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Undignified: The Supreme Court, Racial Justice, and Dignity Claims

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UNDIGNIFIED: THE SUPREME COURT, RACIAL JUSTICE, AND DIGNITY CLAIMS

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Abstract

The Supreme Court has interpreted the Equal Protection Clause as a formal equality mandate. In response, legal scholars have advocated alternative conceptions of equality, such as antisubordination theory, that interpret equal protection in more substantive terms. Antisubordination theory would consider the social context in which race-based policies emerge and recognize material distinctions between policies intended to oppress racial minorities and those designed to ameliorate past and current racism. Antisubordination theory would also closely scrutinize facially neutral state action that systemically disadvantages vulnerable social groups. The Court has largely ignored these reform proposals. Modern Supreme Court rulings, however, have invoked the concept of dignity in order to redress discrimination against disadvantaged classes. Other opinions make appeals to dignity in order to protect or recognize fundamental rights or liberties for marginalized groups. These rulings—together with progressive uses of dignity in foreign constitutional law and in human rights and humanitarian law—have led some scholars to promote dignity-based litigation as an alternative to the Court's formal equality doctrine. Advocates of racial justice, however, should approach these arguments with extreme skepticism. Current doctrine relies upon dignity to invalidate race-based remedies and civil rights statutes. The Court, however, does not recognize the stigmatizing nature of de facto discrimination. Equal protection doctrine extends greater protection to privileged classes than to disadvantaged groups. Judicial ideology, rather than lack of a persuasive theory of equality, explains these results.

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INTRODUCTION

The Equal Protection Clause "no longer protects" persons of color from racial inequality.[1] The U.S. Supreme Court's formalistic equality doctrine legitimizes policies that impose heavy burdens on disadvantaged groups and, by contrast, evaluates racial egalitarian measures with a high degree of skepticism.[2] Reacting to the constraints of federal equal protection litigation, some scholars have considered whether other legal claims could offer alternative avenues for racial justice. Some of these scholars contend that dignity claims can provide redress to persons of color, despite the contradictions of equal protection doctrine.[3] Kenji Yoshino, for example, argues that dignity-based claims can operate as the "new equal protection" and produce good outcomes for plaintiffs who suffer from racial inequality.[4] Other scholars assert that dignity-based arguments can animate equal protection analysis and help build antisubordination theories of equality.[5] The increasing frequency of references to dignity in Roberts Court rulings has emboldened many of

1. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–31, 1139 (1997) (explaining that the Equal Protection Clause is ineffective at prohibiting facially neutral state actions that have disparate impacts on minorities or women); *see also* Erwin Chemerinsky, *Making Schools More Separate and Unequal:* Parents Involved in Community Schools v. Seattle School District No. 1, 2014 MICH. ST. L. REV. 633, 634–35, 638, 644 (arguing that equal protection doctrine validates resegregation of public schools).

2. *See* Siegel, *supra* note 1, at 1130–31, 1134, 1136, 1138–39, 1142–43, 1145–46.

3. *E.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776–78 (2011) (discussing how the "[Supreme] Court has used liberty analysis to mitigate its curtailment of group-based equality analysis").

4. *See id.* at 750, 776, 792–93.

5. *See, e.g.*, Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671, 708–09, 714 (2005); Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMP. POL. & C.R. L. REV. 73, 115–16 (2010); *see also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 526–27 (2010) ("A dignity-based approach to individuals' post-incarceration lives would seek to promote, rather than suppress, their standing in the community. It would aim to restore individuals, as much as possible, to their prior status, rather than impose broad legal restrictions that serve to degrade and marginalize them.").

the proponents of dignity-based claims.[6] Although appeals to dignity first appeared in Court opinions following World War II, the Roberts Court has invoked dignity more frequently than previous courts.[7] Some Court precedent demonstrates the usefulness of dignity-based legal theories for social justice movements. The Warren Court, for example, invoked dignity in opinions that invalidated policies that were essential to Jim Crow.[8] More recently, the Court has utilized dignity-based arguments to invalidate laws that discriminate against gays and lesbians[9] and deny reproductive autonomy to women.[10] Additionally, in a series of cases, the Court has invoked dignity to elaborate a humanistic and evolving meaning of the Eighth Amendment.[11]

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6. On the increasing references to dignity in Roberts Court opinions, see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171 (2011) ("After a brief period of hibernation during the Burger and Rehnquist Courts, the use of dignity is once again on the rise. The Roberts Court has issued opinions that invoke dignity in thirty-four cases, nearly half of those in the last two Terms alone." (footnote omitted)).

7. *See id.* at 178–79.

8. *See* Bracey, *supra* note 5, at 696.

9. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that prohibition of marriage for same-sex couples denies them "equal dignity"); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.").

10. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

11. Henry, *supra* note 6, at 222–24 (discussing how considerations of "dignity" influence Eighth Amendment doctrine); Laura L. Rovner, *Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement* 13 (Univ. of Denver Sturm Coll. of Law, Working Paper No. 15-55, 2015) (arguing that in Eighth Amendment cases, "the Court has arguably expressed one of its clearest commitments to the notion of dignity as animating a constitutional right").

Also, some state constitutions and state court rulings recognize a right to dignity.[12] Similarly, humanitarian and human rights law[13] and the constitutions of many Western-style democracies[14] contain provisions that explicitly guarantee a right to dignity. Because state[15] and foreign law[16] can influence Supreme Court interpretation of the Constitution, the recognition of a right to dignity in some states and in other countries could potentially influence Court doctrine.

Historically, dignity-based arguments served an important function for advocates of racial justice. For example, many slave narratives portray the brutality associated with slavery and racism as an assault on human dignity.[17] Participants in the Civil Rights Movement also invoked dignity

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12. *See, e.g.*, ILL. CONST. art. I, § 8.1(a)(1) (guaranteeing to "[c]rime victims" "[t]he right to be treated with . . . respect for their dignity"); ILL. CONST. art. I, § 20 (banning certain categories of hateful or inciteful speech in order "[t]o promote individual dignity"); LA. CONST. art. I, § 3 (labeling the equal protection provision as the "Right to Individual Dignity"); MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable."); Williams v. Kushner, 524 So. 2d 191, 196 (La. Ct. App. 1988) ("[W]e cannot say the Trial Court erred in finding no violation of Louisiana's constitutional guarantee to Individual Dignity."); Walker v. State, 68 P.3d 872, 885 (Mont. 2003) ("[W]e hold that . . . the living conditions on A-block constitute an affront to the inviolable right of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate's mental health condition.").

13. *See* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 293 (2003) (discussing protection of dignity in human rights and humanitarian law); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266–67 (2000) (discussing rulings of human rights tribunals which hold that dignity is a fundamental precept of human rights and humanitarian law); Amanda Ploch, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 N.Y.U. J. INT'L L. & POL. 887, 905–11 (2012) (discussing international human rights documents that protect human dignity); Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2068 (2003) ("[H]uman rights law and humanitarian law both provide a total precommitment not to undertake certain grave acts against human dignity."). *See generally* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EURO. J. INT'L L. 655, 664–75 (2008) (discussing the inclusion of right to dignity in numerous human rights treaties).

14. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 96 (2011) ("Germany, Italy, Japan, Israel, and South Africa all have explicit clauses in their constitutions protecting the right to dignity of every individual.").

15. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 371–80 (2011) (discussing criminal procedure, due process, and the Eighth Amendment as areas of Supreme Court doctrine most influenced by state court rulings).

16. Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 642, 644–47 (2007) (discussing the Supreme Court's use of foreign law as persuasive authority); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 571–75 (2007) (discussing the Supreme Court's consideration of international constitutional precedent).

17. *See* FREDERICK DOUGLASS, AUTOBIOGRAPHIES 591 (1994) ("A man without force is without the essential dignity of humanity."); Nick Bromell, *Democratic Indignation: Black*

to contest the injustices of Jim Crow and racial subordination.[18] Furthermore, critical race theorists have described contemporary racism as "everyday indignities,"[19] "microaggressions,"[20] or "spirit-murder."[21] Because persons of color frequently describe racial injustice as a deprivation of dignity,[22] judicial receptiveness to dignity-based legal claims could arguably lead to redress for the injuries racism causes.

Despite several reasons for optimism, this Article contends that dignity-based litigation in federal courts would not contribute meaningfully to the attainment of substantive racial equality—at least not in the near future. Several factors support a more cautious stance towards the possibility of achieving substantive racial equality through dignity-based litigation.

First, the concept of dignity remains undertheorized, amorphous, and indeterminate in judicial opinions.[23] Because Court doctrine does not offer a precise meaning of dignity, judges possess a great degree of discretion to interpret and define its meaning prospectively.[24] The

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American Thought and the Politics of Dignity, 41 POL. THEORY 285, 293–96 (2013) (analyzing the concept of dignity in slave narratives); Kimberly Rae Connor, *To Disembark: The Slave Narrative Tradition*, 30 AFR. AM. REV. 35, 38 (1996) (same).

18. *E.g.*, MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 12 (Clayborne Carson ed., 1998) (stating that the "very idea of [racial] separation did something to my sense of dignity and self-respect").

19. *E.g.*, Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 535–36 (2003) (discussing the "everyday indignities" or daily "subtle racism" that people of color experience in the workplace).

20. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) ("'[Microaggressions are] subtle, stunning, often automatic, and non-verbal exchanges which are "put downs" of blacks by offenders.' Psychiatrists who have studied black populations view them as 'incessant and cumulative' assaults on black self-esteem." (footnote omitted)).

21. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) (describing racism as "a crime, an offense so deeply painful and assaultive as to constitute something I call 'spirit-murder'").

22. *See generally* Bromell, *supra* note 17 (discussing the concept of dignity in black antiracist writings).

23. Henry, *supra* note 6, at 172 (arguing that dignity's "importance, meaning, and function are commonly presupposed but rarely articulated"); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202 (2008) ("The Supreme Court . . . has not provided a definition of dignity, and its meaning remains pliable.").

24. *See* Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 247–48 (2011) (discussing judicial discretion arising from indeterminacy of law); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 938–39 (2005) ("The range of vague, ambiguous, non-self-defining terms within the Constitution is daunting. These terms are not self-defining, but instead subject to several plausible interpretations. The Constitution provides no guidance on how its terms ought to be interpreted or on which interpretation is superior." (footnote omitted)); Miguel Poiares Maduro, *In Search of a Meaning and Not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism*, 2013 WIS. L. REV.

ambiguity of dignity as a doctrinal concept complicates its litigation value for victims of racial injustice.

Second, in a series of cases, the Court has utilized dignity arguments to strike down racial equality measures.[25] Specifically, the Court has invoked the dignity of whites and the states to justify invalidation of affirmative action policies and civil rights legislation.[26]

Third, even when the Court has protected human dignity as a constitutional value, it has failed to extend solicitude to some of the most vulnerable social groups. In abortion cases, for example, the Court has disregarded the significant burdens that waiting periods, informed consent, and other legal constraints impose upon poor women[27] and juveniles.[28]

Fourth, Court precedent that portrays dignity in liberal terms contradictorily preserves social inequality because the Court has carefully tailored these rulings to limit their reach. In particular, while the Court has utilized dignity to invalidate legislation that discriminates on the basis of sexual orientation,[29] its rulings do not imply broad disruption of heteronormative state action. Precedent related to sexual orientation has limited reach because the Court has declined to consider whether LGBT persons constitute a suspect class.[30] Furthermore, while the Court has linked reproductive rights and dignity, it has also lowered the standard of review for antiabortion regulations from strict scrutiny to undue burden.[31] Application of undue burden has led to judicial

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541, 545 ("Moreover, it is well known that there are elements inherent in the law itself that feed some discretion into the process of legal interpretation. Textual ambiguity or conflicting rules are two well-known examples.").

25. *See* Bracey, *supra* note 5, at 697–701 (discussing use of dignity in cases invalidating or expressing judicial hostility towards affirmative action policies).

26. *See id.* at 699–701.

27. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 886–87 (1992) (recognizing that the district court found abortion restrictions to be "particularly burdensome" to poor women but holding that "[t]hese findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden"); *see also id.* at 886, 894–95 (invalidating spousal notification provision even though it would only impact one percent of married women—a much smaller number than the poor women impacted by the informed consent provision the Court upheld). *See generally* Ruth Colker, *Abortion and Violence*, 1 WM. & MARY J. WOMEN & L. 93, 106–07, 109–10 (1994) (arguing that *Casey* marginalizes the plight of poor women seeking abortions).

28. *See Casey*, 505 U.S. at 899 (upholding informed parental consent provision).

29. Obergefell v. Hodges, 136 S. Ct. 2584, 2607–08 (2015) (finding that the petitioners asked "for equal dignity in the eyes of the law").

30. Romer v. Evans, 517 U.S. 620, 631–32 (1996) (avoiding the issue of whether the LGBT community is a suspect class because the law did not pass the rational basis test).

31. *Casey*, 505 U.S. at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

validation of types of regulations that had failed under *Roe v. Wade*'s strict scrutiny test.[32]

Fifth, judicial ideology—not lack of a good theory—explains why the Court has interpreted the Equal Protection Clause in a manner that impedes substantive racial equality. The Court's racial equality precedent enacts the primary views that whites hold regarding race relations in the United States.[33] The Court's embrace of majoritarian viewpoints has led to the formation of an equal protection doctrine that legitimizes racial hierarchy.[34]

For all of the foregoing reasons, legal scholars should reconsider their optimistic assertions regarding the potential use of dignity-based litigation as a means of attaining substantive racial justice. In the near future, it is unlikely that the Supreme Court will reinterpret the Equal Protection Clause and employ antisubordination theory or similar approaches that legal scholars have advocated. In the long term, however, changes in the composition of the Court, along with continued politicization of racial inequality by antiracist social movements, could lead to doctrinal innovation.

This Article proceeds in three Parts. Part I briefly analyzes the Court's inversion of the Equal Protection Clause, which has resulted in an equality doctrine that provides greater solicitude to whites and other dominant groups and erects extreme barriers to governmental policies designed to lessen the conditions of racial inequality. Part I then analyzes the use of dignity in Supreme Court opinions, focusing primarily on rulings by the Roberts Court. With respect to the protection of vulnerable groups, the dignity-based cases decided by the Roberts Court have provided justice for incarcerated individuals, same-sex couples and intimate partners, and women seeking to exercise reproductive autonomy. Part I then analyzes legal scholarship and cases that make a persuasive theoretical case for the inclusion of dignity-based claims in race-equality litigation.

Part II questions the usefulness of dignity-based claims for racial justice. Although dignity arguments have led to positive judicial outcomes for vulnerable groups, it is highly unlikely that this precedent will lead the Court to develop a more progressive race-equality doctrine. Currently, the Court places high burdens on state actors that use race-

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32. *See id.* ("*Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.").

33. *See infra* pp. 43–45.

34. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988).

conscious policies to undo substantive racial inequality.[35] The Court, however, tends to validate state action that, though facially neutral with respect to race, causes pervasive patterns of racial inequality.[36] The dignity of persons of color has not led the Court to reconsider these doctrinal outcomes. Instead, the Court has invoked the dignity of whites[37] and state governments[38] to justify its interpretation of the Fourteenth Amendment. Merely reframing equal protection arguments will not make a substantial difference to the Court. Regarding matters of race, the Court embraces the views that most whites hold regarding race-relations in the United States; the Court, however, dismisses the primary views that people of color have on these issues.[39] Because ideology and politics drive judicial interpretation of the Constitution, simply advocating a new theory to conceptualize racial harm will not lead to substantial changes in the Court's race-equality doctrine.

Part III urges legal scholars to accept a sobering reality: currently, the federal courts are not a reliable venue for pursuing substantive racial equality claims or validating remedial racial legislation. Other groups, particularly the LGBT community, confronted a similarly hostile federal judiciary during the late 1980s, after the Court decided *Bowers v. Hardwick*.[40] The tone of the *Hardwick* decision caused LGBT social-movement actors to pursue broader strategies for justice. These alternative routes for justice included litigation in state and local courts and the pursuit of claims in state and local civil rights administrative agencies.[41] LGBT social-movement actors also worked with corporate leadership to accomplish reform of employment practices.[42] Furthermore, LGBT social movements cultivated connections with local, state, and national legislators who voted to enact LGBT antidiscrimination policies.[43] Moreover, LGBT social movements pursued strategies that drew upon the power of the President and state executives to enforce legal norms that protect LGBT individuals from discrimination.[44] Finally, LGBT activists collaborated with international social movement organizations, human rights courts, and human rights governing bodies

35. *See id.*

36. *Id.*

37. *See infra* Subsection II.A.1.

38. *See infra* Subsection II.A.2.

39. *See infra* Subsection II.B.1.

40. 478 U.S. 186, 190–92 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

41. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1314–17 (2010).

42. *Cf. id.* at 1330 (noting that private sector elites, such as business supporters and foundations, can be allies of movement lawyers).

43. *Id.* at 1312–13.

