1380-81; Jack M. Balkin & Reva B. Siegel,

7. Denial and Blaming the Victim

The transformative view contends that the cost of viewing racial discrimination narrowly goes far beyond the legal debate. The individualist approach "helps spread the epidemic of denial" by seizing the liberal rhetoric of individuality and colorblindness.[128] It further "enables those in power to blame the victim while assuring themselves and each other that they are free from any fault."[129]

Individualist rhetoric serves both to rationalize the self-interested practices of the majority group and to make these practices appear credible to minority groups.[130] Accordingly, if minority members are being treated "equally," yet they remain at the bottom of the socio-economic ladder, then they can blame no one but themselves for their situation.[131] In turn, this rationalization produces a negative psychological impact reflected in self-blame and other self-destructive attitudes on the part of minority members who have not made it within a supposed system of "equal opportunity."[132]

8. Collectivity and Organization

Transformativists further argue that the individualist approach undermines the collectivity among the minority group and is politically damaging.[133] The mere eradication of formal barriers creates new life opportunities only for

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The American Civil Rights Tradition: Anticlassification or AntiSubordination?, 58 U. MIAMI L. REV. 9 (2003) (demonstrating how the colorblind approach has functioned to rationalize social stratification).

128. Lawrence, *The Jurisprudence of Transformation*, *supra* note 13, at 837; Gotanda, *supra* note 52, at 16-24.

129. Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1396 (1991) (reviewing ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990)).

130. *See* Mark Tushnet, *supra* note 126, at 1363-64 (critiquing the role of legal rights discourse in rationalizing an oppressive and unjust societal order, and arguing that legal rights discourse impedes advances by progressive social forces as people's ideas and thoughts for progress become trapped within the narrow ideological framework of the law at the expense of pursuing real demands and objectives); *see generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998).

131. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 325.

132. Crenshaw, *supra* note 15, at 1383.

133. *Id.* at 1383 n.197 (referring to "collectivity" as "the recognition of common interests and the benefits derived by Blacks of all classes in sharing the burdens of social struggle," and stressing that "[t]he potential for collective struggle is maximized where the grievance is shared by all").

selected members of the minority group that are not shared by the majority of other members.[134] This process creates social and economic distance among the various classes within the group and, consequently, may impede communal efforts to unite behind issues.[135] This intra-group distancing may create doubt among some members of the group—mainly those who have benefited the most from the formal inclusion—as to "whether there is enough similarity between their life experiences and those of other [minority members] to warrant collective political action."[136] In other words, the semblance of neutral norms obscures and diffuses the targets of the minority group and thus may undermine efforts to organize collectively.

E. Part I Conclusion

As the above critique shows, transformative group-based ideology provides a more compelling remedy than the individualist colorblind doctrine. It does so by requiring a constant effort to achieve racially balanced educational, social, economic, and political systems. The transformative approach views past formal inequality as the basis for its broader understanding of equality. Namely, that the past continues to have pernicious effects on society today and, without eradicating these effects, no meaningful equality can be achieved. A comprehensive remedial power should be invoked to address the real-life conditions of inequality experienced by minority members. Race conscious policies, including wide-ranging affirmative action programs, are integral to this remedy, leading toward real societal transformation.

II. AFRICAN AMERICANS: BETWEEN FORMAL EQUALITY AND SUBSTANTIVE EQUALITY

A. Introduction

This part demonstrates that the U.S. Supreme Court has embraced, on the doctrinal level, the strict individualist approach when addressing equal protection cases to the

134. *Id.* at 1383.
135. *Id.* at 1384.
136. *Id.*

detriment of the struggle for social change by African Americans.[137] On a practical level, this has resulted in a wide socio-economic gap between African Americans and European Americans. Over half a century after *Brown v. Board of Education*, African Americans are still disproportionately represented at the bottom of the American socio-economic ladder.

As the following illustrates, it is a matter of deep frustration, to say the least, that the passionate critiques of transformative theorists were not adopted and reinforced. Indeed, when it became clear that meaningful integration after *Brown* could not be achieved without curtailing European Americans privileges, the road to true inclusion was blocked. It is precisely at this stage that race-conscious policies, indispensable to achieving substantive equality, were attacked under the pretext that group-based policies contradict the traditional American values of liberalism, individualism, and merit.

Roughly a century and a half ago during the Reconstruction era (1865–1872), the principle of equality was introduced into American judicial discourse as a constitutional principle.[138] Along with the abolition of slavery through the Thirteenth Amendment[139] and the Fifteenth Amendment's guarantee of the elective franchise,[140] the Fourteenth Amendment provides in relevant part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[141] The constitutional principle of equal protection was one of the greatest legacies of Reconstruction. Its underlying promise was to make African Americans full and equal citizens after centuries of slavery.[142]

Yet, the hope of the Fourteenth Amendment was

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137. This approach was significantly supported, if not dictated, by conservative constitutional scholars as well as by politicians and policy makers. BELL, *supra* note 9, at 133-36.

138. *See generally* CELESTE M. CONDIT & JOHN L. LUCAITES, CRAFTING EQUALITY, AMERICA'S ANGLO-AFRICAN WORD (1993) (studying and critiquing the meaning of the word "equality" in American public discourse).

139. U.S. CONST. amend. XIII.

140. U.S. CONST. amend. XV.

141. U.S. CONST. amend. XIV.

142. KENNETH L. KARST, BELONGING TO AMERICA 51-56 (1989). *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (Russell & Russell 1963) (1935).

contradicted by the harsh regime of the Jim Crow laws—racial segregation laws governing the relationship between blacks and whites in the post–Reconstruction era.[143] Authorized by federal and state governments, racial segregation and discrimination prevailed in public schools, libraries, public accommodations, workplaces, parks, drinking fountains, restrooms, cemeteries, and elsewhere.[144] Segregation excluded blacks from the national mainstream on the ground that they were so inferior that they could not be allowed to associate with whites.[145]

In *Plessy v. Ferguson*,[146] the Supreme Court sanctioned this policy of racial segregation.[147] It reasoned that while public accommodations were separate, they were constitutionally equal.[148] In establishing the "separate but equal" doctrine, the Court stated that segregation reflected the "established usages, customs and traditions of the people."[149] Hence, African Americans were legally excludable from mainstream American society in all areas of public life. This was realized through sub-standard public accommodations, educational institutions, employment options, and housing opportunities.[150] Segregation was not meaningless racial separation, but rather an implied racial

143. KARST, *supra* note 142, at 64-69. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2d rev. ed. 1966).

144. *See generally* FRANKLIN & MOSS, *supra* note 2. For example, Tennessee's 1901 law prohibiting co-education of the white and colored races is one example of a Jim Crow law in education. H.B. 7, 1901 Leg., ch. 7 (Tenn. 1901). Section 1 of the Act provided that "it shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, college or other place of learning." *Id.* § 1. Offenders of this act were subject to fines and imprisonment up to six months. *Id.* § 3.

145. Lawrence, *Segregation Misunderstood*, *supra* note 20, at 23-26.

146. Plessy v. Ferguson, 163 U.S. 537 (1896) (Homer Plessy, being "seven eighths Caucasian and one eighth African blood," was prohibited from boarding a Louisiana railway car reserved by law for white travelers).

147. The Court rejected the idea that a legal racial distinction "stamps the colored race with a badge of inferiority." *Id.* at 551-52.

148. The Court upheld a Louisiana law requiring public places to serve African Americans in separate, but ostensibly equal, accommodations. *Id.*

149. *Id.* at 550-51.

150. *Id.* (stating that there is no constitutional remedy if "one race be inferior to the other socially"). *See also* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 108-13 (1996) (discussing more broadly the notion of racial inferiority and the majority decision in *Plessy*).

hierarchy establishing African Americans as inferior to whites.[151]

Out of the harsh Jim Crow reality of politically and judicially sanctioned exclusion emerged America's civil rights protests in the 1950s and 1960s.[152] Using nonviolent tactics, organized masses of civil rights activists directly confronted and effectively disrupted the normal functioning of institutions responsible for their subjugation.[153] The mass protests were entwined with pivotal legal battles to advance the cause of equal rights and opportunities.[154] While the former were fought in the streets, the latter were fought in the courts.

