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Against Equality: A Critical Essay for the NAACP and Others

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Abstract

We address a recurring problem in movement scholarship and activism: why do some civil rights organizations persist in promoting themselves as advocates of equal protection when street activists rarely mention it, and lawyers know that litigation brought under that clause almost always loses? Try to recall the last time you heard of a street protest by a group—say Mexican-American school children in Tucson, Arizona, Black victims of police violence, or military women subjected to sexual harassment—proceeding under the banner of equal protection. Or think when you last read of a lawyer who brought and won a case for a client alleging that some form of official treatment violated that guarantee because the official action fell unequally on the client's group vis-à-vis another.

If these causes of action are practically dead letters, why do institutions continue to evoke them on official occasions, fundraising appeals, and their websites? We show how equal protection has receded in importance as a means of advancing the interests of outsider groups, yet traditional organizations that advertise themselves as representing those interests continue to be wedded to it. Drawing on critical race scholarship, including our own, we show how better means are available for advancing the goals of these groups, including street demonstrations, struggle, righteous indignation, and voting. Institutions such as the National Association for the Advancement of Colored People ("NAACP") know this yet continue to press their case with unceasing fervor. We offer an explanation for why this is so and conclude by urging methods that are likely to prove more productive.

Introduction

According to recent polls, a majority of Americans believe that Black people suffer discrimination, with some surveys reporting as many as seventy percent holding this belief.[1] In the public mind, Muslims and recent immigrants of Latin American origin may be just as disadvantaged because of abuse at the hands of the current administration and right-wing media.[2]

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1. *See, e.g.*, Juliana Menasce Horowitz et al., *Social and Demographic Trends 2019*, PEW RES. CTR. (Apr. 9, 2019), https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/ (discussing social science studies of racial attitudes); Charles Blow, *In the Wake of Protests*, N.Y. TIMES (Aug. 9, 2020), https://www.nytimes.com/2020/08/09/opinion/black-lives-matter-protests.html (putting the figure at seventy percent for Americans who believe the criminal justice system is unfair toward minorities).

2. *See* Richard Delgado, *J'Accuse: An Essay on Animus*, 52 U.C. DAVIS L. REV. ONLINE 119 (2018) (noting the recent tide of hate speech directed against this group). *See also*

Yet only a relatively small number of antidiscrimination lawsuits by these groups and others are successful, particularly those brought under the Equal Protection Clause or federal civil rights statutes.[3] Evidently, minorities suffer a great deal of discrimination, but relatively few courts find in their favor when they sue for it under the Equal Protection Clause. If this were true for automobile crashes or surgical malpractice, lawyers would stop taking these cases, and nonprofits and government agencies in the business of improving highway safety or medical outcomes would abandon litigation in favor of more promising strategies.[4]

With minorities who suffer discrimination, sue for it, and lose, one might wonder, why they persist in pursuing this means of redress. It might be that minorities suffer from poor legal representation, while the perpetrators of racist treatment have very good defense lawyers.[5] Conceivably, the typical claim that finds its way to court might be weak—in other words, minorities with the poorest claims sue regularly and lose, while those who suffer the most flagrant abuse suffer quietly and do not sue at all.[6] Needless to say, each of these explanations is implausible.

Why, then, is the success rate of civil rights litigation so low? We posit that equality-based antidiscrimination law itself suffers defects that render it an unattractive vehicle for achieving redress for victims of discrimination.[7]

Horowitz, *supra* note 1, observing that fifty-six percent of Americans believe African Americans experience discrimination, with fifty-one percent believing the same for Hispanics.

3. *See* TRACEY KUYKILHAHN & TOM H. COHEN, U.S. DEPT. OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-2006 (Aug. 2008) (reporting that about one-third of cases that go to trial are successful). *See also Race & Gender of Judges Make Enormous Differences in Rulings*, A.B.A.J. (Feb. 7, 2010) (reporting that relatively few are successful and that the background of the judge makes a difference). For a discussion of the low rate of success of racial-harassment cases, *see* text and *infra* note 9.

4. *See* WILLIAM PROSSER, PROSSER AND KEATON ON THE LAW OF TORTS 227, 254–55 (5th ed. 1984) (noting that some cases of this type, which may fall under the doctrines of negligence per se or res ipsa loquitur, are comparatively easy to win).

5. This explanation is implausible. The NAACP Legal Defense Fund and MALDEF (Mexican American Legal Defense and Education Fund) are considered among the best in terms of technical expertise.

6. It seems much more likely that those with weak claims refrain from suing, while those who suffered flagrant discrimination consult a lawyer and file for redress. Engaging a lawyer is, for the average person, a major cost. Why make the investment if one's likelihood of success is poor?

7. *See* text and *infra* notes 15–114, discussing the various types, and Parts I to IV, *infra*, discussing each in detail. *See also* Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Doctrine*, 62 MINN. L. REV. 1049 (1978) (noting that antidiscrimination doctrine can actually enhance inequality). Professor Freeman was one of the earliest members of critical legal studies (CLS), a predecessor movement that contributed to the development of critical race theory.

Despite these defects, which are well known,[8] organizations like the NAACP Legal Defense Fund maintain a brisk business raising money, publicizing the horrors of discrimination, and suing carefully chosen discriminators, generally losing or winning narrow, short-lived victories.[9]

To be sure, equality is sometimes the only tool available to civil rights litigators.[10] And merely invoking it can bring symbolic benefits.[11] Suits for unequal treatment resonate with the public. Everyone knows that favoritism and unequal treatment are wrong and violate our sense of justice. Even kindergarten children know that a teacher who favors pet students and dispenses rewards and punishments unequally is a tyrant.