44. *See infra* text accompanying notes 315–16.

to create greater protection for LGBT individuals in international humanitarian law and in foreign courts.[45] Part III encourages advocates of racial equality to pursue these numerous alternative paths to justice. Part III concludes by considering how multidimensional racial-justice movement strategies regarding criminal justice reform could lead to the development of more progressive race-equality doctrines. Successful use of dignity claims in racial equality litigation can only happen if lawyers examine and exploit political opportunities that favor doctrinal reform. Simply advocating a new theory, however, will not substantially affect how the Court interprets the Equal Protection Clause.

I. THE FAILURE OF EQUAL PROTECTION AND THE PROMISE OF DIGNITY

This Part links recent scholarship favoring dignity-based litigation claims with the evolution of conservative Supreme Court race-equality doctrine. The Court's interpretation of equal protection facilitates racial subordination and hinders race-based remedies. This problematic doctrine has led many scholars to search for alternative theories of equality, including dignity-based claims.

A. *Equal Protection as Formal Equality*

The Court has interpreted the Equal Protection Clause as a formal equality mandate.[46] Accordingly, the Court treats as presumptively unconstitutional any state action intentionally motivated by race.[47] By contrast, the Court deems state action that causes unintended racially disparate effects as presumptively constitutional and entitled to judicial deference.[48] These two approaches, reflected in the colorblindness

45. *See, e.g.*, Cole Delbyck, *Fostering Collaboration Globally on LGBTI Rights*, OUTRIGHT ACTION INT'L (Oct. 31, 2014), https://www.outrightinternational.org/content/fostering-collaboration-globally-lgbti-rights.

46. Martha Albertson Fineman, *Equality and Difference – The Restrained State*, 66 ALA. L. REV. 609, 609–10 (2015) ("Equality is understood as a mandate for formalized equal treatment; it operates as a nondiscrimination ideal.").

47. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 5 (2011) (observing that under current Supreme Court doctrine, "race-conscious government action is presumptively unconstitutional regardless of whether it aims to aid or injure historically subordinated minority groups").

48. McCleskey v. Kemp, 481 U.S. 279, 286, 299 (1987) (rejecting an equal protection challenge to the Georgia death penalty despite sophisticated statistical study indicating race impacted prosecutors' decision to pursue the death penalty and juries' decision to impose capital punishment); Pers. Adm'r v. Feeney, 442 U.S. 256, 269, 271, 279 (1979) (rejecting woman's equal protection claim despite foreseeable and anticipated dramatic negative impact of veterans' employment preference on women); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254, 270–71 (1977) (holding that municipal zoning decision that preserved racial segregation in town did not violate equal protection); Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without

doctrine[49] and in the discriminatory intent rule,[50] emerged during the Burger Court. Subsequent application of colorblindness and the discriminatory intent rule has impeded the attainment of substantive racial equality.[51]

1. Possible Meanings of Equal Protection

Constitutional interpretation almost always allows for some judicial discretion.[52] Most provisions of the Constitution are broad, unelaborated, and susceptible of multiple meanings.[53] Factors that make the original meaning of the Constitution indeterminate apply with equal force to the Fourteenth Amendment. Also, to the extent that the Framers discussed specific provisions of the Fourteenth Amendment, they sometimes disagreed regarding their meaning.[54] Furthermore, the passage of time can erode the practicality, desirability, and equities of applying known original intent.[55]

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regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." (emphasis omitted)), *superseded by statute*, 42 U.S.C. § 1973, *as recognized in* Chapman v. Nicholson, 579 F. Supp. 1504 (N.D. Ala. 1984).

49. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 405 (2006) (observing that "it was not until the Burger and Rehnquist Courts' attack on affirmative action, in the late 1970s, 1980s, and 1990s, that the Court found in the Equal Protection Clause a firm principle—the 'colorblind Constitution'—that proscribed racial classifications even when their purpose and effect was to benefit historically oppressed minorities" (footnote omitted)).

50. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1049 (2010) (observing that "the Burger Court adopted the discriminatory intent requirement for equal protection violations in 1976, making it difficult for criminal defendants to establish that police conduct violated the Fourteenth Amendment").

51. Crenshaw, *supra* note 34, at 1378 ("Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people."); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1451–52, 1454–55 (1991) (contending that the discriminatory intent rule limits racial justice).

52. Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1071–72 (2006); Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 675–76 (2006).

53. Chemerinsky, *supra* note 52, at 1072.

54. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 123 (1988) ("Historical analysis of the framing and ratification of the Fourteenth Amendment cannot, by itself, resolve the dilemma created by the conflicting commitments of those who participated in the process. Judges and lawyers wishing to be guided only by the original intention cannot know whether to construe the amendment as a guarantor of absolute rights.").

55. *See* Brown v. Bd. of Educ., 347 U.S. 483, 490, 492–93 (1954) (ruling that the original intent was inconclusive, but even if it were not, it should not govern outcome because of the

Congress proposed the Fourteenth Amendment as a response to state and private efforts in southern states to reenslave and terrorize blacks and to deprive them of all rights enjoyed by whites.[56] Congress initially addressed the subjugation of the newly freed slaves with the Civil Rights Act of 1866, which enumerated a list of rights that states could not deny to blacks.[57] The subsequent ratification of the Fourteenth Amendment settled legal questions concerning Congress's authority to enact a law that specified civil rights for inhabitants of all states.[58]

Although the Civil Rights Act of 1866 contained a detailed listing of rights, the Fourteenth Amendment employs broad and generalized language that does not include the words "race" or "discrimination."[59] Also, the historical division of rights into political, civil, and social spheres further complicates efforts to elaborate the meaning of the Fourteenth Amendment.[60] Finally, the procedural history of the ratification of all of the Civil War Amendments makes original intent a complicated basis for their interpretation. The Southern states were required to ratify the Reconstruction Amendments as a condition for readmission to the United States.[61] This historical fact means that state

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evolving role of education in society and new understanding of the stigmatic harm segregation causes in black children).

56. Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1405 (2002) ("In the wake of the widespread denial of legal and civil rights to newly free former slaves . . . , Congress presented the Fourteenth Amendment to guarantee that the legal rights presumed by some to have been granted to former slaves by the Thirteenth Amendment were specifically protected." (footnote omitted)).

57. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)); *see* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 199–200 (2005) (arguing that the Civil Rights Act of 1866 and the Fourteenth Amendment reflected the intention of the Thirty-Ninth Congress that the constitutional guarantee of liberty embodied by the Thirteenth Amendment become a "practical reality").

58. Kaczorowski, *supra* note 57, at 204 ("To eliminate opponents' claims that the [Civil Rights Act of 1866] was unconstitutional, the framers of the Fourteenth Amendment incorporated the Civil Rights Act into section 1 of the Amendment.").

59. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

60. Members of Congress and, subsequently, federal and state judges, could not agree on whether the Fourteenth Amendment secured political and civil rights exclusively or whether it also mandated equality with respect to social rights. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (finding that Fourteenth Amendment secured political, but not social, equality), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); NELSON, *supra* note 54, at 85–86, 112–13 (discussing debate over the scope of rights secured by the Fourteenth Amendment among members of the Thirty-Ninth Congress).

61. Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629 (2013) ("The Southern states had been placed under military rule, and were forced to ratify the Amendment—which they despised with an (un)holy hatred—as a

legislators who voted to ratify the Fourteenth Amendment likely did not hold uniform views regarding its meaning.[62] Southern lawmakers, in particular, viewed Reconstruction and the Civil War Amendments with great hostility.[63] Accordingly, they had a much narrower conception of the Fourteenth Amendment than most legislators. Furthermore, Southern legislators certainly did not share the more liberal views of the Fourteenth Amendment held by the Northern Republican majority in the Thirty-Ninth Congress.[64]

Despite the difficulty elaborating original intent in the Fourteenth Amendment setting, the narrow historical impetus for its ratification is clear. Congress proposed the amendment to quash the Black Codes that Southern states utilized to keep blacks in a persistent state of involuntary servitude and racial subjugation.[65] In that respect, equal protection served an emancipatory purpose that the Supreme Court recognized in the *Slaughter-House Cases*,[66] the first Court opinion to construe the meaning of the Civil War Amendments.[67] The Court described the Fourteenth Amendment in emancipatory terms in other cases, including *Strauder v.*

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condition of ending military occupation and rejoining the Union."); *cf.* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 377–78 (2001) (contending that the procedural background of the Reconstruction Amendments does not detract from their legitimacy).

62. Colby, *supra* note 61, at 1665 ("[A]t the time of [the Fourteenth Amendment's] enactment, a very sizable portion of the American people . . . expressly and vehemently disagreed with it, and yet were forced to ratify it against their will.").

63. *Id.* at 1645.

64. *Id.* (arguing that white "Southerners felt that the [Fourteenth] Amendment was downright insulting and debasing to them as a people").

65. *See* KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 138 (1965); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 877 (2003) (discussing the view that "the Fourteenth Amendment was crafted in response to the Black Codes, which were enacted by the Southern states and imposed brutal discrimination on the newly freed slaves").

66. 83 U.S. 36 (1873).

67. *Id.* at 71 (holding that "no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

West Virginia[68] and *Loving v. Virginia*.[69] Furthermore, Justice John Marshall Harlan II's famous dissent in *Plessy v. Ferguson*[70] describes the Fourteenth Amendment as prohibiting racial "caste."[71] If *Brown v. Board of Education*[72] vindicates Justice Harlan, as many scholars and justices contend, the Court could reasonably conclude that the Equal Protection Clause prohibits racial hierarchy or subordination, rather than simply forbidding intentional racial discrimination.[73] Furthermore, an anticaste theory of equal protection could justify policies that discriminate on the basis of race if they are enacted to ameliorate conditions of racial inequality.[74]

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68. 100 U.S. 303 (1879), *abrogated on other grounds by* Taylor v. Louisiana, 419 U.S. 522 (1975). The Court held that:

> [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.

Id. at 306–07; *see also id.* at 308 (holding that the Fourteenth Amendment gives blacks "the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race").

69. 388 U.S. 1, 11 (1967) (invalidating antimiscegenation law on the grounds that it was "designed to maintain White Supremacy").

70. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

71. *Id.* at 559 (Harlan, J., dissenting) ("But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."); *see also* Scott Grinsell, *"The Prejudice of Caste": The Misreading of Justice Harlan and the Ascendency of Anticlassification*, 15 MICH. J. RACE & L. 317, 355–56 (2010) (interpreting Justice Harlan's dissent in *Plessy* as advocating anticaste vision of the Fourteenth Amendment).

72. 347 U.S. 483 (1954), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

73. Grinsell, *supra* note 71, at 355, 357–58 (criticizing anticlassification view of *Brown*, supporting antisubordination theory).

74. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 461 (1997) (stating that under an anticaste interpretation of the Fourteenth Amendment, "it is pretty clear that standard affirmative action programs would be valid"). Antisubordination theories are not the only possible interpretations of the Constitution, but they are plausible. *See* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622 (discussing possible meanings of equal protection, including the antisubordination theory); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 941–42 (1989) ("[T]he distinctive characteristic of a subordinated group is that its members are systematically subject to violence at the hands of members of another group, or must systematically yield to the commands of members of another group . . . ."); *see also* Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV.

2. Colorblind Constitutionalism

The history of Congressional Reconstruction supports an emancipatory construction of the Equal Protection Clause. The Supreme Court, however, has cobbled together doctrines that collectively preserve racial hierarchy. The rigid application of the colorblindness doctrine impedes race-based state action implemented to remedy the harmful consequences of historical and present-day discrimination. The colorblindness doctrine also categorically prohibits race-conscious state action that redresses "societal discrimination"[75]—or racial discrimination among the general population, rather than within the governmental entity that has adopted the affirmative action policy.[76] When whites challenge remedial race-conscious state action, their claims receive strict scrutiny—the most rigid judicial review available.[77] Consequently, the colorblindness doctrine privileges whites' claims of discrimination over the interests of people of color in redressing the severe consequences of historical and present-day racism.[78] Because this doctrinal outcome disfavors policies that seek to lessen racial inequality, it is antithetical to an emancipatory theory of equal protection.[79]

1366, 1367 (1990) ("The urge to identify a single animating philosophy or an overarching theory of equal protection is understandable but misguided.").

75. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90, 305–06 (1978); *accord* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

76. *J.A. Croson Co.*, 488 U.S. at 505–06 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.").

77. *Id.* at 493–94. Although persons of any race can challenge race-conscious remedial state action, the litigants are usually white.

78. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 2–3 (1991) ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.").

79. R. Richard Banks, *"Nondiscriminatory" Perpetuation of Racial Subordination*, 76 B.U. L. REV. 669, 692 (1996) (reviewing MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH (1995)) ("In contrast, advocates of a race-conscious state reason that after centuries of both governmental and private race consciousness, a sudden embrace of governmental colorblindness would do no more than entrench already existing racial inequalities and, ironically, reinforce race consciousness."); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1645 (2009) (discussing colorblindness and racial subordination); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 172 (1994) ("In a system of racial inequality, the moral claim of colorblindness is, in reality, an enforcement and defense of a status quo that leaves blacks and many other racial minorities at the bottom of the economic ladder.").

3. Discriminatory Intent Rule

The discriminatory intent rule requires equal protection plaintiffs to demonstrate that defendants acted intentionally and not simply that their actions disparately harmed particular groups.[80] Unless equal protection plaintiffs can produce evidence of intent other than statistical disparities, they generally will not prevail.[81] When persons of color challenge facially neutral governmental practices that cause statistically significant racial disparities, courts normally treat these inequities, standing alone, as insufficient evidence of intent.[82]

The discriminatory intent rule leads to problematic outcomes in contemporary America. Racial-justice movements have successfully lobbied for the implementation of legal measures that prohibit racial discrimination. Consequently, explicit and open statements of invidious racial discrimination occur with far less frequency and face much more public condemnation today than in the past.[83] The eradication of explicit racial discrimination, however, has not eliminated discrimination altogether. Research by psychologists, sociologists, and more recently neuroscientists, finds that pervasively held implicit racial biases cause nonconscious discriminatory conduct—even among persons who otherwise support racial egalitarianism.[84] This research suggests that racial discrimination occurs even in the absence of specific intent.[85] Requiring discriminatory intent—even though racial discrimination occurs unintentionally or nonconsciously—substantially impedes the potency of the Equal Protection Clause as a remedy for racial inequality.[86]

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80. Roberts, *supra* note 51, at 1451–52 ("The Court has confined discrimination prohibited by the Constitution to state conduct performed with a discriminatory intent.").

81. *Id.* at 1452 ("State conduct that disproportionately affects Blacks violates the Constitution only if it is accompanied by a purposeful desire to produce this outcome.").

82. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (holding that absent a stark pattern of discrimination, "impact alone is not determinative" of an intent to discriminate).

83. Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 624–25, 625 n.46 (2003) ("Paradoxically, the attainment of formal racial equality has made it more difficult for victims of discrimination to litigate equality claims. In a society that disparages overt manifestations of racism, racist actors often mask their racist intent, making it hard for victims of racism to prove unlawful discrimination.").

84. Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 429, 439 (2007) (finding that implicit preferences "diverge from the consciously reported preferences and beliefs of the same individual").

85. *Id.* at 429, 431.

86. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 989 (1993) ("The position implied by the discriminatory intent rule, that conscious discrimination is blameworthy but unconscious discrimination is not, is counterproductive of the ultimate goal of racial justice."); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review*

Indeed, the discriminatory intent rule has led to judicial validation of policies that produce substantial racial disparities, including practices in legal settings historically associated with pervasive discrimination—such as capital sentencing,[87] criminal law and enforcement generally,[88] employment,[89] and housing.[90]

Together, the discriminatory intent rule and colorblindness doctrine have created a "majority-protective" equal protection doctrine.[91] When the Court adjudicates claims involving the primary method of racial discrimination against persons of color—facially neutral laws with racially disparate effects—it applies the discriminatory intent rule and, in the absence of smoking-gun evidence, subjects the challenged policies to

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of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1054–55 (1978); Kenneth L. Karst, *The Supreme Court, 1976 Term - Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50–51 (1977); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987); Siegel, *supra* note 1, at 1136–37; Strauss, *supra* note 74, at 955 ("*Brown* was tamed by being reduced to discriminatory intent, a standard that . . . appears to avoid the need to deal with 'soft,' open-ended notions like stigma, subordination, or second-class citizenship, and it appears not to call a wide range of established institutions into question."); *see also* Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 16 (2015) ("Because the Court . . . believes that group identity and group-based equal protection divide society, it has generally rejected disparate impact as proof of discrimination in equal protection cases. Even though equal protection plaintiffs who present evidence of discriminatory impact do not formally plead theories of collective rights, the Court, nonetheless, emphasizes the need for individualized proof of discrimination." (footnote omitted)); Hutchinson, *supra* note 74, at 672–73 (analyzing how intent facilitates racial subordination).

87. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 282–83 (1987).

88. Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 57 (2014) (discussing racial disparities in contemporary criminal law and enforcement).