B. State Actions that Harm

1. Brown v. Board of Education

Challenging the separate-but-equal doctrine of *Plessy v. Ferguson* was at the center of African-American legal efforts. Attacks initially focused on the equality part of the separate-but-equal doctrine, acknowledging that neither white America nor the judiciary were prepared for immediate direct

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151. Lawrence, *Segregation Misunderstood*, *supra* note 20, at 25 ("The institution of segregation and the injury it inflicts on blacks are necessarily misunderstood until one recognizes that its chief purpose is to define, not to separate.").

152. It is beyond the scope of this project to provide detailed accounts of all the struggles of America's civil rights movement. For a detailed description of key events in this struggle, see generally, e.g., CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (3d ed. 1981); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984); HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 1954-1992 (rev. ed. 1993); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965 (1987).

153. BELL, *supra* note 9, at 653-718. *See generally* JOHN J. ANSHBRO, MARTIN LUTHER KING, JR.—NONVIOLENT STRATEGIES AND TACTICS FOR SOCIAL CHANGE 231-265 (1982).

154. *See* ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION—CASES AND PERSPECTIVES 48-68 (2d ed. 2000). The legal struggle was led chiefly by the National Association for the Advancement of Colored People (NAACP), which was founded in the beginning of the 1900s. The NAACP became the most dominant organization in the legal struggle against segregation, mainly by pursuing legal challenges and litigation in the courts. *See generally* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950 (1987) (discussing the NAACP legal approach to combat educational segregation).

attacks on the doctrine itself.[155] Successful challenges addressed situations in which segregated educational facilities were not equal or where there was no education at all available for African Americans.[156] These legal attacks on segregation initially focused on higher education, including law schools. The NAACP litigated and won a series of crucial Supreme Court cases, gradually paving the way for a direct attack on the separate-but-equal doctrine.[157]

The NAACP's efforts culminated in the unanimous *Brown v. Board of Education* decision by the Supreme Court.[158] *Brown* declared school segregation to be an unconstitutional violation of the Equal Protection Clause of the Fourteen Amendment because it was "inherently unequal."[159] Separation of the races, the Court reasoned, "generates a feeling of inferiority" as to the African-Americans' status in the community "that may affect their

155. BELL, *supra* note 9, at 443-46.

156. The initial focus was to force an equalization of public school expenditures, as there was documented substantial racial inequality in per-pupil expenditures, school conditions, and teacher salaries, mainly throughout the south. *See, e.g.*, Alston v. Sch. Bd., 112 F.2d 992, 997 (4th Cir. 1940) (holding that African-American teachers were illegally paid less than white teachers for the same public services).

157. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938) (holding that the state discriminated against African Americans by not offering them an in-state opportunity for legal education, and ordering the admission of an African-American student to the state's all-white law school). *Gaines* was the NAACP's first major federal victory in an education case and it was the beginning of the NAACP's efforts to chip away at the separate-but-equal doctrine. BROOKS ET AL., *supra* note 154, at 50. *See also* Sipuel v. Bd. of Regents, 332 U.S. 631, 632-33 (1948) (reaffirming *Gaines* and holding that the State must offer the plaintiff an equal legal education); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 640-42 (1950) (holding that an African-American doctoral candidate was denied equal protection as African-American students were required to sit, eat, and study in segregated areas within the school); Sweatt v. Painter, 339 U.S. 629, 634 (1950) (holding that a hastily established law school for African Americans was unequal in physical facilities and "reputation of the faculty" and ordering the plaintiff admitted to the University of Texas Law School). These victories made the separate-but-equal doctrine a hugely expensive arrangement because it was almost impossible financially to provide true equality in both tangible and intangible aspects. BROOKS ET AL., *supra* note 154, at 65-68. As a result, economic pressure was added to the moral failure of the separate-but-equal doctrine. For further discussion of the graduate school cases, see JACK GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 49-89 (1977).

158. Brown v. Bd. of Educ. (*Brown I*), 347 US 483 (1954).

159. *Id.* at 495.

hearts and minds in a way unlikely ever to be undone."[160] Rejecting *Plessy*'s social inferiority premise, *Brown* sparked mass legal and popular efforts to dismantle segregation in education,[161] and other areas of public life.[162]

A decade later, *Brown*'s ruling was translated into federal civil rights legislation prohibiting discrimination in education, employment, housing, and public accommodations. The enactment of the Civil Rights Act of 1964[163] marked one of the most remarkable legal accomplishments of its era. The Civil Rights Act was passed in an effort to deal with racial discrimination and hostile societal attitudes toward African Americans that continued to infect American society.[164] For

160. *Id.* at 494. For a leftist critique of *Brown*'s sole focus upon the effects of school segregation, see Lawrence, *Segregation Misunderstood*, *supra* note 20, at 43 ("Instead of taking judicial cognizance of the fact that the manifest purpose of segregation was to designate blacks as inferior and noting that such a purpose was constitutionally impermissible, the Court chose to focus upon the effect of school segregation."). For a controversial critique of the *Brown* decision, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), in which Wechsler argues that *Brown* lacked a basis in neutral principles because it ignores the constitutional liberties of whites to choose their associations. He explains that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant." *Id.* at 34. According to his analysis, the legal issue in legally sanctioned segregation was not one of discrimination at all. *Id.* Assuming facilities were equal, he explains, the legal issue was "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." *Id.* For a critique of Wechsler's argument, see Charles Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425-26 (1960) (concluding that racial equality was the correct principle to underlay the *Brown* ruling and that the Equal Protection Clause of the Fourteenth Amendment clearly bars racial segregation that harms African Americans and benefits whites).

161. *See generally* BELL, *supra* note 9, at 215-17; Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

162. The Court relied on *Brown* to decide a number of desegregation rulings. *See, e.g.*, Schiro v. Bynum, 375 U.S. 395 (1964) (city auditoria); New Orleans City Park Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (city golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

163. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (2000)).

164. For a discussion about *Brown*'s contribution to the Civil Rights Movement and the enactment of the Civil Rights Act of 1964, see generally KLUGER, *supra* note 3, at 582-747; Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613 (2004); Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693 (2004); Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173 (1994).

the second time in less than a century, federal legislation promised equality for African Americans.

The following discussion focuses on the legal developments in the field of education, which parallel developments in other areas of civil rights law.[165] The discussion traces judicial doctrinal developments in the aftermath of *Brown* and critically discusses the practical implementation of the equality principle. Specifically, these developments will be analyzed through the lens of the transformative and individualist approaches.[166]

a. Brown*'s Promise*

The constitutional mandate for equality embodied in the Equal Protection Clause of the Fourteenth Amendment provides the legal framework for dealing with the issue of equal educational opportunity.[167] Neither the Constitution nor federal statutes provide an explicit fundamental right to education.[168] Yet, the Equal Protection Clause mandates that if a state provides public education, which is the case in all states, it must do so indiscriminately. Additionally, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in federally funded educational programs.[169]

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165. After all, achieving equal educational opportunities has been a top priority of the Civil Rights Movement since its inception. *See* PETER EDELMAN, SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE 207 (2001) ("No institution is more important to help children acquire the tools they need to escape poverty and do their best in life than the public schools."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1476 (2d ed. 1988) (arguing that the purpose of integration is to guarantee equal education opportunities for African-American students).

166. *See supra* Part I (discussing the transformative and individualist approaches).

167. The Equal Protection Clause of the Fourteenth Amendment governs discrimination by the states. Discrimination by the federal government falls under the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) (construing the Fifth Amendment's Due Process Clause to incorporate the Fourteenth Amendment's equal protection guarantee and applying it to the federal government).

168. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding that education is not a fundamental right). The *Rodriguez* decision dealt with cases where the state financing system created "only relative differences in spending levels" and therefore did not directly address the question whether access to a minimally adequate education is a fundamental right. BELL, *supra* note 9, at 216 n.10 (quoting *Rodriguez*, 411 U.S. at 36).

169. 42 U.S.C. § 2000d (2000). Title IX of the Education Amendments of

Contemporary legal efforts toward equal education focus extensively on the issue of racial integration.[170] The *Brown* Court ordered desegregation to occur "with all deliberate speed."[171] More than a decade later, as defiance by many school authorities continued, the requirement of "all deliberate speed" turned into a mandate of "now." The Court in *Green v. County School Board of New Kent County*[172] made it clear that the "burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[173] Segregated school systems were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[174] Thus, an immediate remedial action was judicially mandated to combat racial segregation.[175]

1972 adopts a similar prohibition for discrimination on the basis of gender. *See* 20 U.S.C. § 1681.