But litigation under the Equal Protection Clause is neither the only, nor the most important source of redress for beleaguered minorities. Struggle, solidarity, voting, protests, and righteous indignation are, to our way of thinking, much more promising means of securing relief from systemic oppression.[12] Yet civil rights organizations, historically committed to equal

8. *See, e.g.*, Freeman, *supra* note 7. *See also* text and *supra* note 3, *infra* note 9, discussing the poor success rate of these suits.

9. *See, e.g.*, Pat E. Chew & Robert K. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases,* 86 WASH. U. L. REV. 1117 (2009) (noting the low rate of success in these cases). *See also* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (discussing why courts are relatively powerless to redress longstanding social inequities).

10. Women suing for salaries equal to those of men performing the same work are examples of invoking equality in a way that makes perfectly good sense.

11. *See* text and *infra* notes 47–49, noting these symbolic effects.

12. Imagine how peculiar it would seem to see a group of Latino schoolchildren marching down the street with placards complaining that their educational options were not the equal of those of another racial group. They might easily protest that the public schools were dilapidated, or the teachers and curriculum unresponsive to their needs. They might complain of harsh disciplinary policies that fell heavily on Latinos who were late to school because working parents had no reliable way to get them there on time. But it is extremely unlikely that they would frame any of these complaints in terms of equal protection.

Other approaches have simply struck minority groups as more promising. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437 (1989) (making the case for solidarity); Thea Riobrancos, *It's a Tough Time for the Left. But I'm More Optimistic Than Ever*, N.Y. TIMES (Aug. 9, 2020), https://www.nytimes.com/2020/08/09/opinion/left-politics.html. *See also* Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma,* 93 HARV. L. REV. 518 (1980) (making the case for interest convergence); ROSENBERG, *supra* note 9 (demonstrating that means other than litigation are apt to be more effective at producing lasting change).

The NAACP's website, however, has long highlighted the organization's commitment to equality as a central approach. *See* NAACP, https://www.naacp.org/about-us/ (last visited Oct. 10, 2020) (noting that "Our mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons.") The NAACP Legal Defense Fund, a separate organization, also identifies itself with the search for equality. *See* NAACP LEGAL DEFENSE FUND, https://www.naacpldf.org/about-us/ (last visited Sept. 30, 2020) (noting that "LDF

protection, routinely give scant attention to these other options—particularly when they are raising money or marshalling public support against the latest affront from an indifferent—or malevolent administration.[13]

This incongruity is noteworthy because many of these pathways—struggle, solidarity, and righteous indignation—played vital roles in the American Revolution that led to the adoption of the Constitution in the first place,[14] with voting arriving some years later with the Bill of Rights.[15] And the Declaration of Independence and Constitution mention these alternatives prominently in their preambles and provisions protecting freedom of speech, petition, and assembly.[16]

With economic inequality standing at a higher level today than ever,[17] it behooves legal thinkers to consider why constitutional protection of equality has yielded so little relief. We concede that things might easily have been worse without it.[18] Still, if a tool does not reliably yield its intended result, it is worth considering why this may be so. The tool may have become rusty for lack of use, or dull from too much use and in need of sharpening. Or perhaps the tool has changed, rendering the tool less useful than it has been theretofore.[19]

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seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans").

13. *See* Leon W. Russell, Chairman of the Board, *Address to the 108th NAACP Annual Convention* (July 23, 2017), https://www.naacp.org/latest/naacp-forward/ (reminding listeners that the organization stands for "equity, equality, and justice for all.").

14. *See, e.g.*, Eric Foner, *Battle Over the Revolution*, N.Y. REV. OF BOOKS, https://www.nybooks.com/articles/1973/02/22/battle-over-the-revolution/ (last accessed Sept. 30, 2020). Consider, for example, the role of pamphleteering and public calls for action—Paul Revere's cry and ride—in marshalling support for colonial action against the Crown.

15. *See* U.S. CONST. amend. XV (protecting the right to vote).

16. *See* U.S. CONST. amend. I (protecting speech and association); THE DECLARATION OF INDEPENDENCE (U.S. 1776) (noting that the King committed a number of transgressions and abuses against the colonies, including unfair taxes and foisting unwanted immigrants on them).

17. *See* Lola Fadulu, *Study Shows Income Gap Between Rich and Poor Keeps Growing, with Deadly Effects*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2019/09/10/us/politics/gao-income-gap-rich-poor.html.

18. The country could easily be even less democratic than it is today. Slavery and Jim Crow would undoubtedly have been harder to combat. *See also* text and *infra* notes 47–49 discussing the clauses' symbolic effect. Other symbolic effects might include public sympathy or an increase in solidarity among the disaffected group. A trial, even a losing one, may serve as a platform to educate the public over important issues that they ought to consider. A trial may also serve to rally supporters to try harder next time. It may also inform the judiciary of a new issue requiring future treatment. *See* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003).

19. To take a familiar example, the new version of a product may require a Phillips screwdriver to tighten it, whereas the former version required an ordinary one. A new light

In what follows, we consider these and other possibilities. We conclude that equality jurisprudence should not be the automatic choice for every civil rights struggle. It is a helpful strategy on carefully selected occasions. But advocates should note its limitations and be on the watch for more effective choices depending on the precise situation confronting them.

The limitations we shall discuss include structural features of inequality, discussed in Part I, conceptual problems inherent in equal protection as a remedy for discrimination, discussed in Part II, and doctrinal barriers, in Part III. Part IV addresses problems afflicting binary approaches to racial remedies. Part V asks why certain civil rights organizations persist in the equality approach despite its poor track record, concluding that it is a good vehicle for soliciting contributions, marshalling the troops, signaling virtue, and little else.