89. Washington v. Davis, 426 U.S. 229, 232, 239 (1976) (upholding police officer employment test despite racial disparity and lack of validity testing).

90. Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 254, 257–58, 271 (1977) (sustaining the denial of a building permit for low-income multi-family housing in a virtually all-white suburb, despite the explicit concern of residents that the project would attract undesirables including racial minorities).

91. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 30, 51 (2013) (describing the Court's equal protection doctrine involving white plaintiffs as "majority-protective"); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 337 (2015) (arguing that Justice Lewis Powell's opinion in *Bakke* "gave not only white persons but also whiteness itself normative power" and that "[h]is constitutional framework elevated whiteness to a special favored status in equal protection, contradicting equal protection's own professed norms of nondiscrimination" (footnote omitted)); Flagg, *supra* note 86, at 958 (arguing that equal protection doctrine reflects white norms); Hutchinson, *supra* note 86, at 48, 54 (analyzing the Court's embrace of white majoritarian perspectives regarding race and racism); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2160 (2013) ("By adopting a principle of colorblindness, the Supreme Court protects the property interest in whiteness by defending the status quo of the distribution of social resources, including tangible goods, status, and privilege.").

rational basis review.[92] On the other hand, the primary governmental discrimination that whites claim to experience—the use of race-conscious policies to undo harmful patterns of racial inequality—receives strict scrutiny.[93] The use of a tougher judicial standard for affirmative action than for facially neutral policies that harm persons of color privileges whites and marginalizes racial minorities.

4. Abandonment of Suspect Class Doctrine

One additional doctrinal development demonstrates the inversion of equal protection: the Court's abandonment of the suspect class doctrine.[94] In several cases, subordinate groups such as the poor,[95] elderly,[96] and persons with disabilities[97] have unsuccessfully sought quasi-suspect or suspect class status in the Supreme Court. In addition, applying Court precedent, many lower federal and state courts have declined to find that LGB or T plaintiffs constitute a suspect class.[98] Unless discrimination harms a suspect or quasi-suspect class, courts apply rational basis review

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92. Hutchinson, *supra* note 74, at 671 ("Adhering to the intent rule, the Court has even explicitly instructed vulnerable classes to pursue legislative remedies against harmful legislation, a result that directly contradicts heightened scrutiny rationale."); Siegel, *supra* note 91, at 18.

93. Hutchinson, *supra* note 74, at 654 ("Equal protection jurisprudence sustains social hierarchy by inverting the concepts of privilege and subordination; policies that benefit historically disadvantaged groups trigger judicial skepticism, suggesting that these policies result from a failing of the political process and that politically vulnerable groups possess sufficient political power to harm socially advantaged classes."); Siegel, *supra* note 91, at 50 ("Equal protection doctrine governing affirmative action worries about the racial meaning and impact of state action even when the government has compelling purposes . . . .").

94. Kenji Yoshino, *Assimiliationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 519 (1998) (arguing that suspect class doctrine serves a gatekeeping function).

95. *E.g.*, James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) ("The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification.").

96. *E.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (finding that a "class of uniformed state police officers over 50" did not constitute a suspect class).

97. *E.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (holding that persons with disabilities did not constitute a quasi-suspect class that would call "for a more exacting standard of judicial review than is normally accorded economic and social legislation").

98. The separation of LGB from T in this instance emphasizes the social and doctrinal differences between sexual orientation and gender identity. Transgender equal protection cases have had some success under sex discrimination doctrine, for example, and a federal district court recently held that transgender persons are a quasi-suspect class. Adkins v. City of New York, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (finding that transgender persons constitute a quasi-suspect class for equal protection analysis); *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 568 (2016) ("For over fifteen years, courts have recognized with 'near-total uniformity' that transgender discrimination is sex discrimination based on sex stereotyping.").

in equal protection litigation.[99] The government almost always prevails when courts apply rational basis review, as opposed to strict or intermediate scrutiny.[100]

A common justification for applying strict or intermediate scrutiny to equal protection claims is process theory. Articulated most extensively by Professor John Hart Ely, process theory justifies invasive judicial scrutiny when laws burden political outsiders who, due to bigotry against them or their small numbers, cannot find sufficient political support to prevent the enactment of or to secure the repeal of discriminatory legislation.[101] As Footnote Four of *United States v. Carolene Products*[102] intimated, process theory defends exacting judicial review in equal protection cases that challenge state action resulting from legislative prejudice against stigmatized and vulnerable groups.[103]

Although the suspect class doctrine theoretically seeks to determine whether additional groups, due to their political vulnerability, deserve tougher judicial scrutiny of their equal protection claims, the Court primarily uses this doctrine to limit recognition of new suspect classes.[104] Compounding this problem, the Court also applies intermediate and strict scrutiny to equal protection claims of socially advantaged classes, including whites[105] and men.[106] Once the Court finds that a vulnerable group constitutes a suspect class, the analysis shifts from classes to classifications.[107] Thus, any racial or sex classification is constitutionally suspect, although only persons of color and women (not whites or men) constitute protected classes.[108] The demise of the suspect class doctrine

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99. *Murgia*, 427 U.S. at 314 (examining the classification under the rational basis standard after concluding that the classification is not subject to "strict judicial scrutiny").

100. Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J. C.R. & C.L. 283, 313 (2016) ("Government actions subject to rational basis review are almost always upheld.").

101. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135, 146 (1980).

102. 304 U.S. 144 (1938).

103. *See id.* at 152 n.4. Legal scholars have offered additional justifications for heightened scrutiny of certain equal protection claims, including antisubordination theory. Others have argued that the Court should eliminate its tiered equal protection doctrine.

104. Yoshino, *supra* note 94, at 530–31 (analyzing the gatekeeping quality of Court's suspect class doctrine).

105. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

106. Craig v. Boren, 429 U.S. 190, 192, 197, 204 (1976) (holding that the statute "invidiously discriminate[d] against males 18–20 years of age").

107. *Id.* at 210 (Powell, J., concurring).

108. *See* Hutchinson, *supra* note 86, at 19 (discussing class-to-classification shift); Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1400 (2000) (discussing "the shift from protecting classes of people who suffer prejudice" to "prohibiting any use of classifications" to extend "protection to . . . classes

and the class-to-classification doctrinal shift provide additional evidence of the Court devaluing the emancipatory roots of equal protection.

B. *From Equal Protection to Dignity*

Because federal court enforcement of the Equal Protection Clause offers very little hope for attaining substantive racial equality, many legal scholars contend that social justice movements should seek redress using other venues. Some scholars argue that state courts could fill the void left by the demise of substantive equal protection in federal constitutional law.[109] Others assert that the democratic process—namely Congress, the President, state legislatures and courts, and social movements—provide the only meaningful hope for justice through law.[110]

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that historically have not suffered prejudice"); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1167 (2002) (discussing the doctrinal shift "from suspect classes to suspect classifications as the linchpin of strict scrutiny" (emphasis omitted)).

109. Justice William J. Brennan, Jr. was the most famous advocate of this approach. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) ("I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach."); *see also* Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499, 501–02 (2002) ("The new judicial federalism came into vogue in the 1970s, with Justice William J. Brennan sounding the clarion call. A primary focal point of this new federalism has been state courts' reliance on state constitutions to provide rights no longer available under the Supreme Court's increasingly restrictive interpretation of the United States Constitution." (footnote omitted)); Robert M. Howard et al., *State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties*, 40 LAW & SOC'Y REV. 845, 846 (2006) ("[R]egional courts relying on regional constitutions can offer enhanced protection for civil liberties beyond the baselines established by a federal constitution and a national court." (citation omitted)); Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 240 (1999) ("With the failure of equal protection economic rights claims in federal courts based on the federal Constitution, focus has turned to challenging inequitable state action in state courts relying on state constitutional law."); Constance Baker Motley, *Civil Rights-Civil Liberties Litigation in the U.S. Supreme Court: Are the State Courts Our Only Hope?*, 9 HARV. BLACKLETTER J. 101, 104 (1992) ("For expansion of existing rights or new views of various rights, many litigants have recently turned to state courts for a more receptive judicial ear.").

110. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 3 (1998) ("The People must retake control of their government. We must act decisively to bring the law in line with the promise of American life."); LARRY D. KRAMER, THE PEOPLE THEMSELVES 8 (2004) ("American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–7 (1999); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 421 (2003) (discussing "'[e]xecutive review,' the power of the President to interpret the Constitution"); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 193–94 (discussing the

Many scholars, however, remain optimistic regarding federal court litigation and the attainment of racial justice. These scholars contend that alternative legal theories might offer greater opportunities for social justice movements than reliance upon traditional equal protection analysis. Recently, several legal scholars have advocated the use of dignity-based arguments for parties seeking racial justice through litigation.[111] The remainder of this Article describes and critically analyzes these arguments.

1. Dignity and the Supreme Court

Although references to dignity have appeared in Court opinions since the 1940s, the Roberts Court has invoked this concept frequently and in numerous doctrinal contexts, including Eighth Amendment and substantive due process litigation.[112] Professor Leslie Meltzer Henry's research finds that the Court has used dignity to elaborate numerous concepts, such as "institutional status," "equality," "liberty," "personal integrity," and "collective virtue."[113] Despite its historical usage in Supreme Court opinions, dignity does not have a fixed or clear meaning.[114]

Legal scholars have analyzed numerous aspects of the Court's usage of dignity. Many of these works examine the Court's references to the

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American people's influence on "constitutional decision-making"); Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 951 (2006); Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 494 (2012) (discussing popular constitutionalism).

111. Henry, *supra* note 6, at 175–77.

112. *Id.* at 179 (finding that the Roberts Court has accelerated use of dignity); Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (invoking dignity while finding fundamental right to same-sex marriage); Brown v. Plata, 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.").

113. Henry, *supra* note 6, at 177 (listing five typologies of dignity).

114. *See* Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257, 260 (2006) ("As a legal or philosophical concept [dignity] is without bounds and ultimately is one incapable of explaining or justifying any narrower interests . . . . Instead, it is a notion that is used by academics, judges, and legislators when rational justifications have been exhausted."). *But see* Sonja Grover, *A Response to Bagaric and Allan's "The Vacuous Concept of Dignity,"* 13 INT'L J. HUM. RTS. 615, 617 (2009) ("All of the meanings of human dignity Bagaric and Allan list in fact coalesce and are directed toward a view of every person as entitled—regardless of his or her status in the group—to a peaceful existence and coexistence with others free from suffering due to victimization based on his or her alleged inferiority as a human being."); Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea*, 32 OXFORD J. LEGAL STUD. 1, 4–5 (2012) (recognizing indeterminacy critiques of dignity but contending that it enforces an expressive norm).

dignity of states in sovereign immunity cases.[115] Recently, scholars have discussed the use of dignity-based arguments in substantive due process cases, namely abortion, sexual privacy, and marital equality.[116] Finally, scholars have also analyzed numerous cases that invoke the concept of dignity to elaborate the meaning of the Eighth Amendment prohibition of cruel and unusual punishments.[117]

Abortion precedent contains frequent references to dignity. The Court's opinion in *Planned Parenthood v. Casey*,[118] for example, connects human dignity with the enforcement of personal fundamental liberties. In *Casey*, the Court found:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity* and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[119]

The Court has also made appeals to dignity in cases involving heterosexist state action. For example, in *Lawrence v. Texas*,[120] the Court found the Texas sodomy statute particularly offensive to human dignity because it interferes with "the most private human conduct, sexual behavior, and in the most private of places, the home."[121] The Court held:

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115. Henry, *supra* note 6, at 175 n.32.

116. *Id.* at 208–11 (discussing the dignity argument in cases involving sexuality and abortion); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 17 (2015) (discussing dignity and the *Obergefell* decision).

117. *See* Henry, *supra* note 6, at 222–23.

118. 505 U.S. 833 (1992).

119. *Id.* at 851 (emphasis added) (citations omitted) (first quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); then quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

120. 539 U.S. 558 (2003).

121. *Id.* at 567.

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their *dignity as free persons*. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[122]

The Court also made frequent references to dignity in *United States v. Windsor*,[123] which invalidated the Defense of Marriage Act (DOMA).[124] In *Windsor*, the Court held that state recognition of same-sex marriages confers "dignity and status of immense import" upon same-sex couples.[125] Specifically,

> [Marital] status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.[126]

The Court found that "interference with the equal dignity of same-sex marriages" is the "essence" of DOMA.[127] DOMA deprives same-sex couples of dignity by placing them in "a second-tier marriage"[128] undeserving of federal recognition.[129] The statute also "humiliates tens of thousands of children" in same-sex families.[130]

Windsor's strong language linking same-sex marriage with dignity led Justice Antonin Scalia, dissenting, to predict that the Court would inevitably rule that the Constitution prohibits states from denying

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122. *Id.* (emphasis added); *see also id.* at 575 ("The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.").

123. 133 S. Ct. 2675 (2013).

124. *Id.* at 2696.

125. *Id.* at 2692.

126. *Id.* at 2692–93.

127. *Id.* at 2693.

128. *Id.* at 2694.

129. *Id.*

130. *Id.*

marriage to same-sex couples.[131] Justice Scalia's prediction came to fruition in *Obergefell v. Hodges*.[132]

In *Obergefell*, the Court invoked dignity in order to explain why the liberty interests protected by the Due Process Clause include a right to same-sex marriage:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for *equal dignity* in the eyes of the law. The Constitution grants them that right.[133]

Dignity also has a well-established lineage in Eighth Amendment cases. In 1958, the Court found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[134] The Court has reaffirmed this principle in numerous cases, including *Hope v. Pelzer*,[135] *Roper v. Simmons*,[136] *Brown v. Plata*,[137] and *Atkins v. Virginia*.[138]

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131. *Id.* at 2709 (Scalia, J., dissenting) ("In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by 'bare . . . desire to harm' couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status." (emphasis omitted) (citation omitted)).

132. 135 S. Ct. 2584 (2015).

133. *Id.* at 2608 (emphasis added).

134. Trop v. Dulles, 356 U.S. 86, 100 (1958).

135. 536 U.S. 730, 745 (2002) ("Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct.").

136. 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

137. 563 U.S. 493, 511 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.").

138. 536 U.S. 304, 311–12 (2002) ("'The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Trop*, 356

2. Legal Academic Support for Dignity-Based Claims

Some scholars have argued that the concept of dignity could lead to possibilities for attaining substantive justice that no longer exist in race-equality doctrine. Professor Kenji Yoshino is one of the most prominent advocates of this position. In *The New Equal Protection*, Yoshino argues that dignity-based claims could advance equal protection for disadvantaged groups.[139] He acknowledges that the Court's abandonment of the suspect class doctrine and requirement of discriminatory intent greatly limits the value of equal protection claims for subordinate racial groups.[140] Yoshino contends that the limited value of equal protection litigation stems from the Court's fear of balkanization—or "pluralism anxiety."[141] To avoid balkanization, Yoshino argues, the Court has discarded the suspect class doctrine, which conceives of persons as groups, rather than individuals.[142] Dignity arguments, however, do not risk balkanization because they rest on conceptions of universal harm and justice.[143] According to Yoshino, the Court has invoked dignity to justify egalitarian outcomes that do not involve claims of group harm.[144] To support his position, Yoshino cites favorable outcomes for disadvantaged groups in precedent that invokes dignity.[145] Based on this precedent, Yoshino concludes that dignity-based claims could replace group-equality arguments and lead to better litigation outcomes for racially disadvantaged classes.[146]

U.S. at 101)).

139. Yoshino, *supra* note 3, at 776, 802.

140. *Id.* at 755, 763–64, 768. Yoshino also analyzes the Court's restriction of Congress's power to enforce the Fourteenth Amendment. *Id.* at 768–69.

141. *Id.* at 755.

142. *Id.*

143. *Id.* at 793 ("The new equal protection paradigm stresses the interests we have in common as human beings rather than the demographic differences that drive us apart. In this sense, the shift from the 'old' to the 'new' equal protection could be seen as a movement from group-based civil rights to universal human rights.").

144. *See id.* at 777 (discussing *Lawrence* and observing that the Court rejected an equal protection ruling and instead held that the anti-sodomy law "violated the fundamental right of all persons—straight, gay, or otherwise—to control their intimate sexual relations"); *id.* at 783 (discussing *Casey* and arguing that the Court advanced women's equality without utilizing group-based equal protection); *id.* at 784–85 (discussing precedent that provides redress to persons with disabilities through a liberty analysis rather than equal protection).

145. *Id.* at 777–78.

146. *See id.* at 787 ("For now, however, the evidence seems to support the proposition that equality norms have not been evicted from constitutional jurisprudence altogether, but have rather been relocated to collateral areas of doctrine [like dignity-based liberty claims]."). Yoshino's analysis of *Obergefell* places less emphasis on dignity and more on liberty as a possibility for substantive equality interests. He interprets *Obergefell* as establishing an "antisubordination liberty" doctrine. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L.