170. BROOKS ET AL., *supra* note 154, at 90-203.

171. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). There was a second *Brown* case because the Court did not address the remedy issue in the initial decision. Brown v. Bd. of Educ. (*Brown I*), 347 US 483 (1954). Explaining its reluctance to order an immediate remedy, as it usually does when finding illegal practices, the Court stated that time was required to deal with "complexities arising from the transition to a system of public education freed from racial discrimination. . . . But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, 349 U.S. at 300-01. By ordering desegregation to occur with "all deliberate speed," as opposed to the immediate relief requested by the petitioners, the Court seems to have sanctioned, if not encouraged, delay in desegregation efforts. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 366 (1990); LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT AND THE NEGRO 351 (1966) (writing that while the first *Brown* ruling was "a great decision," the second was "a great mistake"). *But see* Bickel, *supra* note 161, at 196 (arguing that the Court's "all deliberate speed" is a defensible approach).

172. Green v. County Sch. Bd., 391 U.S. 430 (1968).

173. *Id.* at 436. *See also* Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964) ("The time for mere 'deliberate speed' has run out . . . .").

174. *Green*, 391 U.S. at 437-39 (stating that the court "should retain jurisdiction until it is clear that state-imposed segregation has been completely removed").

175. Essentially this is an "affirmative duty" to desegregate that illustrates the idea that school boards after *Brown* are under a continuing duty to act that is not eliminated merely because no complaints were filed. *Green*, 391 U.S. at 437-38; Lawrence, *Segregation Misunderstood*, *supra* note 20, at 37. Apparently, *Green*'s requirement for affirmative disestablishment has never

In *Swann v. Charlotte-Mecklenburg Board of Education*,[176] the Court held that district courts have broad equitable authority to rectify a finding of an intentionally segregated public school system, including the re-assignment of students, alteration of school attendance zones, and school-busing, all based on race-specific considerations.[177] In *Keyes v. School District No. 1, Denver, Colorado*,[178] the Court considered the lawfulness of school segregation in Denver. Unlike *Brown*, which addressed school systems that were *de jure* segregated by law, *Keyes* addressed a segregated school system that was never mandated by law. It ruled that "a

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been truly met by states. BELL, *supra* note 9, at 209-212. However, in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the Court disapproved a lower court order requiring annual readjustments of school boundary lines to ensure that no school had a majority of minority pupils, thus limiting the power of federal courts to require continual readjustments of district lines to attain unitary, racially balanced status. *Id.* at 424. According to *Spangler*, re-segregation might occur as a result of demographic patterns despite prior compliance with desegregation orders. *Id.* at 427. It seems that after *Spangler*, the affirmative duty doctrine applies only to those school systems that maintained statutorily mandated segregation, such as those in the *Brown* cases. *See* discussion *infra* Part II.B.2. For a critique of *Spangler*, see Freeman, *supra* note 15, at 1111 (asserting that "[*Spangler*] marks the full restoration of the perpetrator perspective in school desegregation cases"). *See also* Lawrence, *Segregarion Misunderstood*, *supra* note 20, at 48-50.

176. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

177. *Id.* at 22-32. The use of such judicial authority has come to be known as "Swann remedies." BROOKS ET AL., *supra* note 154, at 170. In the aftermath of *Swann*, a hostile Congress enacted legislation purporting to curb transportation of students as a remedy for achieving desegregation by prohibiting the allocation of federal funds for the use of such student busing. The Education Amendments of 1972, 20 U.S.C. §§ 1651-56 (2000). Furthermore, § 1652 prohibited federal agencies from requiring states to use funds to achieve racial balance unless constitutionally required. *Id.* § 1652. However, the Court interpreted this legislation as not applicable to endeavors to rectify legally mandated, *de jure* discrimination. *See, e.g.*, Drummond v. Acree, 409 U.S. 1228 (1972); Austin Indep. Sch. Dist. v. United States, 429 U.S. 990 (1976). School busing is a major element in achieving a degree of desegregation that is unreachable through other means. Busing, in particular, drew a great deal of white resentment along with intense attacks on the Court for allegedly encouraging white families to flee to the suburbs to avoid the reach of busing, resulting in increased segregation in urban schools. BELL, *supra* note 9, 177-185. It was the Court's unwillingness to include the suburbs in multi-district desegregation plans that fed re-segregation by excluding these white suburbs from judicial desegregation decrees. *See* discussion *infra* Part II.B.2.b; LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 277-281 (1976) (critiquing busing); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1621-24 (1990) (critiquing anti-busing arguments).

178. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious."[179] As the Court stated, "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are subject to those actions."[180]

2. *Narrowing* Brown's *Promise*

a. *Intent Requirement*

While *Swann* and *Keyes* reaffirmed *Brown*'s ruling that racial segregation subordinated African Americans in violation of their equal protection rights, these cases focused the Court's attention toward the distinction between the intent of government actions and the effects of those actions. Ultimately, the Court narrowed the reach of the anti-segregation mandate. It read *Brown* to prohibit only *de jure*, or intentional, either by law or policy, segregation, not *de facto* segregation, which arises from a combination of social factors not seen as directly resulting from intentional school segregation.[181] This jurisprudential shift marked the Court's preference for the individualist ideology, embracing the narrow perpetrator perspective for discrimination.

According to *Swann* and *Keyes*, the desegregation mandate extends only to "racial discrimination through official action."[182] Plaintiffs would have to "prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional state action."[183] This type of analysis has prevailed at the expense of the broader promise of eradicating existing conditions of segregation, as envisioned by the transformative ideology.[184] The purpose of applying the constitutionally mandated remedy was thus

179. *Id.* at 208.

180. *Id.* at 203.

181. *Keyes*, in particular, set the distinction between *de jure* and *de facto* segregation, as the Court emphasized that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208.

182. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

183. *Keyes*, 413 U.S. at 198.

184. *See* Hayman & Levit, *supra* note 49, at 638-45.

undermined and the vision of *Brown* narrowed.[185]

Hence, in *Milliken v. Bradley*,[186] the Court limited its judicial remedy to school districts where *de jure* segregation was established.[187] Even a finding of the state's, as opposed to the district's, constitutional violation in this regard was insufficient for the purposes of a broad inter-district remedy.[188] As a result, conditions of *de facto* segregation, which arise in the absence of official race-specific classifications, escaped judicial scrutiny. On the practical level, this meant that full integration of school systems by consolidating predominantly African-American inner-city schools with those of predominantly white-surrounding suburbs was blocked.[189] *Milliken* marked a clear departure from the promised results of earlier cases by limiting the breadth of desegregation remedies.[190]

Similarly, in *Missouri v. Jenkins*,[191] the Court invalidated a district court order that attempted to draw white students from outside the district into the segregated city schools in order to improve the quality of education within the school

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185. *See id.* Throughout this process, the Court itself changed and the unanimous *Brown* Court became sharply divided, as between 1969 and 1992, nine appointments were made by Republican presidents and none by Democratic presidents. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 466 (4th ed. 2001).

186. Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974).

187. In a five-to-four decision, it held that a constitutional violation by one school district is not sufficient justification for the imposition of a cross-district remedy. *Id.* at 744. The majority opined that the controlling principle in this context is that the "scope of the remedy is determined by the nature and extent of the constitutional violation." *Id.*

188. *Id.* at 727-48.

189. Lawrence, *Segregation Misunderstood*, *supra* note 20, at 15 (writing that the multi-district remedy "was the last hope for the meaningful integration of schools in a nation whose urban-suburb demography was becoming increasingly segregated").

190. On appeal from the *Milliken I* remand, the Court in *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267 (1977), approved a desegregation remedy that went beyond race-based pupil reassignment. The plan required broad educational reforms, including programs to eliminate the effects of past discrimination, counseling, and career guidance program for students. *Id.* at 274-277. These programs were part of an effort "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 280 (quoting *Milliken I*, 433 U.S. at 746). However, the judicial remedies advocated in *Milliken II* were substantially restricted by *Missouri v. Jenkins* (*Jenkins II*), 515 U.S. 70 (1995).