I. Structural Hurdles

A. Forms of Treatment Unique to One Group

One stumbling block is that equality jurisprudence predisposes legal actors to make comparisons between two things or groups, A and B.[20] For example, this might mean comparing the treatment of Blacks and whites and demanding that it be not too disparate or favor one over the other.

This approach is sometimes useful for Black people since whites often subordinate them using official power or concerted private action to do so.[21] But equality is often considerably less useful with other groups. Native Americans, for example, are not so much interested in equality with whites, as in sovereignty—they want whites to leave them alone to manage their own affairs.[22] The group's foundational experience was not slavery and Jim Crow, but removal from their homelands and the destruction of tribal self-

bulb may require a new socket, or a new socket a different bulb. Removing a battery on a recent-model car may require a socket wrench. And so on.

20. *See* Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997) (discussing how racial discourse and law tend to revolve around two central groups, the Black and the white).

21. *See generally* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2008) (discussing the many ways this has happened throughout history). Bell is, of course, a prime exponent of critical race theory, indeed one of the founders of the movement.

22. *See, e.g.*, JUAN PEREA, ET AL., RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 2, 229–59 (3d ed. 2015) (discussing the struggle to preserve this form of tribal autonomy).

rule.[23] Gaining equal access to housing or to desegregated schools is simply not high on their agenda, at least compared with self-rule.

Nor is it so for many Latino/a activists. This group's formative experience was not slavery or Jim Crow, but Conquest, land loss, and destruction of culture in the wake of territorial takeovers.[24] Harsh immigration laws that often target this group might seem like candidates for challenge under the Equal Protection Clause, but the Plenary Power doctrine permits immigration law to be as unfair as the Administration wishes[25]—and much of the same is true for English-only laws and other measures that disadvantage Latinos and few others.[26] Equality jurisprudence is simply not a helpful way of framing or addressing problems like these and may easily make matters worse.[27]

Asian Americans do not suffer the same forms of unjust treatment as do Blacks. The large groups, Chinese and Japanese, are not economically depressed, at least not across the board.[28] But they are treated as foreign, even though their ancestors may have lived here for many generations, and during wartime or outbreaks of a new virus they may suffer removal, quarantine, or limitations on immigration and travel; none of which are easy to redress under current equality doctrine.

23. JUAN PEREA, ET AL., RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 2, 1–2 (3d ed. 2015) (discussing the role of foundational experiences in shaping the histories of each minority group). For Indians, see *id.* at 126, 610, 617 (excerpting articles and legal documents concerning Indian removal). *See also* Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002). For other groups, the foundational experience may be slavery, conquest, or exclusion.

24. PEREA ET AL., *supra* note 22, at 2, 285, 288–94. *See also* Lobato v. Taylor, 71 P.3d 938 (Colo. 2002) (en banc) (challenging traditional land claims in southern Colorado); U.S. GOV'T GOVERNMENT ACCOUNTABILITY OFFICE, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO, at 1–3 (2004) (analyzing irregularities leading to confiscation of Mexican-owned land in years following the War with Mexico and discussing possible remedies).

25. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

26. *See* PEREA ET AL., *supra* note 22 at 557–64, 792–800 (discussing English-only rules and their effects on Spanish speakers).

27. *See* Part IV infra (discussing structural problems arising from a black-white binary approach).

28. *See* Rakeesh Kochhar and Anthony Cilluffo, *Income Inequality is Rising Most Rapidly Among Asians*, PEW RES. CTR. (July 12, 2018), https://www.pewsocialtrends.org/2018/07/12/ income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians (discussing average family income for various Asian-American groups). Many Asian subgroups, such as Laotians and Cambodians are more recent arrivals and much less prosperous that Japanese and Chinese. *Id.*

B. Neglecting the Frame or Field

Many of the problems that limit the utility of the Fourteenth and Fifteenth Amendments for Black people are doctrinal—judicially created—so that courts, if they were so inclined, could do away with them. We discuss these in Part III.[29] But a number of structural problems limit their utility for any group, including Blacks. One such problem is the way in which single-minded focus on equality can easily cause one to overlook disadvantaging factors that inhere in the very way inequality analysis frames problems.

Equality tends to focus attention on disparities in the treatment of people within a given field, overlooking ones that are inherent in the field or frame.[30] Consider a few examples, one a recent Latino confrontation with the authorities, and another from Black civil rights history:

1. Tucson School Controversy

The Arizona legislature enacted a law aimed at abolishing a highly successful program of Mexican American Studies ("MAS") in the public schools of Tucson.[31] Taught by energetic young teachers, many of them graduates of the University of Arizona's famed Ethnic Studies program, the program attracted students from that city's large Mexican American community, most of them children of working-class immigrant parents.[32]

Before the program began, the drop-out rate for this group had hovered around fifty percent. After students learned about the great civilizations of Meso-America and the accomplishments of writers and artists like Sandra Cisneros and Diego Rivera, as well as the Civil Rights Movement, Martin Luther King Jr., and Cesar Chavez, the graduation rate increased to over ninety percent.[33] Many decided they wanted to go to college and become doctors, lawyers, or novelists.[34]

29. See *infra* Part III.

30. *See, e.g.*, Richard Delgado & Jean Stefancic, *Borders by Consent*, 52 ARIZ. ST. L.J. 337 (2020) (discussing the need for structural reform of borders and immigration). *See also* GEORGE LAKOFF, METAPHORS WE LIVE BY (1980) (discussing the role of framing in the formation and persistence of belief); Matt Bei, *The Framing Wars*, N.Y. TIMES (Sept. 17, 2005), https://www.nytimes.com/2005/07/17/magazine/the-framing-wars.html.