3. Race and Dignity

Although Yoshino's work does not address racial justice extensively, other scholars have focused on the potential benefit that dignity-based claims could mean for race-equality claims. Professor Christopher Bracey, for example, draws from slave narratives and humanities scholarship to illuminate the dignitary harms racial subordination causes.[147] Bracey views the long battle to attain racial justice in the United States "as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color."[148] Bracey therefore believes that legal scholars whose work examines racial injustice should consider using dignity arguments to frame claims for racial justice.[149] Several other legal scholars have invoked dignity to support legal reforms that address pervasive patterns of racial inequality.[150] Although legal scholars have made persuasive arguments about the value of framing racial injustice as dignitary harms, numerous factors undermine these assertions.

II. REASON FOR DOUBT: WHY DIGNITY-BASED CLAIMS IN FEDERAL COURTS WILL NOT LIKELY LEAD TO RACIAL JUSTICE IN THE NEAR FUTURE

The Supreme Court has invoked the concept of dignity in its opinions for over seventy years. Nevertheless, the Court has not done much to elaborate the meaning of dignity. Consequently, dignity suffers from ambiguity and indeterminacy—which weakens the contention that dignity-based litigation claims can lead to better racial-justice outcomes. Even if the Court were to theorize dignity, the resulting conception likely would not validate antisubordination or anticaste approaches to racial justice. Instead, for several reasons, the Court would probably adhere to its current race-equality doctrine, which generally prohibits intentional

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REV. 147, 174 (2015). Yoshino contends that this doctrine requires that "in the common law adjudication of new liberties, the effect on those subordinated groups should matter." *Id.* at 175.

147. *See generally* Bracey, *supra* note 5, at 676 (arguing that "dignity is . . . a central area of concern in the struggle for racial justice").

148. *Id.* at 671.

149. *Id.* at 674–75.

150. *See, e.g.*, Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1373–74 (2009) (advocating a constitutional vision that includes protection of human dignity and contending that "anti-slavery critique" should inform this "reconstructed" constitutional interpretation); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 511–12, 524 (2010) (advocating use of dignity approach to contest collateral consequences of criminal conduct that disparately impacts persons of color); Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMP. POL. & C.R. L. REV. 73, 84 (2010) (arguing that racial isolation of children of color in low-resource public schools causes dignity harms).

racial discrimination, regardless of purpose, and upholds facially neutral legislation, even when it disparately harms persons of color.

A. *Current Doctrinal Conception of Dignity Impedes Racial Justice*

Although dignity is undertheorized in Supreme Court cases, in some precedent, the Court has employed dignity to invalidate racial-justice measures. This precedent counsels against strong reliance upon dignity-based claims to achieve racial justice.

1. Court Invokes Dignity of Whites to Invalidate Race-Based Remedies

The Court has invoked dignity in equal protection cases to invalidate remedies for racial inequality. This occurs most frequently in affirmative action cases. Court doctrine inadequately distinguishes race-conscious remedies from invidious racial discrimination. While the Court recognizes that compelling interests might justify usage of race, it has held that any explicit usage of race by state actors causes dignitary harms.[151] This finding obscures critical distinctions between remedies and the conduct being remedied.[152] State-mandated racial segregation during Jim Crow helped to solidify the subordinate status of blacks. In *Plessy v. Ferguson*, however, the Court found that blacks chose to believe that racial segregation stigmatized them.[153] *Brown v. Board of Education* reversed this finding and held that racial segregation stigmatized black children.[154] The Court relied upon psychological studies to support this finding.[155]

Several factors justify the assertion that racial segregation of blacks (and Jim Crow generally) subordinated and stigmatized blacks, thus

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151. Bracey, *supra* note 5, at 697–98 (observing that in Court doctrine, "dignity is thought to be best protected by a strong presumption against the deployment of any racial classification").

152. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243, 245 (1995) (Stevens, J., dissenting) (observing that applying strict scrutiny to invidious and remedial discrimination is analogous to a failure to distinguish a "No Trespassing" sign from a "welcome mat").

153. 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

154. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

155. *Id.* at 494 & n.11.

causing dignitary harms.[156] The Court, however, has extended this conclusion to find that all racial classifications are destructive of human dignity.[157] The Court supports this position by referencing the historical problems caused by racial discrimination.[158] This history, however, does not involve the use of race to remedy inequality.[159] Instead, the concept of race in U.S. history served to facilitate and justify white supremacist social and legal practices and the subordination of persons of color.[160] The Court's generalization of racial harm distorts the concrete differences between helping and subjugating persons of color or remedying and causing racial inequality.[161] The Court's finding of universal racial injury also ignores substantive distinctions between subjugating entire populations of people by race and racially classifying individuals to create a more egalitarian society.[162] Subordination conflicts with the immediate historical impetus for the Civil War Amendments.[163] Remedying subordination and classifying by race, however, are consistent with that history.[164] Despite this history, the Court's doctrine subjects race-based remedies to a high degree of skepticism; by contrast, racially neutral laws that subjugate or harm persons of color receive judicial deference.[165]

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156. Bracey, *supra* note 5, at 671.

157. *Id.* at 698.

158. *Id.* at 697.

159. *See id.*

160. *See id.* (observing that "the Court has generally chosen to elide the question of dignity as it relates to our painful history of racial injustice").

161. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to 'govern impartially,' should ignore this distinction." (citation omitted)).

162. *Id.* ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

163. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428–30 (1960) (defending the *Brown* decision on the grounds that segregation disadvantages blacks and thus conflicts with meaning of Fourteenth Amendment).

164. *See id.* at 423 ("[H]istory puts it entirely out of doubt that the chief and all-dominating purpose [of the Fourteenth Amendment] was to ensure equal protection for the Negro.").

165. *Compare* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2209–10 (2016) (applying strict scrutiny to university's race-based admissions program), *with* Washington v. Davis, 426 U.S. 229, 242 (1976) (applying rational basis review to a racially neutral law that had a disproportionate impact on persons of color).

The Court first found that race-based remedies injure whites in *Regents of the University of California v. Bakke*.[166] Justice Lewis F. Powell Jr., who wrote the opinion for the plurality, addressed and rejected the University of California's argument that affirmative action measures were "benign" or non-stigmatic.[167] While Justice Powell asserted that stigma is not the only basis for finding that a racial classification violates the Fourteenth Amendment,[168] he also contended that affirmative action plans can stigmatize whites, just like invidious discrimination against persons of color.[169]

In *City of Richmond v. J.A. Croson Co.*,[170] Justice Sandra Day O'Connor appealed explicitly to dignity to justify colorblind constitutionalism and the invalidation of a municipal set-aside program employed to remedy racial discrimination in local government procurement.[171] Justice O'Connor linked Justice Powell's argument regarding white stigma with the concept of dignity. She argued:

> The Richmond Plan denies [to white] citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. . . . [T]heir "personal rights" to be treated with equal dignity and respect are

166. 438 U.S. 265, 305 (1978) ("When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.").

167. *Id.* at 294 ("Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'").

168. *Id.* at 294 n.34 ("The Equal Protection Clause is not framed in terms of 'stigma.'").

169. Justice Powell argued that

> [a]ll state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.

Id. (emphasis omitted).

170. 488 U.S. 469 (1989) (plurality opinion).

171. *Id.* at 493. Statistics showed that only 0.67% of prime municipal contracts went to minority-owned businesses for five years prior to the enactment of the affirmative action plan. *Id.* at 479–80.

> implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.[172]

Subsequently, in *Adarand Constructors, Inc. v. Pena*,[173] a majority of the Court found that racial classifications, regardless of purpose, are an affront to human dignity.[174] *Adarand* marked the first time a majority of the Court held that congressional race-based affirmative action plans trigger strict scrutiny, as do state-sponsored policies.[175] Thus, the Court held that a *rebuttable* presumption that minority-owned businesses are socially disadvantaged requires strict judicial scrutiny.[176] The Court reached this conclusion even though Congress had repeatedly documented discrimination that minority-owned businesses face in the competition for government grants and procurement.[177] The protection of whites from the indignity of affirmative action, however, dictated the outcome of the case.

Roberts Court opinions also prioritize white dignity over the economic and social well-being of persons of color. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[178] for example, the Court invalidated plans implemented by public schools in Seattle, Washington, and Jefferson County, Kentucky, to prevent the racial isolation of children of color in public schools.[179] The Court held that racial classifications—whether remedial or invidious—warrant

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172. *Id.* at 493; *see also* Bracey, *supra* note 5, at 700 (discussing *Croson* and the effect race preference policies have on white people's dignity).

173. 515 U.S. 200 (1995).

174. *Id.* at 230 ("Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."); *see also* Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

175. *Adarand Constructors*, 515 U.S. at 227.

176. *Id.* ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

177. Fullilove v. Klutznick, 448 U.S. 448, 458–59 (1980) (discussing Congressional findings regarding barriers faced by minority-owned businesses); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1167 (10th Cir. 2000) ("There can be no doubt that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy.").

178. 551 U.S. 701 (2007) (plurality opinion).

179. *Id.* at 747–48.

application of strict scrutiny because they harm individual dignity.[180] A plurality of the Court argued that states do not have a compelling interest in eradicating racial isolation in public schools unless segregation results from intentionally discriminatory state action.[181] Justice Anthony Kennedy, however, provided an important swing-vote for a majority, which held that ending racial isolation of students of color in public schools could justify use of race-specific policies by local officials.[182] Although Justice Kennedy recognized that racial isolation can impede "equal educational opportunity,"[183] he, like members of the plurality, argued that the challenged policies were not narrowly tailored.[184] Justice Kennedy contended that school officials' conscious and explicit use of racial benchmarks for pupil assignments inflicted dignitary harms upon whites:

> When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change.[185]

Justice Kennedy did not supply any empirical research to support his contention that race-conscious remedies inevitably deprive persons of dignity. Social scientists, however, submitted an amicus brief that details the deeply injurious consequences of racial and economic isolation upon the education of students of color.[186] Justice Kennedy also failed to weigh the relative value of the harm to white dignity that affirmative action allegedly causes against the actual educational deprivation that students

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180. *Id.* at 746 ("As the Court explained in *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), '[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."' (alteration in original)).

181. *Id.* at 720 (arguing that there was not a "compelling interest of remedying the effects of past intentional discrimination . . . [in the] Seattle public schools" (citation omitted)).

182. *Id.* at 788 (Kennedy, J., concurring) ("To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.").

183. *Id.*

184. *Id.* at 788–98.

185. *Id.* at 797 ("Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.").

186. Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 10, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1., 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079.

of color suffer due to systemic racial inequality.[187] Instead, Justice Kennedy prioritized the dignity of whites while obscuring the acute problems associated with racially isolated schools that most students of color attend.[188]

Procedural doctrines in affirmative action cases also illustrate how the Court prioritizes protection of white dignity in equal protection doctrine. Specifically, the Court has relaxed standing requirements to make it easier for white plaintiffs to challenge affirmative action policies.[189] Traditionally, the standing doctrine requires plaintiffs to demonstrate an "injury in fact" that is "concrete and particularized."[190] The standing doctrine also requires plaintiffs to prove that the challenged conduct of the defendant caused the injury and that such harm is redressable by a ruling in their favor.[191] Whites, however, can challenge affirmative action policies without demonstrating that the plans impeded their access to any governmental benefit.[192] Accordingly, a white plaintiff has standing to challenge affirmative action in higher education solely because the school does not allow whites to compete for every seat available for admissions—or because race operated as a positive factor in the

187. *Parents Involved*, 551 U.S. at 797.

188. Although Justice Kennedy, like the Court in *Adarand*, *Cayetano*, and *Croson*, frames his argument in universal terms (racial classifications are generally harmful), the litigants who challenged the school assignments are white. David Kravets, *The Seattle School District Argues for Racial Tiebreaker*, SEATTLE TIMES (June 22, 2005, 12:00 AM), http://old.seattletimes.com/html/education/2002344178_race22m.html (stating that the organization Parents Involved in Community Schools "consists mostly of white parents"); Nina Totenberg, *Supreme Court to Weigh Schools' Racial Plans*, WBUR NEWS (Dec. 4, 2006), http://www.wbur.org/npr/6567985/supreme-court-to-weigh-schools-racial-plans (describing Kentucky plaintiff Crystal Meredith as "white"). Also, the persons who suffered materially from the judicial invalidation of the plans are students of color. *See* Charles T. Clotfelter et al., *School Segregation Under Color-Blind Jurisprudence: The Case of North Carolina*, 16 VA. J. SOC. POL'Y & L. 46, 58, 61 (2008); Barbara J. Flagg, *In Defense of Race Proportionality*, 69 OHIO ST. L.J. 1285, 1297 (2008); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272–75 (1999); Andy Sharma et al., *Adverse Impact of Racial Isolation on Student Performance: A Study in North Carolina*, EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 10, 2014, at 10–14. Social science data regarding the harmful impact of racial isolation for students of color was submitted to the Court in amicus briefs. Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in* Parents Involved *and* Meredith*: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 717 (2008). Other social science data submitted to the Court challenged this research. *Id.* at 718–19. The National Academy of Education, however, reviewed all of the data and released a report the day after the Court decided *Parents Involved*; the report found that racial integration produces near-term and long-term benefits in terms of student performance and interracial understanding. *Id.* at 719.

189. *See* Boddie, *supra* note 91, at 300–01; Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1423–24 (1995).

190. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

191. *Id.* at 560–61.

192. Boddie, *supra* note 91, at 353–54 (discussing standing in affirmative action cases and contrasting the lower standard used in those cases versus the high hurdles the Court has required of plaintiffs of color challenging discrimination).

admission of students of color but not whites.[193] Likewise, white-owned businesses have met the injury-in-fact requirement because they did not have access to all available contracting opportunities with the governmental agency employing set-aside programs.[194] These plaintiffs, however, do not have to demonstrate that in the absence of affirmative action they would have obtained the desired benefit.[195]

By contrast, when people of color have challenged state action that disparately harms them in very tangible and pervasive ways, the Court has insisted that they meet a narrower and more exacting test for standing.[196] The Court in *Warth v. Seldin*,[197] for example, dismissed a housing discrimination claim brought by black residents of Rochester, New York, and regional builders of low-income housing.[198] The *Warth* plaintiffs alleged that, by design or effect, land-use laws in Penfield, a suburb of Rochester, excluded low- and moderate-income housing.[199] Plaintiffs also alleged that these policies negatively impacted persons of color, who, due to economic disparities, could benefit from more affordable housing.[200] The Court dismissed most of the claims after finding that several plaintiffs lacked standing to sue.[201] The Court found that the racial minority plaintiffs failed to allege any specific conduct that

193. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (finding that "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing").

194. *See* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract.").

195. *See* Boddie, *supra* note 91, at 356 ("The *Adarand* Court found that white litigants had standing to challenge a federal program that offered financial incentives to prime contractors to hire minority subcontractors, even though the plaintiff had not shown how the program had affected its loss of the federal contract or the actual impact that the requested relief would have had on its future business." (footnote omitted)); Spann, *supra* note 189, at 1438–40 (arguing that the Court demands less evidence of causation to meet standing requirements in affirmative action cases).

196. *See* Boddie, *supra* note 91, at 345 (arguing that standing doctrine privileges white affirmative action plaintiffs "who . . . benefit from presumptions of racial harm that are not afforded to minority litigants who challenge systems that have a racially discriminatory impact"); Spann, *supra* note 189, at 1453 ("When the plaintiff challenges a systemic practice that adversely affects the interests of the white majority, such as an affirmative action program, the Court tends to uphold the plaintiff's standing. But when the plaintiff challenges a practice that adversely affects the interests of racial minorities, such as a pattern of restrictive zoning, tax subsidization, or police misconduct, the Court tends to deny the plaintiff's standing.").

197. 422 U.S. 490 (1975).

198. *Id.* at 493.

199. *Id.* at 495.

200. *Id.* at 496.

201. *Id.* at 518.

demonstrated Penfield had excluded them personally from the city.[202] Rather, the Court found the complaint simply alleged that plaintiffs of color were members of a class of people who might have been illegally excluded from housing in Penfield.[203] Shared status with a class of potential victims of discrimination, however, does not establish an injury-in-fact.[204] In affirmative action cases, however, whiteness establishes injury as a matter of law.

The *Warth* plaintiffs also failed to meet the causation and redressability requirements of standing.[205] The Court found that plaintiffs did not demonstrate that in the absence of exclusionary land-use policies they would have been able to find affordable housing in Penfield and that a ruling in their favor would create the necessary conditions for them to find such housing.[206] By contrast, the mere existence of an affirmative action policy establishes causation and redressability—even if plaintiffs cannot demonstrate that the policy resulted in their exclusion from a governmental program.[207]

That affirmative action involves explicit discrimination cannot justify the differing results. In *Warth*, for example, the complaint alleged purposeful discrimination and discriminatory impact.[208] Regardless, subjecting claims challenging pervasive racial inequality to more

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202. *Id.* at 502 ("But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights.").

203. *Id.*

204. *Id.*

205. *Id.* at 506 (finding that plaintiffs failed to demonstrate that "were the court to remove the obstructions attributable to respondents, such relief would benefit [them]").