191. Missouri v. Jenkins (*Jenkins II*), 515 U.S. 70 (1995).

district.[192] Such an inter-district goal, according to the Court, exceeded the district court's remedial authority because it was beyond the scope of the *intra-district* violation found by the district court.[193]

Thus understood, *Milliken* and *Jenkins* clearly embrace the individualist ideology. In doing so, the Court condoned single-race schools, and the large qualitative disparities associated with them.[194] The following discussion will show the Court's strict adherence to the individualist ideology through the full adoption of the "fault" and "causation" principles embodied in the perpetrator perspective. As discussed in Part I, this perspective was adopted at the expense of a broader racial justice vision that considers the overall life conditions of the minority group.[195] In the end, embracing the individualist ideology reveals the Court's tolerance for inequalities suffered by African Americans not just in education, but in social and political areas as well.[196]

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192. *Id.* at 74.

193. The Court concluded that the order was "simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation." *Id.* at 100. Justice O'Connor opined that substantial segregation is being perpetuated by the "white exodus" from the inner cites, but such "natural, if unfortunate, demographic forces" are beyond the reach of the Equal Protection Clause. *Id.* at 111-12 (O'Connor, J., concurring) ("The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation."). Similarly, Justice Thomas admonished lower courts not to "confuse the consequences of *de jure* segregation with the results of larger social forces or of private decisions." *Id.* at 115 (Thomas, J., concurring). Compare Justice Ginsburg's separate dissenting opinion, emphasizing the historical perspective of the case: "Given the deep, inglorious history of segregation in Missouri, to curtail desegregation at this time and in this manner is an action at once too swift and too soon." *Id.* at 176 (Ginsburg, J., dissenting).

194. In his dissenting opinion in *Milliken*, Justice Marshall wrote:

> Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and the extent of the constitutional violation, the Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.

Milliken I, 433 U.S. at 782 (Marshall, J., dissenting).

195. Freeman, *supra* note 15, at 1053.

196. *See generally* Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996).

b. Brown *in the Educational Context Today*

The Court's stance in *Milliken* and *Jenkins* raises a few key questions. Was *Brown* limited to *de jure* segregation—either by laws or by intentional state actions? Or was it supposed to be extended to any segregated schools? Are these *de facto*, single-race schools really a result of neutral social forces that, in turn, bear no constitutional accountability?

Undoubtedly *Brown*'s statement that "separate educational facilities are inherently unequal" can be interpreted to prohibit segregated education, regardless of the sources of the segregation.[197] Civil rights activists have long argued that no distinction should be made between *de jure* and *de facto* segregation and that a court should order relief based on the harmfulness of racial segregation, regardless of any fault on the part of school districts.[198] In his compelling critique of *Milliken* and its progeny, Professor Charles Lawrence suggests that the *Brown* holding

> makes most sense if it is understood as a recognition of the fact that racial segregation by definition is an invidious labeling device and therefore must violate the Equal Protection Clause. . . . The institution of segregation and the injury it inflicts on blacks are necessarily misunderstood until one recognizes that its chief purpose is to define, not to separate.[199]

Three major points are crucial to this recognition:[200]

> First, the injury inflicted upon black children by segregation is one of pejorative classification. This injury occurs by virtue of the existence of the system or

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197. *See* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 78 (1976); *see also* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 280-82 (1991) (arguing that the Warren Court would likely have dismissed the distinction between *de jure* and *de facto* segregation); *see generally* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (a thorough treatment of the *Brown*'s meaning).

198. BELL, *supra* note 9, at 175 n.15.

199. Lawrence, *Segregation Misunderstood*, *supra* note 20, at 24-25. Accordingly, Lawrence points to the failure of the Court in *Brown* to articulate clearly the fact that "the manifest purpose of segregation was to designate blacks as inferior" and that "such a purpose was constitutionally impermissible." *Id.* at 43. Instead, "the Court chose to focus upon the effect of school segregation." *Id.*

200. *Id.* at 45-46.

> institution of segregation rather than particular segregating acts. Second, the Equal Protection Clause of the Fourteenth Amendment is violated by significant state involvement in the creation or maintenance of the sociopolitical system of segregation, and the constitutional rights of black children are violated whenever the state acts to perpetuate that system. This is true without regard to whether the purpose or direct result of the act is the segregation of schools themselves, and such a constitutional violation may not be limited in scope by the boundaries of a school district or other subdivision of the state. Third, the affirmative duty to disestablish segregation, as set forth in *Green v. County School Board*, must apply to all states that have played a predominant role in its establishment, regardless of their geographic location or the date upon which statutes mandating segregation were removed from their books.[201]

Indeed, in a society with an undisputed history of racial subordination, the line between *de jure* and *de facto* segregation might simply be an illusion. When race interferes with the way people conduct their affairs, including choosing their homes and neighborhoods, the distinction between segregation resulting from official state actions and segregation arising from social conditions is misleading because those social conditions are also racially driven.[202] In fact, as transformativists have argued, *de facto* school segregation has been the result of past and present active state action at one level or another.[203]

For example, segregated housing resulted largely from active government involvement in mortgage practices, the location of public housing, and zoning regulation.[204] This has

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201. *Id.* (footnotes omitted).

202. Hayman & Levit, *supra* note 49, at 679-81 ("Decades of government-sponsored housing discrimination have significantly shaped patterns of residential segregation. Contrary to the notion that racial segregation occurs because of 'natural' migration patterns, ample evidence demonstrates the connection between government actions and private behavior. The lingering effects of Jim Crow laws, coupled with current real estate policies and practices, government housing starts, and lending and zoning practices, have isolated black Americans in the inner cities and poorer suburbs." (footnotes omitted)).

203. *See generally* IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY (John A. Powell, Gavin Kearney, & Vina Kay eds., 2001) (demonstrating how race is implicated in one way or another in all government actions and policies).

204. *See* Lawrence, *Segregation Misunderstood*, *supra* note 20, at 38-40

been coupled with white families moving from the poor inner-cities to the affluent suburbs.[205] The fact that the Court has left these residential patterns out of its constitutional remedies has created a cycle of racial re-segregation: poor African-American inner-cities and affluent white suburbs.[206] This result vindicates the transformativist assertion that individualist theory operates to rationalize and perpetuate societal inequalities. Under a theoretical transformative approach, including white suburbs in multi-district desegregation would have paved the way for multi-system integration and, at the same time, removed the attraction of the suburbs for white families who seek to avoid compelled integration.

School segregation and housing segregation are intertwined, and allowing one fosters the other.[207] Adoption of the individualist approach has limited *Brown*'s desegregation mandate to intentional segregative government actions. This limitation overlooks the racial history of American society and falls short of redressing its devastating impact. By condoning current conditions of actual segregation, the *Milliken* doctrine ensured a self-perpetuating system of racial stigmatization.[208] The *Milliken* doctrine might be seen, then, as the most disastrous decision for race relations in America since *Plessy*. Since *Milliken*, there has

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205. This "white flight" has created all-African-American schools in the inner-cities and relatively integrated schools in the suburbs. BELL, *supra* note 9, at 175-76; STONE ET AL., *supra* note 185, at 465-471. Needless to say, segregation in inner-cities has been coupled with blatant poverty. *See* Peter Edelman, *The Welfare Debate: Getting Past the Bumper Stickers*, 27 HARV. J.L. & PUB. POL'Y 93, 96 (2003) ("Between 1970 and 1990 the number of urban poor people living in census tracts with more than forty percent poverty nearly doubled and approximately half of those living in such circumstances were African-American."); EDELMAN, *supra* note 165, at 207; *see also* RACE, POVERTY, AND AMERICAN CITIES (John Charles & Judith Wegner eds., 1996).

206. BELL, *supra* note 9, at 185 ("White suburbs have been insulated from real integration and urban centers have been denied it."); Lawrence, *Segregation Misunderstood*, *supra* note 20, at 15-16 ("The *Milliken* decision assured middle-class whites that their mass exodus to the suburbs to seek refuge from blacks had not been made in vain since the Supreme Court also made clear that they would not use school desegregation to invade the suburban fortress of housing for whites only.").