31. *See* Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes) and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013) (discussing the Tucson case and its implications for racial equity in schools).

32. Delgado, *supra* note 31, at 1530.

33. *See* PRECIOUS KNOWLEDGE (Independent Lens Co. 2011) (film depicting these events and the role of the principal players in the Tucson drama).

34. *Id.*

Authorities in the state's capital were unimpressed. Convinced that the district was teaching dangerous ideas, the legislature enacted HB 2281, prohibiting the teaching of any course designed primarily for students from a particular ethnic group, designed to increase racial solidarity rather than treatment of persons on an individual basis, aimed at the overthrow of the American government, or at inculcating racial resentment.[35] Any district found to violate the law could be punished by withholding up to ten percent of their state budget.[36]

The state superintendent paid a brief visit to one of the MAS classrooms, delivered a speech outside the school, and declared the program out of compliance with the statute.[37]

An administrative law judge agreed with the superintendent and, for good measure, banned seven texts, including Paolo Freire's *Pedagogy of the Oppressed,* Howard Zinn's *A People's History of the United States*, *Critical Race Theory: An Introduction*, by Richard Delgado and Jean Stefancic,[38] and William Shakespeare's *The Tempest*.[39] To make sure that everyone got the message, staff members boxed up the offending books in front of crying students and trucked them off to a distant warehouse.[40]

Two students sued, but a federal district court upheld the state's action as a legitimate exercise in curricular control.[41] After a partial reversal by the Ninth Circuit,[42] the case returned for retrial in front of the same judge who had earlier found against the program. This time, the judge found for the students, and the school board restored the program in a watered-down form.[43]

Where did equality and inequality figure in? The schoolchildren's complaint was not that the statute treated white and Latino kids differently.

35. *See* PRECIOUS KNOWLEDGE (Independent Lens Co. 2011) (film depicting these events and the role of the principal players in the Tucson drama).

36. *See* Delgado, *supra* note 31, at 1522 (describing the statute and the events leading up to its enactment).

37. *See* PRECIOUS KNOWLEDGE, *supra* note 33 (depicting these events and some of the principal characters).

38. *Id.*

39. *See* Richard Delgado & Jean Stefancic, *Banning Books in Arizona*, ACADEME BLOG (Jan. 24, 2012), academeblog.org/2012/01/24/book-banning-in-arizona/ (discussing book-banning and book–burning throughout history).

40. Delgado, *supra* note 31, at 1523–24.

41. *Id.* at 1530–32. By "curricular control" we mean authoritative designation of the prescribed course of study.

42. Arce v. Douglas, 793 F.3d 968, 990 (9th Cir. 2015).

43. *See* Hank Stephenson, *TUSD Board Sidesteps Efforts to Resurrects Aspects of Mexican American Studies*, ARIZ. STAR (Jan. 31, 2018), https://tucson.com/news/local/tusd-board-majority-sidesteps-effort-to-resurrect-aspects-of-mexican/article_620f0e1b-6b09-57c3-ae4c-342130d3b612.html.

Rather, it was that the authorities insisted on teaching everyone the same course of study, featuring kings, heroic colonial figures like Paul Revere, battles like Gettysburg, and inventors like Thomas Edison, even though that approach failed to engage the schoolchildren and struck them as irrelevant to their culture and experiences.[44]

In short, the problem was not that the authorities treated the brown students differently from the way they treated the white ones. That would have been a classic equal protection problem. Rather, the frame itself—an Anglocentric curriculum—was the source of the problem. To its credit, the Ninth Circuit recognized its nature, and, without forcing it into a Fourteenth Amendment framework, found in the students' favor.[45]

2. *Brown v. Board of Education*

A second example draws from African American history. Until 1954, school authorities in the South typically assigned white pupils to one school and Black kids to another.[46] Often, the schools were funded roughly equally.[47] Within a frame that merely considered the tangible resources (books, classrooms, teacher salaries) available in both sets of school, they may have appeared nearly equal. But when evaluated in terms of the symbolic message the assignment scheme sent, they were not equal at all.[48] The frame itself was discriminatory, something that took the American court system close to a century and much gallant lawyering to recognize.[49]

44. *See* Christine E. Sleeter, Ph.D., *The Academic and Social Value of Ethnic Studies: A Research Review*, NAT'L EDU. ASS'N (2011), https://files.eric.ed.gov/fulltext/ED521869.pdf. (reflecting on her testimony before the district court in the Tucson school district); *see also* Julie Depenbrock, *Federal Judge Finds Racism Behind Arizona Law Banning Ethnic Studies*, NPR (Sept. 22, 2017), https://www.npr.org/sections/ed/2017/08/22/545402866/federal-judge-finds-racism-behind-arizona-law-banning-ethnic-studies (discussing Professor Sleeter's findings and testimony in the trial).

45. *See* Maggi Astor, *Tucson's Mexican America Studies Was a Victim of 'Racial Animus,' Judge Says*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/us/arizona-mexican-american-ruling.html (discussing the retrial).

46. Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

47. *See also* Mendez v. Westminster School Dist., 64 F. Supp. 544 (S.D. Cal. 1946) (noting that much the same was true in a case concerning Mexican American schoolchildren and their right to attend school in classes with whites and not just children of their own ethnicity).

48. *See Brown*, 347 U.S. at 491 (noting that the damage was apt to be long-lasting—"in a way unlikely to be ever undone").