206. *Id.* at 504 ("Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed."); *see also* Allen v. Wright, 468 U.S. 737, 746, 755 (1984) (finding black parents lacked standing to challenge tax-exempt status of racially discriminatory private schools on the grounds that they could not demonstrate that in the absence of the policy, their children would have access to a diverse educational environment), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); Boddie, *supra* note 91, at 345 (discussing the innocence paradigm and standing doctrine); Spann, *supra* note 189, at 1453 (discussing race and standing doctrine).

207. *See Leading Cases*, 107 HARV. L. REV. 144, 308 (1993) (observing that the plaintiff challenging contract set-aside program "achieved standing without claiming that the affirmative action program actually caused one of its members to lose a contract" and that the plaintiff "had not even alleged that one of its members had applied for a contract that was affected by the affirmative action program").

208. *Warth*, 422 U.S. at 495 ("Petitioners' complaint alleged that Penfield's zoning ordinance, adopted in 1962, has the purpose and effect of excluding persons of low and moderate income from residing in the town.").

stringent procedural hurdles than standards employed in affirmative action cases directly privileges whites' assertions of injustice over those of persons of color.[209] The substantive and procedural content of affirmative action cases counsel against strong reliance upon dignity-based claims to advance racial equality.[210]

2. Court Invokes Dignity of States to Invalidate Race-Based Remedies

Appeals to dignity in racial justice might not engender a more robust equal protection analysis for an additional reason. The Court invokes state dignity in order to diminish civil rights protection.

a. Institutional Dignity, Sovereign Immunity, and Civil Rights

The Court has employed the concept of "institutional dignity" to immunize states from lawsuits and federal regulation, including litigation and policies related to civil rights and racial justice. Historically, institutional dignity referred to a privileged status that the law extended to aristocratic individuals and to the crown or government.[211] Institutional dignity also served as the basis for changes in early American jurisprudence that strengthened state sovereignty, including the ratification of the Eleventh Amendment.[212] For most of American history state sovereign immunity, derived from institutional dignity, had very little constitutional import. Rehnquist Court rulings, however, endowed the concept of state sovereign immunity with tremendous power. In a string of divided and highly criticized opinions on state sovereign immunity, the Rehnquist Court made it far more difficult for Congress to authorize suits against states seeking monetary remedies.[213] The Eleventh Amendment partly serves as a basis for the state sovereign immunity

209. Spann, *supra* note 189, at 1488 (placing the Court's standing cases within a "long tradition of Supreme Court decisions that have preserved majority control over minority interests").

210. *See* Bracey, *supra* note 5, at 697–701 (advocating dignity but acknowledging that current Court doctrine often uses the concept to strike down race-based remedies).

211. Henry, *supra* note 6, at 191 (discussing institutional dignity).

212. *Id.* at 197.

213. *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1153 (2006) ("The Rehnquist Court's sovereign immunity decisions need no introduction. In approximately a dozen important cases reaching back roughly a decade, the Court has reinvigorated the states' immunity from lawsuits by private citizens in a myriad of ways."); *id.* at 1155 ("With few if any exceptions, the Rehnquist Court's most momentous sovereign immunity decisions have come over the vigorous dissent of Justices Stevens, Souter, Ginsburg, and Breyer." (footnote omitted)); *id.* (noting "persistent and voracious internal and external criticism" of Rehnquist Court's sovereign immunity decisions).

doctrine.[214] Textually, however, the Eleventh Amendment only bars diversity litigation involving state defendants in federal courts.[215] Nevertheless, the Rehnquist Court invoked general notions of state dignity and sovereignty to block litigation against states in state courts.[216] The Rehnquist Court also narrowly construed the conditions under which Congress could abrogate state sovereign immunity.[217] These rulings have drastically reduced the availability of damages and restitution from states that violate federal law. They have also impacted lawsuits seeking remedies for state violations of the Constitution and civil rights statutes.[218] The preclusion of monetary recovery in litigation against states and the curtailment of congressional authority to define and remedy state civil rights violations have weakened the protection of vulnerable persons from abuse by states.[219]

b. Dignity of States, Race, and Civil Rights

The Court has also invoked the dignity of state governments—apart from sovereign immunity—to justify invalidation of antidiscrimination policies. In *Shelby County v. Holder*,[220] for example, the Court invalidated Section 4(b) of the Voting Rights Act.[221] Section 4(b)

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214. Jennifer Lynch, *The Eleventh Amendment and Federal Discovery: A New Threat to Civil Rights Litigation*, 62 FLA. L. REV. 203, 214 (2010) ("The Eleventh Amendment to the Constitution contains basic principles of the state sovereign immunity doctrine . . . .").

215. *See* U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.").

216. *See* Alden v. Maine, 527 U.S. 706, 706, 714 (1999).

217. *See* Siegel, *supra* note 213, at 1153 (arguing that the Court has "developed a fairly intrusive test to determine whether Congress has properly abrogated the states' immunity pursuant to its Fourteenth Amendment powers").

218. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363–64, 374 (2001) (finding that Congress cannot abrogate state immunity for lawsuits under the Americans with Disabilities Act because Article I cannot serve as basis for abrogation, and Section Five of the Fourteenth Amendment cannot serve as basis in this instance because the Court has determined that discrimination against persons with disabilities does not generally violate the Constitution).

219. Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 593 (2007) (arguing that "[a]s a result [of sovereign immunity for states and qualified immunity for state actors], victims of constitutional violations are often left without an opportunity to obtain compensation for the harm they have suffered, and civil rights protections are inadequately enforced"); *id.* at 605–06 (arguing that liability for monetary relief incentivizes states to comply with legal obligations).

220. 133 S. Ct. 2612 (2013).

221. *Id.* at 2631 ("Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.").

contains a formula to determine which states, due to a history of voter suppression on the basis of race, should have changes to their election laws approved by the U.S. Department of Justice or a panel of federal judges.[222] *Shelby County* found Section 4(b) unconstitutional on the grounds that it impugns the "equal" "dignity" of states.[223]

The Voting Rights Act is the strongest statutory weapon against racist voter suppression.[224] Congress reauthorized the Voting Rights Act in 2006 by wide margins in both houses.[225] Congress held hearings that determined the covered jurisdictions continue to erect barriers that prevent political participation among persons of color.[226] Despite extensive congressional findings of ongoing discrimination and the documented success of the Voting Rights Act, the Court invalidated Section 4(b).[227] The Court effectively extended solicitude to covered states to protect their dignity against the intrusion of a racial-justice statute.[228]

Shelby County raises many important concerns for racial justice. Even if states are entitled to equal dignity—which is debatable—the Court's decision to elevate this concept over the protection of persons of color from racial subordination should lead to skepticism regarding the potential role of dignity as an instrument of racial justice in federal courts. Indeed, in *Shelby County* the Court dismissed the significance of ongoing racism as a contemporary barrier to political participation by people of color.[229] Furthermore, the Court showed very little concern for the

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222. *Id.* at 2620 ("Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges.").

223. *Id.* at 2623, 2630–31.

224. *Id.* at 2634 (Ginsburg, J., dissenting) (observing that "the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history"); Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1289 (2007) ("Deemed by Congress 'the most effective tool for protecting the right to vote,' the Voting Rights Act has come to embody a broad and powerful proclamation against both intended and inadvertent diminutions of electoral power based on race." (footnote omitted)).

225. *Shelby Cty.*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting) (observing that "the House . . . passed the reauthorization by a vote of 390 yeas to 33 nays" and that it passed in the Senate "by a vote of 98 to 0").

226. *Id.* at 2639–44.

227. *Id.* at 2631 (majority opinion).

228. *Id.* at 2625–26.

229. *Id.* at 2625 ("Nearly 50 years later, things have changed dramatically. . . . In the covered jurisdictions, '[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' The tests and devices that blocked access to the ballot have been forbidden nationwide for over

historical origins of the Fourteenth and Fifteenth Amendments, which empower Congress to secure racial egalitarianism in voting.[230] Both of these amendments place racial egalitarianism above the institutional dignity of southern states.[231] The Court, however, inverts this history. Securing rights for the descendants of slaves and other persons of color constitutes an affront to state dignity. This same perception of race-equality measures permeated white supremacist legal and political discourse during the post-bellum era and justified judicial invalidation of congressional efforts to disestablish slavery and to create civil, political, and social equality for blacks.[232] The Court's use of this logic in 2015 undermines assertions that dignity-based litigation in federal courts can advance racial justice.

3. Dignity Precedent Fails to Protect Most Vulnerable Populations

Even when the Court has used dignity to expand fundamental rights and equal protection for disadvantaged groups, it has sometimes failed to extend solicitude to the most vulnerable populations of individuals. Consequently, dignity-based litigation claims might not persuade the Court to articulate a substantive racial-equality doctrine.

a. Abortion, Dignity, and Poor Women

The abortion cases—particularly *Planned Parenthood of Southeastern Pennsylvania v. Casey*—have generated substantial academic attention regarding dignity as a constitutional concept. A closer examination of these cases, however, demonstrates the limited value of dignity for racial-justice litigation. While these cases invoke dignity to support abortion rights, these precedents also uphold laws that deny reproductive autonomy and access to reproductive services by poor women, who are disproportionately persons of color.

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40 years." (citation omitted) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009))).

230. Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. FORUM 175, 192 (2013) ("To elevate a principle of the equal dignity of the states to the status of a constitutional constraint on the Reconstruction Power, in a case about federal protection for minority voting rights, would be to inscribe into the Constitution some of the core constitutional claims, unsuccessful even in their own time, of the defeated Confederacy and its apologists.").

231. *See id.* at 192–93.

232. *Id.* at 181 ("In opposition to Reconstruction, Southerners began to forge a combination of themes into a powerful ideology: Southern honor and virtue, the perfidious and dishonorable character of the federal occupation, principles of state sovereignty and the equal treatment of the states, and opposition to racial equality.").

In *Casey*, for example, the Court broadly construed the Due Process Clause as barring state intrusion into "matters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[233] The Court also found that "[a]t the heart of [Fourteenth Amendment] liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[234]

The Court's liberal construction of the Due Process Clause justifies invalidation of a spousal notification provision—even though evidence showed that the vast majority of married women tell their husbands before they have an abortion and that the threat of abuse among the remaining couples is small.[235] On the other hand, the Court's sweeping definition of liberty did not preclude upholding the informed consent and waiting period provisions, even though evidence indicated that these policies significantly increased the cost of obtaining abortions, which in turn substantially impacted poor women, who are disproportionately women of color.[236] This harmful outcome goes beyond the logic the Court applies in abortion-funding cases.[237] The Court upholds funding restrictions on the grounds that the governmental defendants did not directly cause indigent women's inability to pay for an abortion.[238] In *Casey*, however, the Court upholds state policies that directly increase the cost of the procedure—making it more burdensome for poor women to exercise their right to terminate a pregnancy.[239] Because the Court fails

233. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

234. *Id.*

235. *Id.* at 892.

236. In the *Casey* litigation, the District Court held that the 24-hour waiting provision of the statute was unconstitutional due to the burden it would place on poor women. *See* Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990) (discussing economic impact of the statute), *aff'd in part and rev'd in part*, 502 F.2d 682 (3d Cir. 1992), *aff'd in part and rev'd in part*, 505 U.S. 833. The Supreme Court, however, held that "the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles," so its finding does not demonstrate a violation of the newly minted undue burden test. *Casey*, 505 U.S. at 886–87 (upholding 24-hour waiting period).

237. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

238. *McRae*, 488 U.S. at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); *Maher*, 432 U.S. at 474 ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.").

239. *Casey*, 505 U.S. at 885–87 (conceding that a 24-hour waiting period would increase cost of abortion but upholding the provision).

to protect poor people in cases that express a robust commitment to human dignity, it is doubtful that dignity-based litigation can advance racial-justice agendas that seek to lessen and eradicate pervasive racial inequality.[240]

b. Dignity, Sexual Orientation, and Suspect Class Doctrine

Due process and equal protection cases implicating the rights of LGBT individuals have also used dignity to advance the causes of vulnerable populations. In *Lawrence v. Texas*,[241] *United States v. Windsor*,[242] and *Obergefell v. Hodges*,[243] the Court found that the challenged laws impugn the dignity of same-sex married couples and sexual partners. While these cases produce results that LGBT social movements have celebrated, they do not broadly imply the impermissibility of anti-LGBT legislation. The Court's sexual-orientation precedent does not generally imply the impermissibility of anti-LGBT legislation because it fails even to consider whether LGBT individuals constitute a suspect class—or whether sexual orientation and gender identity are suspect classifications.[244] Thus, the Court has applied only rational basis review in these cases. Application of strict or intermediate scrutiny presumes that the challenged statute, absent pressing justification and sufficiently close tailoring, violates the

240. The Court has also invoked gender stereotypes to limit abortion rights. *See* Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." (citations omitted)); *id.* at 183–84 (Ginsburg, J., dissenting) ("Because of women's fragile emotional state and because of the 'bond of love the mother has for her child,' the Court worries, doctors may withhold information about the nature of the intact D&E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety." (emphasis omitted) (footnote omitted) (citations omitted)); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1732–33 (2008).

241. 539 U.S. 558, 575 (2003).

242. 133 S. Ct. 2675, 2696 (2013).

243. 135 S. Ct. 2584, 2608 (2015).

244. Barry et al., *supra* note 98, at 551 (observing that only one federal district court, but not the Supreme Court, has ruled that transgender persons constitute a quasi-suspect class); Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?*, 100 MINN. L. REV. 2103, 2140 (2016) ("Despite efforts to establish sexual orientation as a suspect or quasi-suspect classification, the Supreme Court has thus far not based its pro-LGBT decisions on that theory.").

Constitution.[245] Rational basis review, by contrast, presumes the constitutionality of the challenged law, and courts scrutinize the policies with great deference.[246] In cases finding animus, the Court has arguably applied a stronger version of rational basis review and invalidated anti-LGBT legislation.[247] The Court, however, has not found that deprivations of dignity, standing alone, warrant a more robust rational basis scrutiny. Furthermore, applying rational basis, numerous state and federal courts have upheld anti-LGBT policies, including discrimination related to employment,[248] adoption,[249] and civil rights enactments.[250] Although these cases predate *Windsor* and *Obergefell*, the Supreme Court's dignity jurisprudence does not render them inapplicable. *Windsor* and *Obergefell* apply rational basis review, just like the older precedent that upholds anti-LGBT policies. *Lawrence*, *Windsor*, and *Obergefell*, along with *Romer v. Evans*,[251] indisputably mark a departure from prior doctrinal approaches to sexual-orientation discrimination. Yet, the scope of that shift remains unclear. While litigants will certainly use the Court's sexual-orientation dignity precedent to challenge anti-LGBT discrimination in contexts beyond marriage and sexual liberty, application of strict or intermediate scrutiny in these cases would have benefitted LGBT plaintiffs more immediately and substantially because it would have bound all state and federal courts to a higher standard of review. The Court's cautious approach in sexual-orientation precedent justifies skepticism regarding assertions by legal scholars that dignity-

245. Under strict scrutiny, courts will deem the challenged policy unconstitutional unless the government can demonstrate that it pursues a "compelling" interest and is "narrowly tailored" to that end. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (discussing strict scrutiny in context of racial discrimination). Intermediate scrutiny is more flexible than strict scrutiny, but the government still must demonstrate why the court should not find the law unconstitutional. United States v. Virginia, 518 U.S. 515, 533 (1996). To survive intermediate scrutiny, the government must demonstrate that the law pursues an "important" interest and the means taken are "substantially related" to the attainment of that governmental objective. *See id.* (discussing intermediate scrutiny in the context of sex discrimination).

246. *See* Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (describing rational basis review).

247. Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2116 (2015) (including *Romer* and *Windsor* on list of cases finding animus and applying stronger version of rational basis called "rational basis with bite").

248. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818, 827 (11th Cir. 2004); Steffan v. Perry, 41 F.3d 677, 686–87 (D.C. Cir. 1994); Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987); Dronenburg v. Zech, 741 F.2d 1388, 1397–98 (D.C. Cir. 1984).

249. *Lofton*, 358 F.3d at 818.

250. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 301 (6th Cir. 1997).

251. 517 U.S. 620 (1996).

based claims could lead to robust use of judicial power to counter systemic racial inequality.[252]

c. Dignity, Sexual Orientation, and Intentional Discrimination

The development of dignity as a factor in sexual-orientation precedent might not help racial-justice movements for another important reason. In those cases, the Court invalidates laws that discriminate facially on the basis of sexual orientation.[253] Dignity helped to advance LGBT rights claims when the challenged policies were intentionally and overtly discriminatory.[254] With respect to race, equal protection litigation fails people of color precisely because the Court requires them to prove facial or otherwise intentional discrimination.[255] Furthermore, the Court's treatment of all racial classifications as an affront to human dignity—regardless of purpose—has impeded the attainment of racial equality.[256] The presence of intentional discrimination in the sexual-orientation dignity cases complicates arguments that these precedents can serve as the basis for a more progressive race-equality doctrine. Unless the Court expresses a willingness to find that statistical patterns of discrimination can impose dignitary harms, it is unlikely that its sexual-orientation precedent will help transform racial-equality doctrine.

d. Dignity, Sexual Orientation, Race, and Public Opinion

Political scientists and legal scholars have written extensively on the correlation between Supreme Court rulings and known public opinion. Although many scholars continue to view the Court as a counter-majoritarian institution, empirical research has rebutted this perspective.[257] The strong correlation between Court rulings and popular opinion counsels against arguments that dignity-based claims can lead to a more robust race-equality doctrine.