207. *See* Paul Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585, 661 (1983) (discussing the interrelationship between housing segregation and education segregation).

208. BELL, *supra* note 9, at 184-85; Hayman & Levit, *supra* note 49, at 644-45.

been no significant improvement in the desegregation of American schools.[209] Instead, the Court has backed away from the fight for integration, resulting in a perpetual racial hierarchy in the education system, where schools are still separate and still unequal.[210] In the beginning of the 1990s, "more black children attend[ed] racially isolated schools than at any time since the early 1970s."[211]

Affirming its adherence to the individualist approach embraced in *Milliken*, the Court has further overturned efforts by lower courts to block re-segregation through intra-district remedies. In *Austin Independent School District v. United States*,[212] the Supreme Court invalidated a court order mandating large-scale student busing within the school district.[213] Similarly, in *Dayton Board of Education v. Brinkman*,[214] the Court vacated an order requiring integration in the entire school system.[215] The Court has additionally curtailed efforts to block re-segregation through continuous federal court supervision. This was the case in *Pasadena City Board of Education v. Spangler*,[216] *Board of Education v. Dowell*,[217] and *Freeman v. Pitts*.[218]

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209. *See* BELL, *supra* note 9, at 182-92.

210. *See* Hayman & Levit, *supra* note 49, at 709-20.

211. Julius L. Chambers, *Black Americans and the Court: Has the Clock Been turned Back Permanently?*, *in* THE STATE OF BLACK AMERICA 9, 19 (Nat'l Urban League ed., 1990).

212. Austin Indep. Sch. Dist. v. United States, 429 U.S. 990 (1976).

213. *Id.* at 995.

214. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

215. *Id.* at 424. Moreover, these cases further established "a presumption of innocence in favor of the defendant school district," deemphasizing the presumption in *Keyes* that once intentional segregation is proven in a substantial portion of the school district, the burden shifts to the school district to prove that segregation not intentional. Lawrence, *Segregation Misunderstood*, *supra* note 20, at 50-51. This retreat from *Keyes* placed the full burden of proof on the plaintiffs, undermining a plaintiff's chances of obtaining meaningful relief. *See id.*

216. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (invalidating an order requiring annual reassignment of pupils to maintain unitary status, i.e., racial balance, so that no school had a majority of minority pupils).

217. Bd. of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991) (holding that a federal district court should terminate its supervisory jurisdiction where the school board "had complied in good faith with the desegregation decree" and where "the vestige of past discrimination had been eliminated to the extent practicable"). Rejecting the majority formalistic interpretation of *Brown*, Justice Marshall wrote in dissent that "a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I*

Taken together, these cases leave a great deal of *de facto* re-segregation intact, regardless of the historic and contemporary context of the segregation.[219] Based on the individualist ideology's indifference to these results, cases continue the trend of weakening desegregation jurisprudence by solidifying the formalistic distinction between *de jure* and *de facto* segregation. Requiring proof that current conditions of segregation are a result of intentional government actions has proved to be a formidable burden that plaintiffs have been unable to shoulder.[220]

The willingness of the Court in *Spangler*, *Dowell*, and *Freeman* to tolerate existing conditions of segregation departs significantly from *Brown*'s legacy that inequality is inherent in racial segregation and that this inequality must be redressed.[221] The ultimate consequence is to perpetuate this inequality and the perception of inferiority. To redress this injury, a transformative ideology is required, an ideology that is sensitive to group-based social experiences, result-oriented, and committed to societal transformation.

In the shadow of increasing *de facto* re-segregation and funding disparities, many concerned civil rights advocates have shifted their focus to the quality of education, even at

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persist and there remain feasible methods of eliminating such conditions." *Id.* at 252 (Marshall, J., dissenting).

218. Freeman v. Pitts, 503 U.S. 467, 490 (1992) (holding that "federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations").

219. Hayman & Levit, *supra* note 49, at 647. According to *Spangler*, the re-segregation was a result of "quite normal pattern of human migration." *Spangler*, 427 U.S. at 436. The Court overlooked the fact that much of the racial composition of residential patterns has been driven by racist white flight from blacks. *See* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 28 (1989) ("[*Spangler*] illustrates the profound ways in which judicial power has helped to shape the legal and social landscape so that a white parent who wants to *resist* desegregation feels not a gravitational pull to accept racial integration as inevitable, but instead a pull to follow her worst instincts and flee.").

220. BELL, *supra* note 9, at 137-44. STONE ET AL., *supra* note 185, at 464-474.

221. Justice Marshall's dissent in *Freeman* rightly reminds the Court that conditions of racial separation "remain inherently unequal." Hayman & Levit, *supra* note 49, at 727 (quoting *Freeman*, 503 U.S. at 648 (Marshall, J., dissenting)). *See also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

the expense of racially balanced schools.[222] Civil rights advocates remain torn between their integration ideals and the purely educational interests of African-American children. It appears that W.E.B. Du Bois's insights are being realized almost seven decades after he stated:

> [T]here is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.[223]

Dr. Du Bois's words appear to have predicted the current situation. More importantly, they suggest the solutions to the problem: a meaningful, transformative integration that guarantees true multicultural and multi-racial integration. Only such an approach can lead to true equal education by guaranteeing group-level equality and integration.

In sum, the Court has adopted the narrow individualist approach by reading the Equal Protection Clause to ban only intentional, state-sanctioned segregation. Under this approach, proving a racially discriminatory purpose on the part of the government actor is indispensable to establishing a claim for a constitutional violation. This approach has

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222. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470, 471-72 (1976) (arguing that "traditional racial balance remedies are becoming increasingly difficult to achieve or maintain" and that "racial balance may not be the relief actually desired by the victims of segregated schools"); *see also* Amy Stuart Wells et al., *The Space Between School Desegregation Court Orders and Outcomes: The Struggle to Challenge White Privilege*, 90 VA. L. REV. 1721, 1722 (2004) ("The *Brown* decision was a historic ruling, clearly one of the most significant Supreme Court decisions of the twentieth century. Still, despite the optimism that this case fostered fifty years ago, school desegregation failed as a public policy. Thus, today, we need to find alternative means of fulfilling the promise of *Brown* within more racially separate schools.").

223. W.E.B. DU BOIS, *Does the Negro Need Separate Schools?*, *in* W.E.B. DU BOIS: A READER 278, 288 (Meyer Weinberg ed., 1970).

turned *Brown*'s promise into an "empty victory," and has failed to cure the lasting, pervasive effects of segregation and the Jim Crow regime.[224]

However, this Supreme Court doctrine of intentional discrimination was not limited solely to education. The following discussion will demonstrate that the Court's retreat from desegregation in the educational context was part of a broader reluctance to respond positively to civil rights challenges under the Equal Protection Clause.

c. Brown *Today in Other Areas*

The Supreme Court's requirement of proof of intentional discrimination to warrant the remedy of desegregation is part of a broader constitutional doctrine of discriminatory purpose. Absent discriminatory intent, there is no constitutional violation and, subsequently, no legal remedy. Only upon a finding of intentional racial discrimination will the challenged governmental actions be subject to the most rigid judicial review—strict, and usually fatal, scrutiny.[225] According to the strict scrutiny standard, the action is only permitted when the government is able to show that it was necessary to achieve a "compelling state interest" that could not be achieved by other, less drastic means.[226] The action should therefore be narrowly tailored toward accomplishing a compelling end.[227]

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224. Flagg, *supra* note 75, at 969 (discussing the failure of the intent requirement to effectuate substantive racial justice in America).

225. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."). *See generally* STONE ET AL., *supra* note 185, at 474-684 (discussing the Supreme Court's "suspect classification" methodology).

226. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (overturning a conviction that only criminalized conduct by an interracial couple, calling such a racial classification "constitutionally suspect" and "'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose" (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

227. John Ely argues that the requirement of the strict scrutiny test meant to screen out those acts in which the government actor's intention was to deprive a group on the basis of race or another unconstitutional motive. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980). A classification that in fact was unconstitutionally motivated will face serious constitutional difficulty and is unlikely to survive the "special scrutiny." *Id.*

A corollary to the intent requirement is that a facially neutral action that is occasioned with a disproportionate burden on a racial group does not *per se* violate the Constitution unless the action is intended to produce the race-based result. This doctrine was clearly articulated in *Washington v. Davis*[228] where the Court approved the use of a qualifying test administered to applicants for police officer positions in Washington, D.C.[229] A showing that a disproportionate percentage of African Americans failed the test was insufficient to establish a prima facie case for a constitutional violation because no discriminatory intent was proved.[230] Under *Davis*'s intentional discrimination doctrine, racially discriminatory effects of a facially neutral action are not *per se* unconstitutional and are not, therefore, subject to strict scrutiny.[231]

The *Davis* Court adhered to the individualist approach to equality. In establishing and maintaining the intent requirement and rejecting a result-based standard, the Court emphasized several rationales that reflect an individualist reading of the Equal Protection Clause. These include the views that: result-oriented standards are based on race-conscious considerations that are incompatible with the individualist rights covered by the Equal Protection Clause; a result-based standard would grant benefits to individuals based on their group affiliation to which they are otherwise not entitled as an individual under the Equal Protection Clause; and benefiting these individuals would inevitably

228. Washington v. Davis, 426 U.S. 229 (1976).

229. *Id.* at 232.

230. *Davis* rejected *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970), a case of employment discrimination decided under Title VII of the Civil Rights Act of 1964. A unanimous Court required a justification for facially neutral practices that produced racially disproportionate results. *Id.* at 436. *Griggs* altered the concept of intent by focusing on consequences, ruling that if an employment practice that operates to exclude African Americans cannot be shown to be related to "job performance," the practice is prohibited. *Id.* This ruling demonstrated for the first time that the Act proscribes not only "overt discrimination," but also "practices that are fair in form, but discriminatory in operation." *Id.* at 431. Although the decision was decided under Title VII, its rationale and logic in emphasizing results was broad enough to be applicable beyond Title VII. Freeman, *supra* note 15, at 1096-1097. *Davis* not only eliminated all extra-Title VII implications of *Griggs*, but further lowered the level of scrutiny thought to be required under *Griggs* in comparable anti-discrimination cases. *Id.* at 1114-1118.

231. *Davis*, 426 U.S. at 239-40.

mean unfairly harming other innocent people who bear no responsibility for the existing conditions.[232]

As was the case in the segregation context, *Davis*'s focus on the government actor's purpose overlooks history, real-life experiences, and social and political realities. *Davis* fails to recognize that many of the current conditions are the lingering result of past, intentional discrimination. The poor performance of African Americans in the test employed in *Davis* is a function of the historically deficient educational system African Americans endured under Jim Crow and continue to endure today.[233]

On a substantive level, African Americans have suffered from the continued existence of disparate racial and economic conditions and an ongoing hostile social and political climate of exclusion. These inequalities produce painful injuries, regardless of motive. The intent requirement ultimately serves to legitimize these injuries.[234] On a practical level, *Davis* underestimates the difficulty in uncovering hidden discriminatory intent.[235] It places an almost impossible burden on the petitioners to prove invidious intent on the part of a public actor.[236] As a result, *Davis*'s doctrine severely curtails the cases in which courts will recognize racial discrimination, leaving many African Americans with no legal remedy.[237]

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232. *Id.* at 245-46.

233. *See* Charles R. Lawrence III, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 849 n.69 (1983) (reviewing DAVID L. KIRP, JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION (1982)) (noting that African Americans' poor performance on standardized employment tests could be directly traced to the history of formal racial discrimination suffered by them); *see also* Harris, *supra* note 36, at 1713. *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

234. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 111 (1997) (arguing that by condoning facially neutral actions the Court may be legitimizing and thereby maintaining practices that perpetuate historic forms of racial subordination); Delgado, *supra* note 129, at 1396.

235. *See* Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 50 (1987) (arguing that "the modern forms of prejudice frequently remain invisible even to its perpetrators"); *see also* Flagg, *supra* note 75, at 957.

236. BELL, *supra* note 9, at 137-44; Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 369-76; Crenshaw, *supra* note 15, at 1379-81.

237. Similar strict adherence to the concept of intent as a prerequisite for constitutional violation has been evidenced in many other areas of life,

By adopting the individualist process-based view of equality in *Davis*,[238] the Court has limited its role to addressing solely official-symbolic subordination while condoning conditions of substantive material subordination.[239] This indifference to the real-life conditions of African Americans clearly demonstrates that the Court approaches racial discrimination exclusively from the narrow perpetrator perspective rather than the broad victim perspective.[240] The unfortunate result is that

> [T]he actual conditions of racial powerlessness, poverty, and unemployment can be regarded as no more than conditions—not as racial discrimination. Those conditions can then be rationalized by treating them as historical accidents or products of a malevolent fate, or, even worse, by blaming the victims as inadequate to function in the good society.[241]

In his seminal work, *The Id, the Ego, and the Equal Protection Clause: Reckoning with Unconscious Racism*, Professor Lawrence suggests an alternative manner of addressing anti-discrimination cases.[242] He emphasizes that individualist intention-based constitutionalism, which denies consideration for disparate impact cases, is to a large extent ineffective in dealing with the true discriminatory conditions experienced daily by African Americans.[243] African Americans and the nation at large would be better off if the Court would accept as proof of racial discrimination evidence regarding the historical, cultural, and social context in which the decision was delivered.[244] Such evidence might reveal an actual manifestation of racial bias, even if unconscious, on the

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including housing, *see, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), and criminal justice, *see, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

238. *See* discussion *supra* Part I.D.4 (discussing Equality as a Result v. Equality as a Process).

239. *See* discussion *supra* Part I.D.2 (discussing Material Subordination v. Symbolic Subordination).

240. *See* discussion *supra* Part I.D.3 (discussing Victim Perspective v. Perpetrator Perspective).

241. Freeman, *supra* note 15, at 1103. *See also* Flagg, *supra* note 75, at 969.

242. *See generally* Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64.

243. *Id.* at 323.

244. *Id.* at 355-56.

part of the public actor.[245] If these decisions persist without being legally recognized, they will continue to contribute to the real life conditions of racial inequality by rationalizing and nurturing these conditions.[246] Public actors, in turn, will continue to abdicate any responsibility for the consequences of their decisions, convinced that they exercise their authority with impartiality.[247]

Lawrence argues that the key concept in the Court's theory—that "facially neutral actions [are] either intentionally and unconstitutionally or unintentionally and constitutionally discriminatory"—is a false dichotomy.[248] This is because "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation"[249] and this unconscious racism should also be uncovered.[250] Therefore, he emphasizes that the "equal protection doctrine must address the unconscious racism that underlies much of the racially disproportionate impact of governmental policy."[251]

Lawrence emphasizes that racism is a part of the common American historical experience and, therefore, a part of American culture.[252] Founded on racial subordination, this culture has produced cultural symbols that have racial meaning.[253] Because governmental actors are themselves a part of this culture, their decisions might be influenced by racist beliefs, even if they are not consciously aware of these beliefs.[254] Therefore, he proposes a standard that

> would look to the 'cultural meaning' of an allegedly racially discriminatory act as the best available analogue

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245. *Id.*

246. *Id.* at 325, 387.

247. *Id.* at 349.

248. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 322, 328-44 (discussing evidence of unconscious racism).

249. *Id.* at 322.

250. *Id.* at 349 ("Where a society has recently adopted a moral ethic that repudiates racial disadvantaging for its own sake, governmental decisionmakers are as likely to repress their racial motives as they are to lie to courts or to attempt after-the-fact rationalizations of classifications that are not racial on their face but that do have disproportionate racial impact.").

251. *Id.* at 355; Flagg, *supra* note 75, at 957.

252. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 322-23.

253. *See id.* at 324.

254. *Id.*

> for and evidence of the collective unconscious that we cannot observe directly. This test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by the preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.[255]

Lawrence's suggestions might be understood as a compromise between the Court's strict individualist view of exclusive reliance on intentional discrimination and the opposing view that would completely abandon such a requirement by recognizing all government actions with discriminatory effects.[256] This is done by identifying those cases where race unconsciously influences governmental action, while leaving intact decisions that disproportionately burden African Americans only because they are over-represented or underrepresented among the targets or beneficiaries of the action such as sales taxes, bridge tolls, fees for obtaining a driver's license, or the cost of a building permit.[257]

Lawrence's suggestion is squarely on point. Otherwise, too many state actions that harm African Americans are left untouched by the Court's individualist approach, only to

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255. *Id.* at 355-56.