49. *See, e.g.*, William Harvey et al., *The Impact of the Brown v. Board of Education Decision on Postsecondary Education of African Americans*, 73 J. NEGRO EDUC. 328 (2004) (describing how the decision counteracted poisonous stereotypes).

3. Immigration and Deportation

A further area, immigration policy, introduces a form of inequality that can target almost any minority group. In a recent article, the two of us showed that a host of current problems—family separation, unlawful detention, and refusal to consider refugee states when law provides—are products of violence rather than a lack of equality.[50] Once one sees immigration measures in that light, the nature of the problem comes into focus and the search for remedies can begin.[51] For example, one can see how what we called multi-group oppression advances several interests of the Republican Party at the expense of those of minorities and the Democrats, in a manner tantamount to a new Southern Strategy.[52]

II. Conceptual Limits on Enforcing Decrees

Equality-based remedies for racial wrongs often encounter poor reception or incomprehension by the authorities responsible for putting them into effect.[53] Many such decrees are apt to spark strenuous resistance, even from public officials who believe themselves champions of law and order—even ones who consider themselves stout defenders of equality.[54] Consider a few ways this can arise.

A. Disbelief

With *Brown v. Board of Education*, Southern authorities resisted the landmark decree, first maintaining that it only applied to schools, or just K-12 schools, and not to public swimming pools, restaurants, and movie theatres.[55] Still others insisted that it applied only to the parties before the court (plaintiffs named Brown and administrators of school districts in Kansas).[56] Authorities throughout the South reacted to the landmark

50. *See* Delgado & Stefancic, *supra* note 30 (explaining the concept, its roots in the work of theoretician Jacques Derrida, and its application to the law of borders and immigration).

51. *Id.* (discussing possible solutions to border violence).

52. *See generally* Richard Delgado & Jean Stefancic, *Multi-Group Oppression and a Theory of Judicial Review*, 51 U.C. DAVIS L. REV. 1 (2017) (naming and discussing the new strategy).

53. *See* Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education*, 36 WM. & MARY L. REV. 547 (1995) (discussing the social construction of the famous case and explaining how the decision failed fully to generalize).

54. *Id.* at 550.

55. *Id.* at 555.

56. *Id.* at 550 (discussing this resistance).

decision with disbelief: Surely, the Supreme Court could not have been intending *this (viz, full integration).*

Earlier, we explained this resistance as a product of a "reconstructive paradox" that sets in when a judicial decree threatens to change the status quo in wide-ranging fashion.[57] A number of scholars have pointed out that social reform through law is laborious and halting because law's scope is so narrow—most lawsuits proceed with a single plaintiff suing for a single harm that is capable of redress in the case at hand.[58] But, with institutional litigation, a new set of difficulties arise in connection with enforcement. Because every social practice is part of an interlocking system of practices, meanings, and interpretations, changing just one element (for example, school assignment rules) leaves the rest unchanged.[59]

Thus, when the Supreme Court decided *Brown*, its decree was soon robbed of much effect when, in a myriad of decisions, school officials, lower courts, sheriffs, and others interpreted *Brown* against the familiar background of beliefs and practices.[60] "Of course, the Supreme Court didn't mean *that*," they would reason in new case after new case.

It is as though legal decisions take place against a gravitational field, with the pull being toward the familiar—stasis. Because *Brown* set out to change just one element, leaving the force-field itself intact, its effect quickly eroded. For social reform to happen, "everything must change at once"; but legal doctrines such as stare decisis, standing, mootness, ripeness, and political question mean that the law cannot change everything at once. It can only decide the case before it.[61]

Dubious local officials are not the only forces that rob landmark decisions of much of their effect. If that were true, all that would be necessary would be vigilance and determined enforcement carried out over time. Rather, such decisions fail to establish themselves in the wider legal culture, so that even those who are sympathetic to reform fail to see their applications in closely related areas. "Swimming pools" southern officials asked in the wake of Brown— surely the Supreme Court didn't mean we had to desegregate *them*, and so on for movie theatres, restaurants, public bathrooms, and water fountains.

57. *See infra* Part II, C (discussing the paradox).

58. *See*, for example, rules of standing, *e.g.,* Warth v. Selden, 422 U.S. 990 (1975) and other prudential doctrines such as mootness and ripeness which have much the same effect.

59. S*ee* text and *infra* notes 52–53.

60. *See* Delgado & Stefancic, *supra* note 53, at 554–55 (discussing this limitation and its application to *Brown*).

61. *Id.* at 551.

B. Colorblindness

This problem is not limited to situations where the party from whom a decree requires change of some sort is strongly resistant because of a longstanding practice, such as a Southerner contemplating desegregation. Consider, for example, the relatively recent debate over campus hate speech rules.[62] Beginning in the late 1990s, college and university administrators began noticing an upsurge in the number of racist insults, graffiti, and name-calling taking place on their campuses.[63] At some, minority enrollment began to drop as parents decided to send their sons and daughters to schools like Howard or Spelman where the atmosphere might be more supportive.[64] To avoid these consequences, many mainstream campuses responded by enacting anti-hate speech rules that punished certain forms of racial or sexual epithets. These rules sparked immediate resistance from free-speech organization like the American Civil Liberties Union ("ACLU") or Foundation for Individual Rights in Education ("FIRE").[65]

Brown at least had some effect. Today, a school official who might be tempted to assign all the Black children to one school and the white or Latino/a ones to another might easily hesitate, thinking "I had better avoid doing that, at least for now, and, when I do it, disguise what I am doing." Today's opponents of hate speech rules, however, show little such compunction—they proceed as though *Brown* had not taken place at all. Hate speech controversies are in many respects like ones over student-assignment practices.[66] Yet, opponents make the same arguments and rhetorical moves that society did with other forms of discrimination in former years, including the idea that for complaining parties, the problem is all in their heads.[67]

62. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (discussing how controversies over campus speech codes can be seen in two ways—as struggles over the right of free speech guaranteed by the First Amendment, on one hand, or ones over the right to equality and equal status on the other, vouchsafed by the Fourteenth).