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252. Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 504 (2015) (predicting how the Court will approach cases dealing with sexual orientation in the future).

253. The laws discriminate against LGBT persons facially or against same-sex intimate couples who are, by definition, members of the class of LGBT individuals. *But see* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 185–86 (2016) (arguing that the Court applies disparate impact analysis to find sexual orientation discrimination).

254. *See* Allison S. Bohm et al., *Challenges Facing LGBT Youth*, 17 GEO. J. GENDER & L. 125, 129 (2016).

255. *See supra* text accompanying notes 80–90.

256. *See supra* Subsections I.A.2, II.B.1.

257. *See* Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 15–17 (2005) (discussing literature rebutting the counter-majoritarian view of the Supreme Court).

Consistent with the majoritarian nature of judicial decision making, the Court's sexual-orientation and race cases mirror public opinion. Opinion polls consistently show that whites do not believe that race substantially harms persons of color.[258] Some studies have also found that whites believe that they are more likely to suffer from racial discrimination than persons of color.[259] Although a majority of the public supports formal racial equality, opinion polls of whites reveal deep skepticism regarding the need for substantive race-equality measures.[260] Recent studies have even shown that Millennials, who are generally seen as the most liberal generation, harbor similar views about race.[261] One poll found that a significant number (though not a majority) of white Millennials believe that blacks are lazier and less intelligent than whites.[262] Their perspectives on race mirror the views of older whites.[263] The Court embraces these majoritarian perspectives by conceptualizing racial justice as formal equality.[264] The Court extends deference to neutral policies that cause strong racial patterns of discrimination, reflecting a general disbelief that lawmakers act with discriminatory motivation.[265] On the other hand, it treats with great suspicion any policy that classifies on the basis of race—including policies enacted to ameliorate conditions of racial inequality—which is consistent with adherence to formal equality and skepticism regarding the need for race-based remedies.

The Court's sexual-orientation dignity cases also follow public opinion. When the Court decided *Lawrence*, *Windsor*, and *Obergefell*, polls showed that the public supported the outcome in each case.[266]

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258. Hutchinson, *supra* note 86, at 45–46 (discussing polling data finding that "whites tend to believe that equal opportunity exists in the United States regardless of race").

259. *Id.* at 48.

260. *See, e.g.*, *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/ (finding that 53% of whites and 88% of blacks believe "more changes [are] needed"; that 22% of whites and 64% of blacks believe that employers treat blacks fairly; and that 36% of whites and 70% of blacks believe that racial discrimination keeps blacks from "getting ahead").

261. Scott Clement, *Millennials Are Just About as Racist as Their Parents*, WASH. POST (Apr. 7, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/23/millennials-are-just-as-racist-as-their-parents/.

262. *Id.*

263. *Id.*

264. *See* Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485, 508–09 (1991).

265. *See supra* Subsections I.A.2, I.A.3.

266. When the Court decided *Lawrence*, a majority of Americans supported legalization of adult homosexual conduct. *See* Neil A. Lewis, *Conservatives Furious over Court's Direction*, N.Y. TIMES (June 27, 2003), http://www.nytimes.com/2003/06/27/national/27CONS.html (observing that polls showed that the majority of Americans supported legalizing consensual,

Furthermore, each case involved matters of formal equality; the challenged laws explicitly discriminated against same-sex couples and intimate partners. It is unclear how the Court or the public would view LGBT issues that extend beyond formal equality or that involve multidimensional or intersectional discrimination.[267] Also, while the Court decided the sexual-orientation dignity cases as public attitudes concerning LGBT rights shifted rapidly towards greater acceptance and tolerance, similar changes have not occurred with respect to public attitudes concerning substantive racial equality.[268] It is unlikely that the Court will substantially alter its race-equality doctrine in the absence of substantial social and political change in the United States.

B. *Equal Protection Fails People of Color Due to Judicial Ideology—Not Imperfect Theories*

The pursuit of racial justice through dignity-based litigation would also face extreme barriers due to judicial ideology. Conservative

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adult homosexual conduct). When the Court decided *Windsor*, most Americans opposed the Defense of Marriage Act. *See* Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/with-gay-marriage-a-tide-of-public-opinion-that-swept-past-the-court.html (finding that "[a] series of polls suggests that the public wanted the Defense of Marriage Act struck down" when Court decided *Windsor*). When the Court decided *Obergefell*, most Americans supported marriage equality. *See* Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html (noting that public opinion polls showed majority support for same-sex marriage when the Court decided *Obergefell*).

267. *See* Darren L. Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1362, 1365 (2000) (discussing multidimensionality and intersectionality theories); *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (developing intersectionality); Hutchinson, *supra*, at 1370–72 (discussing race critiques of same-sex marriage); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1058–59 (2014) (critiquing arguments by proponents of same-sex marriage for trivializing racial inequality). Also, lesbian feminists have criticized marriage as a civil rights pursuit on the grounds that marriage historically has been the site of male domination. *See, e.g.*, Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIANS, GAY MEN, AND THE LAW 401, 402 (William B. Rubenstein ed., 1993) (arguing that marriage is "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis"); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) (asserting that the "desire to marry . . . betrays the promise of . . . radical feminism"). Also, scholars have observed that some advocates of marriage equality view LGBT rights as the last civil rights movement—an argument that implies racial justice has been achieved. Robinson, *supra*, at 1045, 1049, 1052 (critiquing LGBT rights discourse that portrays blacks as politically powerful).

268. *See* Hutchinson, *supra* note 267, at 1368.

constitutional interpretation—rather than imperfect theories of equality—explains why equal protection doctrine impedes substantive racial equality.[269] The Constitution contains broad provisions that judges must construe.[270] The intent of the Framers is, more often than not, ambiguous or unknown;[271] using it as a basis for constitutional interpretation can also prove impractical.[272] While the historical conditions that generated the text can provide some meaning, judges still retain ample discretion to construe the terms.[273] This discretion permits judicial ideology to influence constitutional adjudication.[274]

1. Court Endorses White Racial Perspectives, Dismisses Views of Persons of Color

With respect to racial equality, the Court has crafted a doctrine that corresponds to the most common perceptions and beliefs of whites

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269. *See supra* Subsection I.A.2.

270. Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 139–40 (2015) (discussing "linguistic indeterminacy" of the Constitution); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 20 (2000) ("The Founders by and large appear to have recognized that legal texts typically are ambiguous rather than self-executing and that the judge's role in interpreting statutes therefore could be important.").

271. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 7 (2009) ("Over the years, originalism's critics have argued, among other things: that the target of the originalist search—be it intent, understanding, or public meaning—is undiscoverable or (in the case of intent) nonexistent . . . ."); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 96 (1987) (arguing that "just about everybody—including Mr. Meese and Judge Bork—concedes, when pressed, that 'original intent' is often multifaceted (since there were many 'framers' both in Congress and in the ratifying assemblies, speaking at many points in time) and indeterminate (since the relevant 'intent' may have been very general or nonexistent)").

272. Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 70, 72 (1995) (arguing that changing society can make original intent obsolete); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1196 (2012) ("An even more serious problem with a reliance on original expected applications to guide the interpretation of vague or ambiguous constitutional text is that framing-era understandings and practice may be irrelevant to contemporary circumstances."); Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 927–28 (2009) ("One of the most persistent criticisms of originalism—and also one of the most powerful—is that originalism is not a viable interpretative methodology because of the tremendous technological, social, cultural, religious, and moral change that has occurred since the Constitution's original meaning was created." (footnotes omitted)); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.").

273. *See supra* text accompanying notes 52–55.

274. *See supra* text accompanying notes 52–55.

regarding race and racism. Court doctrine, however, does not reflect the viewpoints that most persons of color hold regarding race and racism. Social psychology research can help illuminate these points. Quantitative social psychology research examines the core beliefs of racial groups regarding prevalent racial issues in the United States. This research reveals dramatic differences of opinion regarding race among whites and persons of color. Whites, unlike persons of color, favor colorblindness and universalism over race-consciousness and multiracialism.[275] While whites embrace social narratives of individualism, people of color accept group identity and redress.[276] People of color think that race remains a substantial obstacle to their advancement, but whites tend to believe that equal opportunity exists in the United States regardless of race.[277] Finally, a majority of whites now believe that they are a vulnerable social group, while people of color reject this contention.[278]

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275. Hutchinson, *supra* note 86, at 43; Victoria C. Plaut et al., *"What About Me?" Perceptions of Exclusion and Whites' Reaction to Multiculturalism*, 101 J. PERSONALITY & SOC. PSYCHOL. 337, 339 (2011); Carey S. Ryan et al., *Multicultural and Colorblind Ideology, Stereotypes, and Ethnocentrism Among Black and White Americans*, 10 GROUP PROCESSES & INTERGROUP REL. 617, 623–24 (2007); *see* Alison M. Konrad & Frank Linehan, *Race and Sex Differences in Line Managers' Reactions to Equal Employment Opportunity and Affirmative Action Interventions*, 20 GROUP & ORG. MGMT. 409, 424 (1995); Hazel Rose Markus et al., *Colorblindness as a Barrier to Inclusion: Assimilation and Nonimmigrant Minorities*, 129 DAEDALUS 233, 246 (2000) (discussing whites' preference for assimilation and colorblindness versus pluralistic perspective held by persons of color); Aneeta Rattan & Nalini Ambady, *Diversity Ideologies and Intergroup Relations: An Examination of Colorblindness and Multiculturalism*, EUR. J. SOC. PSYCHOL. 12, 13–14 (2013); Maykel Verkuyten, *Ethnic Group Identification and Group Evaluation Among Minority and Majority Groups: Testing the Multiculturalism Hypothesis*, 88 J. PERSONALITY & SOC. PSYCHOL. 121, 134 (2005); Christopher Wolsko et al., *Considering the Tower of Babel: Correlates of Assimilation and Multiculturalism Among Ethnic Minority and Majority Groups in the United States*, 19 SOC. JUST. RES. 277, 301 (2006); *see also* Maykel Verkuyten, *Social Psychology and Multiculturalism*, 1 SOC. & PERSONALITY PSYCHOL. COMPASS 280, 283 (2007) ("Multiculturalism is not only about the majority group accepting and recognizing minority groups, but implies acceptance and recognition on the part of minorities too.").

276. Markus et al., *supra* note 275, at 244–46 (discussing whites' embrace of individualistic social narratives).

277. Hutchinson, *supra* note 86, at 45–46 ("Despite the pervasiveness of substantive racial inequality, whites tend to believe that equal opportunity exists in the United States regardless of race . . . ."); *see also* Richard P. Eibach & Thomas Keegan, *Free at Last? Social Dominance, Loss Aversion, and White and Black Americans' Differing Assessments of Racial Progress*, 90 J. PERSONALITY & SOC. PSYCHOL. 453, 453 (2006) (discussing opinion polls showing a dramatic difference between black and white opinions regarding the existence of racial discrimination).

278. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. PSYCHOL. SCI. 215, 216 (2011) (discussing data showing that whites believe they are more vulnerable to racism than blacks, while blacks do not agree with this position).

These core precepts regarding race influence some of the most compelling social policy questions in the United States, including matters related to educational equality,[279] housing policy,[280] economic justice,[281] employment discrimination,[282] and healthcare delivery.[283] These

279. *See* Clotfelter et al., *supra* note 188, at 57, 61; Flagg, *supra* note 188, at 1290, 1297; Ryan, *supra* note 188, at 272; Sharma et al., *supra* note 188, at 10.

280. Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 198 (2003) (finding that racial isolation of blacks and Latinos impedes their social mobility); Micere Keels et al., *Fifteen Years Later: Can Residential Mobility Programs Provide a Long-Term Escape from Neighborhood Segregation, Crime, and Poverty?*, 42 DEMOGRAPHY 51, 71 (2005) ("Helping low-income minority families relocate to communities that are racially integrated, economically prosperous, and less plagued by crime appears to be beneficial in both the short and long run."); Douglas S. Massey, *Segregation and Stratification: A Biosocial Perspective*, 1 DU BOIS REV. 7, 15 (2004) (discussing long-term negative consequences of residential segregation for poor blacks); Ruth D. Peterson & Lauren J. Krivo, *Segregated Spatial Locations, Race-Ethnic Composition, and Neighborhood Violent Crime*, 623 ANNALS AM. ACAD. POL. SOC. SCI. 93, 105 (2009) ("Proximity to more disadvantaged areas and especially to racially privileged (heavily white) areas is particularly critical in accounting for the large and visible inequality in violence found across neighborhoods of different colors."); Min Xie, *The Effects of Multiple Dimensions of Residential Segregation on Black and Hispanic Homicide Victimization*, 26 J. QUANTITATIVE CRIMINOLOGY 237, 254 (2010) (finding that racial residential segregation makes blacks and Latinos more vulnerable to neighborhood violence).

281. *See* Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354, 355 (2012) (discussing segregation and poverty); Scott J. South et al., *Exiting and Entering High-Poverty Neighborhoods: Latinos, Blacks and Anglos Compared*, 84 SOC. FORCES 873, 891 (2005) ("At low levels of family income, blacks exhibit by far the highest rate of moving from a lower-poverty to a high-poverty tract, followed by Mexicans and Puerto Ricans, respectively.").

282. Sherry N. Mong & Vincent J. Roscigno, *African American Men and the Experience of Employment Discrimination*, 33 QUALITATIVE SOC. 1, 15 (2010) ("Our results suggest that African American men experience significant levels of discretionary sanctioning and policing while on the job. While some of this is tied to harassment, there is no doubt that such policing is playing a large part in disparate rates of firing and differential mobility."); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 561 (2005) ("More specifically, implicit racism interacted with a climate for racial bias to predict discrimination; when individuals were given a business justification for racial discrimination their implicit racist attitudes were positively related to their discriminatory behavior.").

283. Kevin Fiscella et al., *Inequality in Quality: Addressing Socioeconomic, Racial, and Ethnic Disparities in Health Care*, 283 J. AM. MED. ASS'N 2579, 2579 (2000) ("Similarly, being a member of a minority racial/ethnic group appears to be a risk factor for less intensive, if not lower quality, care."); Michelle van Ryn et al., *The Impact of Racism on Clinician Cognition, Behavior, and Clinical Decision Making*, 8 DU BOIS REV. 199, 200 (2011) ("Over the past two decades, thousands of studies have demonstrated that Black adults and children are less likely to receive appropriate, guideline-concordant, and cutting-edge medical care than their White counterparts, independent of disease status and other clinically relevant factors." (footnote omitted)); David R. Williams & Pamela Braboy Jackson, *Social Sources of Racial Disparities in Health*, 24 HEALTH AFF. 325, 325 (2005) ("Race is a marker for differential exposure to multiple disease-producing social factors.").

perspectives also arise in racial discrimination cases because this litigation can involve challenges to racially unequal distributions of resources and suits brought by whites contesting remedies for these disparities.[284] When these racial perspectives have become relevant in litigation, the Supreme Court has largely adopted the perspectives of whites—not persons of color. In keeping with the views of most whites, the Court disapproves of race-based state action,[285] accepts social narratives of individualism over group identity and redress,[286] does not view racism generally as an ongoing substantial barrier to social and economic advancement of people of color,[287] and treats whites as substantially vulnerable to racism.[288] So long as white majoritarian views regarding race inform the Court's interpretation of the Constitution, newer theories of justice, such as dignity-based claims, will not affect litigation outcomes for subordinate racial groups.

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284. *See supra* text accompanying note 92.

285. *See supra* text accompanying notes 75–79.

286. *See* John C. Duncan, Jr., *The American "Legal" Dilemma: Colorblind I/Colorblind II—The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 VA. J. SOC. POL'Y & L. 315, 334 (2000) ("The constitutional concept of individual rights protection necessarily leads to a perspective that the harm caused by the infliction discussed above must be attributed to the individual."); Yoshino, *supra* note 3, at 755 ("Under the Supreme Court's own account, pluralism anxiety has pressed the Court away from traditional group-based identity politics in its equal protection and free exercise jurisprudence.").