256. *See id.* at 324; *see also* Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 275 (1983) (arguing that some racially disproportionate effects of governmental action ought to be subjected to heightened judicial scrutiny, and citing the persistent disproportionate presence of African Americans among the poor as the main difficulty for adopting increased scrutiny in all racially disparate impact cases).

257. These cases are pointed out by the *Davis* Court as examples of the overreach of the disparate impact doctrine. Washington v. Davis, 426 U.S. 229, 248 n.14 (1976). Because American culture does not think of the impact of these fees in racial terms, it is unlikely that unconscious racial attitudes influenced the decision-maker in setting policy. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 364-65.

become part of the system that reinforces racial inequalities and denies African Americans "the status of full humanity."[258]

C. State Action That Benefits: Invalidating Affirmative Action Programs

The transformative, race-based, result-oriented approach rejected by the Court in *Davis* was African Americans' best hope for transforming their plight in American society. Instead, the intentional discrimination requirement has served to legitimize discrimination.[259] The other hope for African-American advancement was the implementation of comprehensive affirmative action programs, as these programs could compensate for past systematic discrimination.[260] The *Davis* doctrine meant that the State is not under a legal obligation to take race into account to guarantee a racially balanced result.[261] But would race-specific considerations be constitutional if the government pursues them to the benefit of African Americans?[262] In providing a negative answer, the Court fully adhered to the individualist ideology, extinguishing the hopes of African Americans to transform their socioeconomic conditions and achieve genuine group-level equality.[263]

To briefly recap, the Court adopted a wholesale prohibition of racial classification, embodied in a *per se* rule of color-blindness.[264] Under this approach, the Constitution is fully colorblind and every intentionally race-based classification will be strictly scrutinized by the court and usually invalidated. According to this symmetrical view, no distinction will be made between benign, race-based actions designed to benefit African Americans and invidious, race-based actions meant to disadvantage African Americans.[265]

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258. Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 369.

259. *Id.* at 383-84.

260. *See generally* STONE ET AL., *supra* note 185, at 553-95.

261. *See* Lawrence, *Reckoning with Unconscious Racism*, *supra* note 64, at 319.

262. STONE ET AL., *supra* note 185, at 553.

263. *See id.* at 553-95; discussion *supra* Part I.D.4.

264. BELL, *supra* note 9, at 134-36. *See generally* STONE ET AL., *supra* note 185, at 553 (considering the Court's treatment of race-specific classifications that benefit minorities).

265. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("[U]nder our Constitution there can be no such thing as

The leading cases in which the Supreme Court applied strict scrutiny to strike down affirmative action programs are *City of Richmond v. J.A. Croson Co.*[266] and *Adarand Constructors, Inc. v. Pena.*[267] Each of the challenged programs was designed to enhance economic opportunities for minority-owned businesses and redress the effects of past discrimination in the construction industry. Similarly, in the context of university admissions, the Court in *Bakke* struck down a race-based admissions policy designed to increase the number of disadvantaged minority students and to

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either a creditor or a debtor race."); BELL, *supra* note 9, at 145; Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223-24 (1991) (critiquing affirmative action programs from the left and arguing that the system bases inclusion of racial minorities on principles "of social utility, not reparations or *rights*"). Delgado further notes that:

> [A]ffirmative action serves as a homeostatic device, assuring that only a small number of . . . people of color are hired or promoted. Not too many, for that would be terrifying, nor too few, for that would be destabilizing. Just the right small number, generally those of us who need it least, are moved ahead.

Id. at 1224.

266. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Croson*, the Court stuck down a set-aside program adopted by the City of Richmond, requiring prime contractors on city projects to subcontract at least 30% of the dollar amount of the contract to minority business enterprises. *Id.* In adopting the plan, the city relied inter alia on a study which indicated that, while African Americans constituted 50% of the general population in Richmond, less than 1% of the city's prime construction contracts had been awarded to minority businesses. *Id.* at 479. The Court noted that the city failed to prove that past discrimination had impeded minorities from participating fully in Richmond's construction industry, and ruled that the program was not narrowly tailored to remedy the effects of prior discrimination. *Id.* at 507-09.

267. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). In *Adarand Constructors*, a federal affirmative action program implemented by the United States Department of Transportation was at stake. *Id.* The program gave general contractors on government highway construction projects a financial incentive to hire subcontractors owned by minorities. *Id.* at 205. The Court made it clear for the first time that all racial classifications imposed by any federal, state, or local governmental actor must be analyzed under strict scrutiny. *Id.* at 236. In striking down the program, the majority held that the federal government failed to prove that past racial discrimination interfered with the awarding of highway construction contracts. *Id.* at 238-39. Thus, *Adarand Constructors* marked a doctrinal departure from a 1980 precedent requiring that federal affirmative action programs be reviewed under a lower and more forgiving standard of review with deference to Congressional powers. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (applying an intermediate scrutiny standard to uphold a federal race-specific set-aside program requiring that at least 10% of federal grants to work projects be expended for minority business enterprises).

compensate them for historical discrimination.[268] Most recently, the court in *Gratz* invalidated an undergraduate admission program that automatically assigned additional points to minority applicants.[269] In reaching these conclusions, the Court expressed concerns that such race-based plans burden innocent non-minority members, while at the same time benefiting minority members that might not have suffered any discrimination.[270]

The Court's adoption of wholesale colorblind constitutionalism and subsequent application of strict scrutiny in affirmative action programs has significant ideological implications in relation to the Court's commitment to racial equality. While in *Davis* the Court prohibited itself from considering claims of group-based results in establishing constitutional liability, in *Adarand Constructors* the Court further prohibited the government from employing group-based programs for any purpose.[271] If *Davis* is judicial deference to public actors, similar deference in *Adarand Constructors* would have resulted in a different holding. The circle of the individualist ideology is now complete. The Court's embrace of the individualist colorblind ideology means that the same public institutions that historically employed systematic discrimination against African

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268. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1977) (plurality ruling that a university admissions policy that set aside sixteen percent of its admissions seats for disadvantaged minorities violated the equal protection rights of non-minority applicants), *with* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding a university admission program designed to ensure racial and ethnic diversity in which race, among other variables, provided a plus characteristic favoring admission); *see also* Harry T. Edwards, *The Journey From* Brown v. Board of Education *to* Grutter v. Bollinger*: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944 (2004).

269. Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down an undergraduate admission program that assigned twenty points for minority applicants, or one-fifth of the points needed to guarantee admission, as a violation of the Equal Protection Clause because it was not narrowly tailored to achieve the school's interest in diversity).

270. Under the strict scrutiny standard, race-based plans are not "narrowly tailored" to remedy the effects of prior discrimination. *See, e.g.*, *Croson*, 488 U.S. at 507-09; *Adarand Constructors*, 515 U.S. at 235-38.

271. BELL, *supra* note 9, at 136-154 (a profound critical race theory critique of the coulorblindness doctrine). *See* STONE ET AL., *supra* note 185, at 589 ("Why doesn't the government have a compelling interest in remedying pervasive, generalized discrimination"); *see also* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35 (2004).

Americans are now also prohibited from attempting to correct the contemporary effects of their own wrong doing.

More importantly, the doctrinal application of strict scrutiny in the affirmative action context represents a comprehensive ideology that subordinates substantive equality to formal equality. This blind formal approach bears resemblance to the legal ideology that produced *Plessy* over a hundred years earlier.[272] Such jurisprudential formalism perpetuates the economic, social, and political disadvantages of African Americans, as well as their exclusion from the centers of power in American society. Indeed, formalism was used to condone actions that disproportionately burdened African Americans, and formalism is currently used to invalidate affirmative action efforts to move African-Americans forward.[273]

D. Part II Conclusion

The complete picture drawn by the Court's rulings concerning racial equality in the last three decades is one that reverts African Americans to living conditions of separate—by condoning conditions of segregation in schooling and housing—and unequal—as racially disparate effects continue as a result of government actions. Indeed, studies show that in the late 1990s, two-thirds of African-American students attended predominantly minority schools[274] and that the achievement gap between African-American and white schools is substantial and growing.[275]

Part II demonstrates that this new *de facto*, separate-but-unequal reality has largely been reinforced due to the Court's strict embrace of the narrow individualist ideology. The discriminatory intent requirement, coupled with the rejection of race-based, result-oriented claims, results in the

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272. *See* BELL, *supra* note 9, at 137.