63. *Id.* at 348–53.

64. *Id.* at 376, 378 n. 354.

65. Mainly from the free speech camp. *See, e.g.*, Alan M. Dershowitz, *Dubious Arguments for Curbing the Free Speech of Nazis*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/outlook/dubious-arguments-for-curbing-the-free-speech-of-nazis/2018/01/31/495cd256-fc96-11e7-8f66-2df0b94bb98a_story.html.

66. Namely, both are degrading, but not seen as such at the time. *See* Charles Lawrence, *If He Hollers, Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431 (1990) (arguing that *Brown v. Board of Education* was, in reality, a case about hate speech).

67. *See, e.g.*, Delgado & Stefancic, *supra* note 53, at 553.

Under *Plessy v. Ferguson*,[68] laws that distributed public goods (seats in the railroad car set aside for whites) along racial lines were upheld, so long as the benefit Blacks received was roughly comparable to that received by whites. The Supreme Court upheld the practice—separate but equal. Whites and Blacks were equally disadvantaged; neither could ride in the other's car.

A similar situation prevailed in the schools of Topeka, Kansas, at the time *Brown* was decided. Indeed, shortly after the decision came down, a prominent scholar wondered if the decision was principled: Why should the right of Blacks to associate with whites trump that of whites *not* to associate with Blacks?[69] One right balanced another, one claim against its perfect reciprocal.

The debate about hate speech proceeds in strikingly similar fashion. The white insists on a right to say whatever is on his mind. The Black demands protection when what is on the white's mind is a face-to-face racial insult.[70] One claims a right to do *X*, the other the right not to have *X* done to him. One right emanates from one part of the Constitution—the First Amendment—the other from a different part, the Fourteenth.[71] As with separate but equal, today's debate over hate speech features commentators insisting that the Black's injury is all in his head[72]—an insistence that echoes early cases in which the Supreme Court told African Americans that the indignity of being shunted off to separate facilities is offensive only because they chose to put that construction on it.[73] Contemporary opponents of hate speech rules dismiss the Black's injury as merely dignitary—a mere matter of wounded feelings—an "offense" and not a real harm.[74] One scholar rejected the argument that hate speech *silences* its target, thus reducing the amount of speech on campus, by pointing out that silencing requires mental

68. Plessy v. Ferguson, 163 U.S. 537 (1896).

69. Delgado & Stefancic, *supra* note 53, at 552 (discussing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

70. That is, the white's intention.

71. Delgado, *supra* note 62, at 345–48 (noting that in each struggle between liberty and equality [the First and Fourteenth Amendments], liberty almost always wins).

72. *E.g.*, "I said that just in fun, you're a snowflake." *See* DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 132–36, 156 (1991); NAT HENTOFF, FREE SPEECH FOR ME BUT NOT FOR THEE (1992) (observing that minorities seem ready to complain of imagined or exaggerated slights). *But see* ULRICH BAER, WHAT SNOWFLAKES GET RIGHT (2020) (noting that commentators like these got it wrong).

73. *Plessy*, 163 U.S. at 551.

74. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, DUKE L.J. 484, 498 (1990) (characterizing the injury to minorities as merely a momentary discomfort or feeling of offense).

mediation—the victim decides to remain silent.[75] As with *Brown*, the opposition to hate speech rules portrays itself as highly principled. It is not in favor of hate speech, but rather that higher principles are at stake here.

Brown effected relatively little change in terms of social consciousness or the realities of life for Black schoolchildren.[76] Yet, society has constructed the decision as a breakthrough of momentous proportions. We believe the two consequences stem from a common cause. *Brown*'s sharp departure from the past caused it to stand out—to seem a breathtaking advance. The sharp break also assured that it would fail to "take," or would succumb to what one might think of as kind of social gravity.[77] Let us now spell out in greater detail of what that gravity consists.

B. The Reconstructive Paradox

This inertial drag includes the system of meanings and social interpretations against which the new rule must operate.[78] It also includes a set of narratives, or "stock stories," with which the new ruling is forced to harmonize.[79] It also includes a set of social practices with which the new command must contend.[80] Each of these components mitigates the new decision's effect.

1. Meanings and Interpretations

Onlookers interpret any text, including legal ones, against a background of meanings, presumptions, and preexisting understandings.[81] If a parent tells a child, "Clean up your room before coming down to dinner," the terms "clean" and "room" have well-understood meanings: the child knows he or she is not expected to launder the drapes or vacuum under the bed. If an adolescent tells the parent, "I'll be back home by midnight," both understand

75. *See* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795 (1993) (discussing the controversy over hate speech codes under traditional First Amendment principles).

76. As is often observed, more African American children today attend schools that are segregated—largely Black—than they did in the *Brown* era.

77. *See* Section C, immediately *infra.*

78. *Id.*

79. *See* section C.1., *infra.*

80. *Id.*

81. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980) (discussing how communication rests on commonly accepted meanings and interpretations); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992).

that "midnight" means tonight, not a week from now, and "back" means inside the house, not parked outside in the car.

The same holds true for legal commands. Thus, when *Brown* ordered school districts to desegregate "with all deliberate speed,"[82] southern officials interpreted the decree in terms of their common sense. In hundreds of cases, they construed *Brown* to mean what it could only mean, given their experience—integration that went not too far, not too fast, and that left the school system as little changed as possible.