287. Although the Court has never asserted that racism no longer impedes people of color, its doctrine assumes that racism occurs sporadically. This is demonstrated in the requirement of discriminatory intent, which presumes that patterns of racial discrimination are not evidence of invidious discrimination. *See supra* text accompanying notes 80–90. The colorblindness doctrine requires exacting proof of past discrimination by the government or private actors participating in governmental programs to validate affirmative action plans. *See supra* text accompanying notes 74–79. Finally, the Court has dismissed congressional findings of racial discrimination and invalidated remedial antidiscrimination statutes. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2625 (2013) ("In the covered jurisdictions, '[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.'" (quoting Nw. Austin Mun. Util. v. Holder, 557 U.S. 193, 202 (2009))). *But see* Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 391 (2011) (discussing methods of felon disenfranchisement); Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 19 (2009) (discussing voter purge lists); Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 348 (2010) (discussing forms of voter harassment); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) (discussing methods of vote denial); Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html (discussing laws that toughen voter registration requirements enacted immediately after the *Shelby County* decision).

288. *See supra* text accompanying notes 74–79.

2. Universalism as an Impediment to Racial Justice

Appeals to universalism or shared humanity are fundamental to legal discussions of dignity.[289] In the past, these concepts have allowed subordinate groups to contest oppression and have facilitated legal remedies.[290] The development of international human rights and the emergence of dignity as a norm in national constitutions following World War II demonstrate the positive value of universalism to justice.[291] Requiring states to secure certain rights—or meet certain needs—for all people can positively transform the human condition.

Appeals to universal justice, however, have also hindered racial justice. In the United States, universalistic doctrines such as colorblindness and assimilation, as opposed to race-consciousness and multiculturalism, justify rigid judicial review of race-based remedies and deferential analysis of laws that, though facially neutral, impose severe burdens upon persons of color.[292] Court decisions that invalidate affirmative action and other race-based remedies demonstrate the detrimental impact that universalism can have upon racial-justice advocacy. Under prevailing Court doctrine, all racial classifications harm human dignity.[293] Thus, the Court treats all race-based policies, including those intended to remedy racial discrimination, with the utmost suspicion.[294] By contrast, policies that injure persons of color more pervasively but which do not make explicit references to any specific racial group receive judicial deference.[295] These laws do not warrant special attention because the Court deems the racially disparate impact incidental to the stated purpose of the law.[296] Thus, a criminal statute that

289. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 817–18 (discussing the universality of dignity in human rights law).

290. *Id.*

291. *See supra* text accompanying notes 12–16 (discussing dignity in human rights charters and post-World War II constitutions).

292. *See supra* text accompanying notes 74–79 (analyzing how colorblindness hinders racial justice).

293. *See supra* text accompanying notes 147–50 (discussing race and dignity).

294. *See supra* text accompanying notes 74–79.

295. *See supra* text accompanying notes 80–90 (discussing discriminatory intent rule).

296. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (rejecting equal protection claim of a black capital defendant despite statistical study showing discrimination in application of Georgia death penalty because "there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment"); Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

leads to disparate sentences for persons of color is presumptively legal—so long as the statute does not contain a racial classification.[297] Universality of potential application is the most relevant factor. Likewise, a state employer can implement an English-only policy and fire persons who speak Spanish in the workplace—even if all or most of those individuals are Latino—so long as the policy applies to all workers.[298] Under the Court's reasoning, speaking Spanish is chosen behavior, a universal experience—not a specific marker of racial identity entitled to protection under antidiscrimination law.[299]

Legal scholars such as Lani Guinier and Gerald Torres have persuasively argued that social movements for racial justice should frame their positions in universal terms, when possible.[300] Universal justice arguments can foster greater understanding across subordinate populations and perhaps generate more tolerance for progressive agendas.[301] Strategically embracing universal justice arguments, however, can lead to conflict within social-movement organizations, as racial issues become obscured and marginalized.[302] Furthermore, a strategic emphasis on universal justice does not alter the reality that race remains a central source of inequality in the United States. The persistence of racial inequality requires race-based remedies, which a focus on dignity—rather than group-based injustice—could obscure.[303]

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297. *McCleskey*, 481 U.S. at 298.

298. Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1728 (2006) (analyzing cases rejecting discrimination claims of Latinos fired due to English-only policies).

299. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1527 (2011) ("Because bilingual employees can communicate in English, the courts viewed speaking a foreign tongue as a choice and as conduct that could easily be controlled and altered by workers."); Rodriguez, *supra* note 298, at 1728. Universal conceptions of justice need not lead to negative consequences for persons of color. The Supreme Court, however, routinely invokes such ideals to invalidate racial-equality measures and to immunize racially disparate state action from judicial invalidation.

300. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 31 (2002).

301. *Id.* at 54–55.

302. Angie Beeman, *Walk the Walk but Don't Talk the Talk: The Strategic Use of Color-Blind Ideology in an Interracial Social Movement Organization*, 30 SOC. F. 127, 142–43 (2015) (analyzing negative consequences of strategic colorblindness in a progressive social movement organization); *see also* Hutchinson, *supra* note 86, at 59 n.295, 60 n.297 (forcing racial minorities to embrace colorblindness, especially within a context of racial inequality, causes resentment, withdrawal, and other harms).

303. Some scholars assert that class-based remedies can eradicate racial inequality. *See, e.g.*, Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1037–38 (1996) ("This approach would provide preferences in education, employment, and government contracting based on class or socio-economic status, rather than race or gender—implicitly addressing the current-day legacy of past discrimination without resorting to the toxic remedy of

III. CHANGING CONSTITUTIONAL LAW

Although dignity-based claims that seek to advance racial justice would probably face resistance by the Court, constitutional law is not fixed.[304] The malleability of constitutional law suggests that dignity might not always stand as a doctrinal barrier to racial justice. The remainder of this Article analyzes conditions that might lead the Court to develop a more robust race-equality doctrine in which dignity compels—rather than impedes—substantive racial equality.[305]

A. *Social Movements, Politics, and Constitutional Law*

Social change requires more than a theory. Evolution in social structure occurs from a combination of political, social, and economic forces.[306] Social movements exploit political opportunities to influence public opinion, attract the attention of lawmakers, affect the outcome of elections, impact the views of elites, and alter the landscape of social

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biological preference."). Substantial sociological literature, however, demonstrates that race and class shape the experiences of poor persons of color and that class-based remedies alone cannot remedy their disadvantage. *See, e.g.*, Chiquita A. Collins & David R. Williams, *Segregation and Mortality: The Deadly Effects of Racism?*, 14 SOC. F. 495, 496 (1999) ("Residential segregation is a primary mechanism by which racism has operated in American society . . . ."); Daniel T. Lichter et al., *The Geography of Exclusion: Race, Segregation, and Concentrated Poverty*, 59 SOC. PROBS. 364, 383 (2012) ("The policy implications are clear: because spatial and social mobility often go hand-in-hand, the segregation of the minority poor from the nonpoor connotes persistent racial injustice, limited opportunities for upward social mobility, and the reproduction of poverty and inequality from one generation to the next."); Gregory D. Squires & Charis E. Kubrin, *Privileged Places: Race, Uneven Development and the Geography of Opportunity in Urban America*, 42 URB. STUD. 47, 48 (2005) ("Place and race have long been, and continue to be, defining characteristics of the opportunity structure of metropolitan areas."); J. Phillip Thompson III, *Universalism and Deconcentration: Why Race Still Matters in Poverty and Economic Development*, 26 POL. & SOC'Y 181, 192–95 (1998) (criticizing liberal universalist theories of black poverty).

304. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 35 (2003) ("Our constitutional law has continuously evolved to reflect the changing beliefs of the nation.").

305. A full exposition of possibilities for successful racial-justice litigation is beyond the scope of this Section.

306. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 934 (2006) (discussing ingredients of social change).

policy.[307] Litigation takes place within this broader social context.[308] Although legal opinions rest on doctrine, political activity—namely collective mobilization—is an essential ingredient of evolutionary constitutional law.[309]

The politicized nature of litigation means that legal scholars must analyze the broader societal context in which judging occurs before they can recommend strategies to social-movement lawyers. The Court refuses to construe the Equal Protection Clause as a prohibition of oppression, subordination, caste, or subjugation.[310] Instead, the Court has crafted doctrines that validate racial inequality and subject race-based remedies to exacting scrutiny.[311] To reach these outcomes, the Court accepts prevailing white attitudes regarding the most pressing matters related to race relations.[312] By contrast, the Court discounts or rejects the perspectives that most persons of color hold regarding these issues.[313] The Court privileges and strengthens white supremacy and racial inequality with the doctrinal choices it makes.[314]

The most successful social movements, however, have not relied completely upon federal courts for redress. Instead, social movements engage in "multidimensional advocacy"[315] that involves legislative, executive, and judicial processes in states and the federal government, as well as the media, nonprofit organizations, educational institutions, and public opinion.[316] This type of multidimensional advocacy led to the historic gains made by the Civil Rights Movement.[317] Multidimensional

307. *Id.* at 929 ("As social movements challenge the conventions that regulate the application of principles, longstanding principles can call into question the legitimacy of customary practices (e.g., racial profiling, racial segregation, or sexual harassment) or imbue with constitutional value practices long judged illicit (e.g., abortion, pornography, same-sex sodomy, or same-sex marriage).").

308. *Id.* at 947 ("Courts respond to social disruption by social movements rather than initiate it themselves; they reconstitute and reformulate law in the light of political contestation, rationally reconstructing and synthesizing changes in political norms with what has come before.").

309. *Id.* ("Social movements—which include both mobilizations and countermobilizations—play a key role in disrupting norms and expectations about legitimacy and illegitimacy. Litigation before courts is only one of many possible fora in which movements fight these battles.").

310. *See supra* text accompanying notes 74–94.

311. *See supra* text accompanying notes 74–95.

312. *See supra* text accompanying notes 274–88.

313. *See supra* text accompanying notes 274–88.

314. *See supra* text accompanying notes 74–94.

315. Cummings & NeJaime, *supra* note 41, at 1312.

316. *Id.* at 1312–18 (discussing legislative, litigation, and public education campaign of marriage equality movement in California).

317. Darren Hutchinson, *Social Movements and Judging: An Essay on Institutional Reform Litigation and Desegregation in Dallas, Texas*, 62 SMU L. REV. 1635, 1637–43 (2009) (discussing interplay of president, Congress, and courts with respect to school desegregation).

advocacy also helped create the conditions that gave rise to the recent successful use of dignity-based claims in marriage-equality litigation.[318] The Supreme Court did not decree a right to same-sex marriage rooted in dignity on its own. Instead, the *Obergefell* decision follows decades of social-movement advocacy,[319] legislative[320] and judicial[321] recognition of same-sex marriage in states, presidential policy,[322] international advocacy and support,[323] changes in ideological composition of the federal government,[324] new appointments to the Supreme Court[325] and other federal courts,[326] protection of LGBT rights outside of the marital context in state and federal law,[327] and increasingly favorable public

318. Cummings & NeJaime, *supra* note 41, at 1312 (analyzing marriage equality movement advocacy).

319. *Id.*

320. When the Court decided *Obergefell*, eleven states and the District of Columbia had passed laws legalizing same-sex marriage. Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015).

321. When the Court decided *Obergefell*, the supreme courts of five states had ruled that the respective state constitutions guaranteed a right to same-sex marriage. Also, appeals court rulings in four of the eleven federal judicial circuits had held that the U.S. Constitution conferred a right to same-sex marriage. Bostic v. Schaefer, 760 F.3d 352, 367 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014); Latta v. Otter, 771 F.3d 456, 464–65 (9th Cir. 2014); Bishop v. Smith, 760 F.3d 1070, 1074 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014). Numerous federal district courts had reached similar conclusions. *Obergefell*, 135 S. Ct. at 2611.

322. Brief for the United States as Amicus Curiae Supporting Petitioners at 2, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574), 2015 WL 1004710.

323. Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the Western World*, 25 DUKE J. COMP. & INT'L L. 125, 144–45 (2014) (analyzing marital equality litigation in several foreign jurisdictions).

324. During his second term, President Obama's public position on same-sex marriage shifted, and he announced his support for marriage equality. *See* Josh Earnest, *President Obama Supports Same-Sex Marriage*, WHITE HOUSE (May 10, 2012, 7:31 PM), https://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage. President George W. Bush supported a constitutional amendment banning same-sex marriage. *See* David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES (Feb. 24, 2004), http://www.nytimes.com/2004/02/24/politics/bush-backs-ban-in-constitution-on-gay-marriage.html?_r=0.

325. The majority in *Obergefell* included the two newest members of the Court—Justices Sotomayor and Kagan—both of whom Democrat President Barack Obama appointed. *See Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., https://www.supremecourt.gov/about/biographies.aspx. Democrat President Bill Clinton appointed two of the other three in the majority—Justices Breyer and Ginsburg. *Id.* Republican presidents (Presidents Ronald Reagan and George W. Bush) appointed all of the dissenting justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito. *Id.*

326. Tom Watts, *From* Windsor *to* Obergefell*: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. ONLINE S52, S72 (2015) (analyzing twenty-nine federal court rulings in support of marriage equality and finding judges appointed by Democrats more likely to issue favorable rulings).

327. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 435 (Conn. 2008) ("These statutory provisions constitute an acknowledgment by the state that homosexual orientation is no more

opinion.[328] Some media accounts of *Obergefell* dismiss the substantial social movement work that led to the ruling by claiming that same-sex marriage was achieved rapidly.[329] Marriage equality was not achieved quickly or through a single governmental institution. It was attained after years of multidimensional advocacy and litigation.

B. *Future of Racial-Justice and Dignity-Based Litigation*

Contemporary racial-justice movements (like other social movements) can only achieve change through complex resource mobilization. Currently, dignity-based racial-justice claims would face a high hurdle in federal courts. Donald Trump's successful presidential campaign makes the possibility of courts embracing antisubordination theories of equality even less promising.[330] The likelihood of the Supreme Court becoming receptive to such claims will increase, however, if political and social developments cause favorable conditions for a shift in doctrine. Legal scholars committed to broad social change must

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relevant to a person's ability to perform and contribute to society than is heterosexual orientation."); Varnum v. Brien, 763 N.W.2d 862, 892 (Iowa 2009) ("Based on Iowa statutes and regulations, it is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society.").

328. *See supra* text accompanying notes 266–69. For an analysis of the multilayered advocacy conducted by the same-sex marriage movement, see generally Cummings & NeJaime, *supra* note 41, at 1312 (discussing multidimensional advocacy of marriage-equality movement in California); Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1542 (2009) (discussing strategy of marriage-equality movement); Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 39–40 (2005) (analyzing "multi-institutional" strategy of marriage-equality movement); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 677 (2012) ("Early marriage litigation focused on state law claims in states with favorable background conditions. Only recently have advocates pursued a limited federal litigation strategy, and in doing so, they have sought to specifically build on important state-based advances.").

329. Robert Samuels, *He Saw Her Marriage as "Unnatural." She Called Him "Bigoted." Now, They Hug.*, WASH. POST (July 4, 2015), https://www.washingtonpost.com/politics/he-saw-her-marriage-as-unnatural-she-called-him-bigoted-now-theyre-friends/2015/07/04/9e44e7c6-1a90-11e5-bd7f-4611a60dd8e5_story.html ("As the dynamics shift breathtakingly fast in the long-running battles over gay rights, some of the most hardened combatants are embarking on a surprising new strategy: being friends."); Nate Silver, *Change Doesn't Usually Come This Fast*, FIVETHIRTYEIGHT (June 26, 2015, 6:14 PM), http://fivethirtyeight.com/datalab/change-doesnt-usually-come-this-fast/. *But see* Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0 (describing *Obergefell* as "the culmination of decades of litigation and activism").

330. During the completion of this Article, Donald Trump became the forty-fifth President of the United States. His election greatly altered the discussion regarding the future of federal-court litigation contained in this Article. Because Trump will likely appoint many conservative judges to the federal bench, racial-justice advocates must view the future landscape for litigation success with great skepticism.

scrutinize national and local politics to articulate litigation-based strategies with the greatest potential for success.

A comprehensive analysis of the possible immediate steps that contemporary racial-justice activism could take to expand federal judicial support for dignity-based arguments is beyond the scope of this Article. Nonetheless, at least one contemporary movement—criminal justice reform—could present future opportunities to advance dignity-based racial-justice claims in federal courts. Former President Barack Obama,[331] Congress,[332] state governments,[333] traditional social movement organizations,[334] and activist groups such as Black Lives Matter,[335] have coalesced on issues related to sentencing reform and police misconduct. In an unprecedented move, some Supreme Court justices have publicly indicated support for these reforms during discussions with Congress.[336] Also, some of the proposed reforms, particularly changes in the treatment of inmates, implicate legal doctrines like the Eighth Amendment that already incorporate dignity-based claims.[337] Because the contemporary criminal justice reform movement has support among federal governmental actors, it could impact future Supreme Court cases.[338]

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331. Peter Baker, *Obama Calls for Effort to Fix a "Broken System" of Criminal Justice*, N.Y. TIMES (July 14, 2015), http://www.nytimes.com/2015/07/15/us/politics/obama-calls-for-effort-to-fix-a-broken-system-of-criminal-justice.html.

332. Carl Huse, *Senator John Cornyn Aims to Sway Fellow Republicans on Criminal Justice*, N.Y. TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/01/30/us/politics/senator-john-cornyn-criminal-justice-reform-bill.html.