273. *See, e.g.*, Gotanda, *supra* note 52, at 53-63 (arguing that a colorblind doctrine serves to legitimate, and thereby perpetuate, the socioeconomic advantages that whites have been holding over minorities in all spheres of life in America).

274. Frank R. Kemerer, *School Choice Accountability*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 181, 188-89 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

275. Lawrence C. Stedman, *An Assessment of the Contemporary Debate over U.S. Achievement*, *in* BROOKINGS PAPERS ON EDUCATION POLICY 53 (Diane Ravitch ed. 1998).

rationalization of harsh inequalities in the educational, social, and economic experiences of African Americans.[276] Furthermore, the embrace of a wholesale colorblind approach, which invalidates affirmative efforts to address some of these inequalities, has perpetuated the present material conditions of racial injustice largely linked to past institutional discrimination. These conditions include, for instance, the fact that at the end of the 1990s the unemployment rate among African Americans was almost double that of the total U.S. unemployment rate,[277] that the poverty rate among African Americans was more than double that of whites,[278] and that white median income was more than one and a half times that of African-American median income.[279]

The individualist ideology has blocked any meaningful transformation of these conditions. It has failed to bring African Americans any meaningful relief from the urgent socio-economic needs they encounter as a result of historical discrimination.[280] Instead, individualist ideology has operated to perpetuate their exclusion from the centers of power in American society.[281] Considering the pervasiveness

276. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 150-60 (1993); *see also* Bonilla-Silva, *supra* note 76, at 78-84 (discussing the social mechanisms that have produced and perpetuated racial inequality in the post-civil rights era). *See generally* ROY L. BROOKS, RETHINKING OF THE AMERICAN RACE PROBLEM (1990) (discussing the socioeconomic inequalities between African Americans and whites in almost every area).

277. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 430 tbl.680 (119th ed. 1999). In 1998, while the African-American unemployment rate was 8.9%, the total U.S. unemployment rate was 4.5%. *Id.*

278. *Id.* at 483 tbl.760.

279. Between 1970 and 1997, African-American median income was approximately 59% of white median income. *Id.* at 474 tbls.742 & 743. *See also* Bonilla-Silva, *supra* note 76, at 78-84 (concluding that although many of African Americans' socioeconomic conditions are a manifestation of the legacies of slavery and the Jim Crow era, the overall conditions of African Americans relative to whites has not advanced much since the 1960s).

280. *See* Freeman, *supra* note 15, at 1102 (concluding that while in the first two decades after *Brown* the Court managed to offer African Americans "expectations of proportional racial political power" and "a working system of equality of opportunity," in the next era "these expectations were systematically defeated and only the perpetrator perspective was preserved").

281. Bonilla-Silva, *supra* note 76, at 64-68 (discussing under-representation of African Americans among elected and appointed officials, as well as the limited political possibilities of those elected or appointed); SPANN, *supra* note 276, at 121-22 ("[A]ll United States presidents have been white; all but two

of this exclusion, only a methodical adoption of the transformative ideology offers any realistic hope for real social change for African Americans. What is needed is a group-based recognition of the collective African-American experience with regards to social and economic transformation of their community's poor conditions. This is a demand for substantive equality—for *de facto* equality in real life—that duly addresses the wounds of past discrimination.

In fact, in each case discussed in Part II, there was a legally viable alternative for the Court to deliver a ruling that would have been more responsive to African-American group experiences. Consider, for example, approving the desegregation inter-district remedy in *Milliken*;[282] endorsing the desegregation orders in *Jenkins*,[283] *Austin Independent School District*,[284] and *Brinkman*;[285] invalidating the qualifying test in *Davis*;[286] endorsing the affirmative action programs in *Bakke*,[287] *Croson*,[288] *Adarand Constructors*,[289] and *Gratz*.[290] Taken together, such hypothetical rulings would have paved the way for genuine advancement of the poor conditions of African Americans.

Instead, the Court, represented by its current majority, is endorsing and legitimizing racial subordination in America. There is no other way to describe the Court's insistence on a strict adherence to the individualist, colorblind ideology in the face of its clear failure to effectuate substantive racial equality. Does the Court's current majority act in such a way because they themselves are committed to a hierarchical racial relationship, or because they are expressing a dominant political climate that would render contrary decisions judicially unsustainable? Are they operating,

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United States senators have been white; the overwhelming majority of United States representatives has been white . . . .") *See generally* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

282. *See supra* notes 186-91 and accompanying text.
283. *See supra* notes 191-94 and accompanying text.
284. *See supra* notes 212-14 and accompanying text.
285. *See supra* notes 214-16 and accompanying text.
286. *See supra* notes 228-32 and accompanying text.
287. *See supra* notes 39, 268 and accompanying text.
288. *See supra* note 266 and accompanying text.
289. *See supra* note 267 and accompanying text.
290. *See supra* note 269 and accompanying text.

consciously or unconsciously, to protect the self-interest of the dominant group to which they belong?[291] Or are they expressing a sound institutional deference in light of surrounding political forces? Whatever the answer, the outcome remains that the legacy of white privilege and African-American subordination lives and thrives. The color line in America might be less bright today, but it seems to be more solid than ever.

Much of the work of the Civil Rights Movement remains unfinished. If one looks at the cup as half-full, *Brown* has clearly improved the status of African Americans. It has opened the doors to integrated schools, integrated public accommodations, and established the principle of anti-discrimination as an integral part of American norms.[292] Looking at the cup as half-empty, socio-economic statistics show that the subordinating structures have been reinforced.[293] Most disappointing might be the fact that the Civil Rights Movement today seems to have lost its internal organizational and spiritual power essential to mobilization of the masses.[294]

Currently, there is a need for judicial leadership that is dedicated enough to understand the historic roots of inequality, and courageous enough to articulate the mandate of equality in a firm, clear, and uncompromising manner. However, instead of leading the way to healing, the Court has served to reinforce too many of the historical wounds.

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291. Only two African Americans were ever appointed to the United States Supreme Court; Justice Marshall was the first African American to be appointed, and Justice Thomas was the second. SPANN, *supra* note 276, at 122.

292. *See* STONE ET AL., *supra* note 185, at 456-60.

293. By every virtually socioeconomic measure, African Americans remain impoverished as relative to whites. As Hayman & Levit conclude:

> America's white citizens average roughly twice the income of its black citizens; its black citizens are unemployed at over twice the rate. Its white citizens are more than twice as likely as its black citizens to live in a family with an annual income in excess of $50,000; its black citizens are roughly three times more likely to live in poverty. Its white citizens have substantially lower mortality rates than its black citizens; its black citizens are more likely to be murdered as young adults.

Hayman & Levit, *supra* note 49, at 678-79 (footnotes omitted).

294. *See* Bonilla-Silva, *supra* note 76, at 86.

CONCLUDING THOUGHTS

A civil and human-rights vision for the twenty-first century must be committed to the moral principle of social justice. Minority protection is an integral part of this principle.[295] If the current laws frustrate civil and human rights by rationalizing social injustices, the law should be transformed to address the plight of minority groups. On the role of law in society, the position of faithful civil rights advocates must be clear: the law must play a transformative role, not a passive one. Where the political structure is biased, it is the role of the judicial branch to maximize the transformative capacity of the law.

The American experience further teaches us that to transform the real-life conditions of deprived minorities in democratic, deeply divided societies, it is insufficient to adopt a general norm of formal equality. Majority privileges are deeply ingrained in the current hierarchical structure of society, and introducing a mere legal norm of equality, though an important end by itself, falls short of changing this structure. It is most likely that formal equality would leave this hierarchical structure intact, and thereby perpetuate the societal injustices inherent in it.

Yet, there is an alternative option that must be considered if justice is to be sought: it must adopt a full, transformative, group-based approach to equality that can relate equally to the collective experiences of each group. Only this transformative approach would identify and deconstruct built-in social injustices.

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295. *See generally* EDELMAN, *supra* note 165, at 177-82; Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547 (1998).

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