Administrators of public beaches, movie theaters, restaurants, colleges, and universities interpreted *Brown* as a case affecting only K-12 schools. Some even took the position that it bound only the districts before the court.[83] To many, *Brown* looked like an exception, an improbable edict that should naturally be interpreted in that light. The only way to harmonize it with common sense was to construe it narrowly: "Of course, the Supreme Court did not mean that Blacks and whites are strictly equal," they told themselves. "Nor that we now need to assign Black principals to white schools, provide college counseling to all children including the newcomers; adopt due process protections in disciplinary actions for Black children who misbehave," and so on. Because *Brown* was interpreted against the background of a myriad of such understandings, traditions, habits, and expectations, and because, unlike a parent, the Supreme Court was not available to clarify immediately what it meant, the decision had relatively little impact.[84]

It did change one thing—pupil assignment rules—but the rest of society remained essentially the same. The gain in one area was quickly swallowed up by interpretive effects emanating from the rest.

2. Social Practices

A second component of the force-field is the panoply of preexisting social practices, many of which the judiciary is powerless to change. These include: (1) friendship patterns, (2) the manner in which a teacher looks at or responds to a Black child, (3) that child's own self-image, and (4) expectations of treatment from white teachers, librarians, principals, school counselors, classmates, bus drivers, crossing guards, and others. They include who is chosen for student body president, the debate team, hall monitor, prom date, and cheerleading squad. If all of these practices remain

82. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (*Brown II*).

83. *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 11820, 565–607 (3d ed. 1992) (noting that the decision produced a comparatively small effect for this reason, among others).

84. *See generally* ROSENBERG, *supra* note 9.

the same while only school assignment practices change, a Black child's life will not greatly improve after a decision like *Brown* and may easily be worse.[85]

Of course, a legally enforced change in one area could potentially lead to reconsideration elsewhere. When white schoolchildren begin to attend a school in a building that would now house some Blacks, the abovementioned social practices might also start to change. But everything we know about cognitive dissonance suggests the opposite.[86] New practices that depart sharply from old ones encounter initial resistance and find favor only slowly and grudgingly.[87] New reasons are found to justify the newly disapproved social practices.[88]

3. Narratives

A final component of the forces that militate against adoption of a new legal decision is the myriad of narratives or stories with which the new rule must contend.[89] Narratives are the simple, script-like mottos and catch-phrases, like "he hit me first," "I had no idea it was yours," "majority rules," "I've been waiting in line longer than you," or "it's always outsiders who are causing trouble" that we use in ordering our social world.[90]

With school desegregation, judicial decrees confronted a host of countervailing narratives, including "neighborhood schools are best," "who are these outsiders trying to tell us what to do?," "our Negroes were happy until . . . ," "Black people just want to push into places where they are not wanted," "they want things they don't deserve and haven't earned," "integration might be okay, but the schools should remain predominantly white, and the curriculum, teachers, and so on, roughly as they are now," and others.[91]

85. We say "worse" because the child may easily meet with violence or rude treatment at the new school.

86. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1962) (describing and analyzing the tendency to reject new truths if they conflict with ones that an individual has long held).

87. *See id.* The Black child's plight could worsen because white parents and classmates might see him as an interloper out to cause trouble and upset settled expectations.

88. *Id.*

89. *See generally* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) (discussing how narratives shape discourse and consciousness).

90. *See id.*

91. *See generally* ROSENBERG, *supra* note 9 (noting law's resistance to change and how social movements that proceed too rapidly are apt to spark backlash).

Of course, these narratives could theoretically change. A person who holds a large number of such beliefs regarding minority people, neighborhood schools, and "the way things are" could possibly revise his or her opinion when confronted by the image of a dignified, intelligent, reasonable Black person at a school or workplace. But narratives are slow to change—we tend to interpret new versions in terms of the ones that we have held for a long time.[92] These old narratives provide the very basis for understanding new experiences, including that of our first close Black associate. It is far easier to pronounce the Black an "exception" than to revise one's entire stock of beliefs.

Eventually, social stories and practices do change. But this happens much more slowly than we like to imagine.[93] And when they do, courts and decrees play little role in bringing them about. Courts are distant institutions. Unlike flesh-and-blood persons, they cannot follow up an exchange by saying, for example: "no, he is not an exception; most of them are like that if you take the trouble to get to know them."

4. Ineffective Decrees

In short, courts are not in a position to engage society in the kind of continuing dialogue that could readily change meanings and practices.[94] They can only change one practice at a time. Everything else—the entire system of practices, traditions, and meanings—remains the same, exerting a gravitational tug toward the familiar. In giving effect to the new decree, something the courts *are* in a position to enforce, hundreds of lower-level bureaucrats, state officials, and lower court judges will interpret the ringing words according to their common sense understandings.[95]

The combined effect of all these forces means that any reform measure other than the most gradual will meet resistance, spur reinterpretation, and encounter obstruction in ways that the legal system is poorly equipped to counter.[96] One perspective from which to view these forces is in terms of what we earlier termed the "reconstructive paradox." Our description went something like this:

92. Delgado & Stefancic, *supra* note 89, at 1259–60 (defining "empathic fallacy" as the belief that we can change belief systems quickly and easily by offering better narratives).

93. *See* ROSENBERG, *supra* note 9; *see also* Delgado & Stefancic, *supra* note 89.

94. *See* ROSENBERG, *supra* note 9; *see also* Delgado & Stefancic, *supra* note 89.