333. Rebecca Beitsch, *States at a Crossroads on Criminal Justice Reform*, THE PEW CHARITABLE TRUSTS: STATELINE (Jan. 28, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/01/28/states-at-a-crossroads-on-criminal-justice-reform.

334. *Criminal Justice*, NAACP, http://www.naacp.org/issues/criminal-justice/ (last visited Dec. 13, 2016); Onealc, *National Urban League Weighs in on Criminal Justice Reform*, NAT'L URB. LEAGUE WASH. BUREAU (Oct. 30, 2015, 11:05 AM), http://nulwb.iamempowered.com/content/national-urban-league-weighs-criminal-justice-reform.

335. The Black Lives Matter movement started in 2012 to protest unfairness in police treatment of black crime victims and suspects. *See About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Dec. 13, 2016).

336. Editorial Bd., *Justice Kennedy's Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html (discussing Justices Breyer's and Kennedy's public criticism of United States criminal justice).

337. *See supra* text accompanying notes 134–38.

338. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1984–86, 1995–97, 2004 (2003) (contending that Congress influenced the Supreme Court's treatment of sex discrimination); Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 377, 380–81 (2008) (analyzing presidential impact on Supreme Court decision making).

The election of President Donald Trump, however, should lead to extreme skepticism regarding the political climate for racial justice, including within the federal courts. Trump's campaign made appeals to racism and white supremacy.[339] He favorably cited New York City Police Department's "stop and frisk" policy that a federal judge held discriminated against racial minorities.[340] Trump has also described Mexican-Americans as "rapists"[341] and has delivered on his promise to create anti-Muslim immigration policies.[342]

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339. Henry A. Giroux, *White Nationalism, Armed Culture and State Violence in the Age of Donald Trump*, 43 PHIL. & SOC. CRITICISM 1, 5 (2017) (arguing that Trump used "a nativist language that targeted the most vulnerable in American society—unauthorized immigrants, Blacks, Muslims and Syrian refugees" and "provoked society's darkest impulses which served to energize a range of extremist racist and anti-Semitic groups including the alt-right, white nationalists and other breeding grounds for a new authoritarianism").

340. Michelle Ye Hee Lee, *Trump's False Claim That Stop and Frisk in NYC Wasn't Ruled Unconstitutional*, WASH. POST. (Sept. 28, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/09/28/trumps-false-claim-that-stop-and-frisk-was-not-ruled-unconstitutional (noting Trump's praise for New York City's stop and frisk policies and his desire for nationwide use); *see* Floyd v. City of New York, 959 F. Supp. 2d 540, 660–64 (2013) (finding New York City's use of stop and frisk impermissibly discriminated against blacks and Latinos).

341. When Trump announced his presidential run in 2015, he delivered a speech that invoked racist imagery to portray Mexican-Americans as criminals: "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." Washington Post Staff, *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST. (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid.

342. In 2015, Trump's campaign released a statement "calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See Donald J. Trump Statement on Preventing Muslim Immigration*, DONALDTRUMP.COM (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration. During his first month in office, President Trump issued an Executive Order that, among other things, banned entry into the United States of persons coming from seven majority-Muslim nations. *See* Exec. Order 13,796, 82 Fed. Reg. 8977 (Jan. 27, 2017); *see also* Washington v. Trump, 847 F.3d 1151, 1168–69 (9th Cir. 2017) (upholding temporary restraining order on the Executive Order on grounds that it likely violates due process rights of certain classes of potential entrants to United States). On March 6, 2017, after numerous courts enjoined the Executive Order, in whole or in part, Trump issued a new order that reduces the scope of the original travel ban. A federal district judge has temporarily enjoined enforcement of the new order as well. See Hawai'i v. Trump, CV No. 00050-17 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017). The court examined contemporaneous statements of Trump and his advisers regarding the Executive Order and concluded that it lacked a "secular purpose" and that it was enacted intentionally to target Muslims. *See id.* at *14 ("These plainly-worded statements, made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive

Additionally, Trump's historical positions on racial-justice matters indicate that he will not actively pursue progressive criminal-justice reform. For example, Trump still believes in the guilt of five black and Latino men who were exonerated by DNA evidence after they served from six to thirteen years in prison for allegedly raping a white woman in New York City,[343] even after another man subsequently confessed to the sexual assault.[344] The "Central Park Jogger" rape and subsequent arrest of the young men revealed and inflamed severe racial tensions in New York City.[345] Media described the alleged assailants using racist and sexualized constructions of black and Latino men.[346] Also, the media obsessed over this particular victim—a white upper-class professional—even though during the same week she was raped, twenty-eight other women reported brutal sexual assaults.[347] Two weeks after the Central Park rape, a black woman was raped by multiple men and then thrown from a four-story building by her assailants. She suffered a shattered pelvis, broken ankles and legs, and severe internal injuries.[348] This crime, however, did not garner nearly the attention and public outrage as the Central Park rape. The disparate coverage parallels the historical marginalization of women of color who suffer sexual assault.[349] In response to the Central Park rape, Trump purchased "full-page advertisements in four New York newspapers calling for the return of the

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Order is, at the very least, 'secondary to a religious objective' of temporarily suspending the entry of Muslims.").

343. Henry Goldman, *Trump Insists the Exonerated Central Park Five Are Guilty*, BLOOMBERG (Oct. 7, 2016, 2:09 PM), https://www.bloomberg.com/politics/articles/2016-10-07/trump-again-insists-the-exonerated-central-park-five-were-guilty.

344. *Id.*

345. Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for $40 Million*, N.Y. TIMES (June 19, 2014), https://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-are-to-settle-suit-for-40-million.html ("The initial story of the crime, as told by the police and prosecutors, was that a band of young people, part of a larger gang that rampaged through Central Park, had mercilessly beaten and sexually assaulted the jogger. The story quickly exploded into the public psyche, fanned by politicians and sensational news reports that served to inflame racial tensions.").

346. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1348–50 (2004) (analyzing racist portrayals of black rape suspects).

347. Don Terry, *In Week of an Infamous Rape, 28 Other Victims Suffer*, N.Y. TIMES (May 29, 1989), http://www.nytimes.com/1989/05/29/nyregion/in-week-of-an-infamous-rape-28-other-victims-suffer.html.

348. Duru, *supra* note 346, at 1350.

349. Crenshaw, *supra* note 267, at 1268 (situating Central Park Jogger case within the historical "devaluation of Black women and the marginalization of their sexual victimizations").

death penalty"[350]—even though the Supreme Court had held that states cannot impose the death penalty in rape cases that do not involve a homicide.[351]

Events since the election demonstrate Trump's continued insensitivity to matters of racial injustice. For example, he nominated Jeff Sessions for Attorney General, and the Senate subsequently approved his appointment.[352] The confirmation process for Sessions became controversial due to allegations of racism in his past.[353] Indeed, in 1986, a Republican-controlled Senate Judiciary Committee voted to block Ronald Reagan's nomination of Sessions—who was then Attorney General of Alabama—to a federal district judgeship.[354] Allegations of racism from Sessions's former colleagues clouded the nomination.[355] During Sessions's U.S. Attorney General confirmation hearings, Republican senators voted to silence Senator Elizabeth Warren after she attempted to read a letter that Coretta Scott King wrote in opposition to Sessions's judicial nomination.[356] King's letter urged the Senate to reject Sessions's nomination due to his history of alleged racism.[357] The actions of Trump's Republican colleagues put party unity above racial justice. They also indicate that racial-justice groups cannot place much hope in Congress as a check on racist executive action during Trump's presidency.

Consistent with Trump's hardline rhetoric regarding crime and contempt for antiracism, Sessions has announced that the U.S. Department of Justice will review all existing and pending consent decrees requiring reforms in police departments found to engage in a pattern and practice of constitutional violations.[358] Many of these

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350. Michael Wilson, *Trump Draws Criticism for Ad He Ran After Jogger Attack*, N.Y. TIMES (Oct. 23, 2002), http://www.nytimes.com/2002/10/23/nyregion/trump-draws-criticism-for-ad-he-ran-after-jogger-attack.html.

351. Coker v. Georgia, 433 U.S. 584, 592 (1977).

352. Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html.

353. *Id.*

354. Amber Phillips, *That Time the Senate Denied Jeff Sessions a Federal Judgeship Over Accusations of Racism*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/the-fix/wp/2016/11/18/that-time-the-senate-denied-jeff-sessions-a-federal-judgeship-over-accusations-of-racism/?utm_term=.244d861d7a45.

355. *Id.*

356. Lichtblau & Flegenheimer, *supra* note 352.

357. *Id.*; *see also* Wesley Lowery, *Read the Letter Coretta Scott King Wrote Opposing Sessions's 1986 Federal Nomination*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/10/read-the-letter-coretta-scott-king-wrote-opposing-sessionss-1986-federal-nomination.

358. Sari Horwitz et al., *Sessions Orders Justice Department to Review All Police Reform*

agreements were secured by the Department of Justice after very high-profile police homicides involving black victims.[359] Department of Justice investigations documented systemic police misconduct in the covered jurisdictions.[360] Sessions has also indicated that the Department of Justice will curtail federal investigation of police misconduct.[361] Sessions claims that the investigations and consent decrees produce less effective policing.[362]

Trump has also vowed to appoint federal judges in the mold of the late-Justice Antonin Scalia, one of the Court's most conservative members.[363] Scalia's judicial philosophy led him to oppose civil rights measures,[364] race-based remedies,[365] as well as equal protection and fundamental rights for many vulnerable classes.[366] Scalia also voted to

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Agreements, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html?utm_term=.d9356ddb7d56.

359. *See id.* (discussing consent decrees in Ferguson, Missouri and Baltimore, Maryland).

360. *See, e.g.*, Press Release, Dep't of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri. Federal law prohibits law enforcement agencies and their employees from "engag[ing] in a pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141(a) (2012). The same provision authorizes the Department of Justice to obtain "equitable and declaratory relief" to remedy the prohibited behavior. *Id.* § 14141(b). Thus, the consent decrees require a finding of systemic misconduct by law enforcement agencies or their employees.

361. John Byrne et al., *Concerns Mount Over Chicago Cop Reform as Sessions Vows to "Pull Back,"* CHI. TRIB. (Mar. 1, 2017), http://www.chicagotribune.com/news/local/politics/ct-emanuel-sessions-consent-decree-react-met-20170228-story.html ("In his first major speech since being appointed by President Donald Trump, Sessions on Tuesday vowed to 'pull back' on federal civil rights probes of local police departments . . . .").

362. *Id.*

363. *See Transcript of Second Debate*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/10/us/politics/transcript-second-debate.html ("Justice Scalia, great judge, died recently. And we have a vacancy. I am looking to appoint judges very much in the mold of Justice Scalia.").

364. *See, e.g.*, Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (invalidating portion of Voting Rights Act).

365. Antonin Scalia, Commentary, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 147. Scalia voted against affirmative action policies in many cases, including: *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); and *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013).

366. Scalia dissented in numerous LGBT cases. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (finding right to same-sex marriage secured by Due Process Clause of Fourteenth Amendment); United States v. Windsor, 133 S. Ct. 2675 (2013) (invaliding DOMA on grounds that it rested on animus towards same-sex couples); Lawrence v. Texas, 539 U.S. 558 (2003)

legitimize facially neutral governmental practices that disparately impact persons of color.[367] If Trump fulfills his promise to appoint judges who share Scalia's judicial philosophy, this would make the federal bench more conservative and hostile to racial justice. During the Trump era, Congress and the federal courts do not offer much hope for racial progress.[368] Nonetheless, social justice lawyers must continue to seek and take advantage of available political opportunities to advance their causes. The democratic process in states can lead to some reform.[369] Also, federal courts, as they have in the past, will likely intervene to curtail

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(invalidating Texas same-sex sodomy statute); Romer v. Evans, 517 U.S. 620 (1996) (invalidating antigay state constitutional amendment). Scalia also frequently voted to uphold abortion regulations, but dissented in cases providing abortion-rights protections. *Compare* Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003), *with* Stenberg v. Carhart, 530 U.S. 914 (2000) (invalidating state partial-birth abortion ban), *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (recognizing right to terminate a pregnancy and invalidating portion of a state antiabortion regulation). Furthermore, he suggested that the Court should review sex-based discrimination using rational basis review. *See* United States v. Virginia, 518 U.S. 515, 574–75 (1996) (Scalia J., dissenting) (arguing that "if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review"). Subsequently, Scalia posited that the Constitution does not bar sex discrimination during speeches. *See* Emi Kolawole, *Scalia: Constitution Does Not Protect Women Against Discrimination*, WASH. POST (Jan. 4, 2011), http://voices.washingtonpost.com/44/2011/01/scalia-constitution-does-not-p.html.

367. McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (rejecting equal protection and Eighth Amendment challenges to Georgia death penalty despite statistical study showing racially discriminatory application).

368. By contrast, the two leading Democratic Party candidates—Hillary Clinton and Bernie Sanders—met with Black Lives Matters activists to discuss criminal justice reform and made such reforms a central part of their platforms. *See* DeRay Mckesson, *Reflections on Meeting with Senator Bernie Sanders and Secretary Hillary Clinton, and the #DemDebate*, MEDIUM (Oct. 15, 2015), https://medium.com/@deray/reflections-on-meeting-with-senator-bernie-sanders-and-secretary-hillary-clinton-and-the-38c4a2d9f797.

369. Political leaders in Baltimore and Chicago, for example, stated those cities would implement police reforms even if Sessions instructs the Department of Justice to withdraw the consent decrees. *See* Kevin Rector & Luke Broadwater, *Baltimore Leaders Pledge Police Reform Will Occur With or Without Consent Decree*, BALT. SUN (Apr. 4, 2017), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-consent-decree-folo-20170404-story.html; Byrne et al., *supra* note 361. Additionally, Florida State Attorney Aramis Ayala announced that she would not seek death sentences in eligible cases. *See* Gal Tziperman Lotan, *Ayala Takes First Step in Fight for Death Penalty Cases*, ORLANDO SENTINEL (Apr. 7, 2017, 10:45 AM), http://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-death-penalty-pam-bondi-20170407-story.html. Florida Governor Rick Scott responded by removing Ayala from twenty-three murder cases. *Id.* Ayala filed a lawsuit challenging Scott's actions. *See* Gal Tziperman Lotan, *State Attorney Ayala Files Lawsuit Against Gov. Scott in Death Penalty Cases*, ORLANDO SENTINEL (Apr. 11, 2017, 6:10 PM), http://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-rick-scott-death-penalty-lawsuit-20170410-story.html.

extreme governmental practices that blatantly flout constitutional values.[370] Indeed, several courts have acted to enjoin, at least temporarily, Trump's Muslim-targeting executive orders.[371] Furthermore, extended political mobilization by liberal and progressive social movements could alter state and federal politics, which, in turn, might lead to a more positive climate for racial progress. These changes, however, will occur gradually, not swiftly.

CONCLUSION

The Roberts Court has decided several cases that invoke the concept of dignity to advance reproductive rights and privacy. Furthermore, humanitarian and human rights law, foreign constitutions, and some state constitutions recognize dignity as an important value. The increasing appearance of dignity-based arguments in Supreme Court rulings has moved some scholars to argue that dignity claims could advance racial justice. The *Obergefell* decision, which makes strong use of the concept of dignity, will likely generate more scholarship advocating dignity-based framing of racial-justice claims.

Although dignity-based claims look promising on the surface, a closer examination of Court doctrine reveals limitations. For example, the Court has invoked the dignity of whites and states to justify invalidation of race-based remedies and civil rights measures. Furthermore, the Court's restrained equal protection analysis does not result from the lack of a good theory; instead, it reflects the conservative ideology of a majority of the Court. These Justices have created doctrines that mirror white majoritarian perspectives regarding race. Dignity-based claims cannot alter the Court's ideological balance.

Constitutional law, however, evolves as a result of political, social, and economic processes. Political activism by racial-justice advocates can motivate politicians and the media to endorse racially egalitarian policies. If these forces intersect, then racial-justice advocates, like social movement actors of the past, will have a better probability of achieving desired outcomes in federal courts. Such developments, however, will likely occur over the long-term, rather than immediately.

Legal scholars must analyze the broader social and political context in which constitutional law develops before they advocate strategies for

370. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 93 (2000) ("Thus, it is erroneous to conceive of these landmark criminal procedure cases as instances of judicial protection of minority rights from majoritarian oppression. Rather, they better exemplify the paradigm of judicial imposition of a national consensus on resistant state outliers . . . .").

371. Int'l Refugee Assistance Project v. Trump, 2017 WL 1018235 (E.D. Va. Mar. 16, 2017); Hawai'i v. Trump, CV No. 00050-17 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

social movement lawyers. Dignity-based claims can lead to the development of antisubordination race-equality doctrines only if the social conditions necessary for evolution in constitutional interpretation exist. In the absence of a more promising social and political climate, dignity-based claims, standing alone, will not cause a substantial shift in Court doctrine concerning race.