95. *See* ROSENBERG, *supra* note 9; *see also* Delgado & Stefancic, *supra* note 89.

96. Delgado & Stefancic, *supra* note 89 at 1258–59 (observing that speech and dialogue can correct small, clearly bounded errors, but not ones that are large and systemic, since these are relatively immune to change through narrative means alone).

(1) The greater a social evil (for example Black subordination, stereotypes of Latinos as criminals and rapists) the more it is apt to be entrenched in our national practices, thought, and narratives.

(2) The more entrenched the evil, the more massive the social effort that will be necessary to eradicate it.

(3) The harm of such a deeply rooted evil will be invisible to many because it is embedded and commonplace.

(4) The massive effort will collide with other social values and things we hold dear (settled expectations, religion, family, privacy, the southern way of life, etc). This effort will entail dislocations, shifts in spending priorities, and changes in the way we speak, act, and relate to each other.

(5) These latter efforts, by contrast, will be highly visible and will give rise to objections that the proponents are engaging in totalitarian tactics, siding with big government, discomfiting innocent whites, violating the merit principle, elevating group rights over individual ones, reviving old grudges, and whipping up division.

(6) Complaints like the ones just mentioned will feel perfectly in order, righteous and proper, since the other side will appear to be sacrificing real liberty for a nebulous goal.

For these reasons, reconstruction will often strike many in a society as unprincipled and wrong. Little surprise, then, that few take up its cause, persist for long in the face of resistance, or even frame their aims broadly enough that if they come to pass, they have a chance of achieving much effect. This seems particularly so with petitions based on unequal treatment, for reasons we discussed earlier, *supra* Part I.

III. Doctrinal Barriers

In addition to conceptual problems with redressing discrimination via the equality principle, litigation confronts a number of judicially created hurdles.

A. Intent

Some unequal treatment is unmistakable and hard to deny. The one administering it accompanies his act with words like "You N___. You're just like all rest. A bunch of low-talent, lazy louts. You're fired." But other forms are veiled or arrive via practices that, while seemingly neutral on their face, exert a discriminatory effect. Sometimes, the administrator responsible

knows about the discriminatory effect and could easily avoid it, but chooses not to, preferring the current regime. Supreme Court decisions like *Firefighters v. Stotts*[97] and *Griggs v. Duke Power Company*[98] say that this is perfectly legal, and more recent decisions such as *Arlington Heights v. Metropolitan Housing Development Corporation*[99] and *McCleskey v. Kemp*[100] suggest that the Supreme Court regards the intent requirement as "quite simply . . . a technique for not finding discrimination."[101] After *McCleskey*, showing a discriminatory purpose requires "proof that the government desired to discriminate" so that merely proving that the government took an action with knowledge that it would have discriminatory consequences would not suffice.[102]

B. State Action

Mrs. Murphy chooses not to admit minority guests into her boarding house. This, too, is perfectly legal because she is a private citizen, not a state actor like a hostel operator in a state park.[103] Since our free-market system relegates much of everyday life to the private sector, many racist decisions and policies fall outside judicial purview.

97. Firefighters v. Stotts, 467 U.S. 561 (1984).

98. Griggs v. Duke Power Company, 401 U.S. 424 (1971).

99. Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977).

100. McCleskey v. Kemp, 481 U.S. 279 (1987).

101. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV.1779, 1854 (2012).

102. Mario L. Barnes and Erwin Chemerinsky, *What Can Brown Do for You?: Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV 1293, 1306 (2018). *See also* Carrie Rosenbaum, *Immigration UnEqual Protection*, YALE J. ON REG. (July 22, 2020), https://www.yalejreg.com/nc/unequal-protection-in-immigration-law-by-carrie-rosenbaum/ (noting that "After McCleskey, showing a discriminatory purpose required proof that the government desired to discriminate." Merely showing that the government took an action while aware that it would have discriminatory consequences would not suffice. The Court's new approach was so lax that if lawmakers merely cleansed government acts of racial or other classifications based on protected status, intent would evade detection. The approach embodies the "colorblindness perspective insofar as it views all, and only decisions that overtly or covertly take race into account as constitutionally impermissible, but rejects the view that unequal outcomes ought to be equally constitutionally suspect."). *Id.*

103. Brenna R. McLaughlin, *Repealing the Fair Housing Act's Mrs. Murphy's Exemption*, 2018 WIS. L. REV. 149 (2018) (discussing the origin and practice of excluding small innkeepers and boarding houses from federal fair-housing law). *See* Civil Rights Cases, 109 U.S. 3 (1883) (the Fourteenth Amendment can only be enforced against state action, not private action).

C. Equality of Opportunity Versus Equality of Result

Programs like affirmative action that aim merely to even the playing field by giving minorities better opportunities to secure jobs and college slots than they would otherwise enjoy, may not incorporate specific goals and quotas.[104] Nor may they aim to make up for past societal discrimination.[105] Officials may strive to provide minorities notice of an opportunity or job.[106] But minorities then must compete for it in the same way as everyone else even though some of their competitors may be more advantaged and enjoy a head start in the competition.

D. Exceptions for Wartime, Immigration, and Presidential Immunity

As though the above-mentioned obstacles were not enough, the law provides that in a number of areas, official policy may be flagrantly unequal.[107] In wartime, the authorities may require that citizens of a certain descent remove themselves from their homes and live in concentration camps for the duration of the conflict.[108]

A different rule forbids courts from intervening in connection with immigration practices and policies that are expressly racist.[109] By the same token, the president of the United States may, with impunity, revile members of groups that the president's supporters disfavor.[110]

E. Voting Restrictions

The Fourteenth Amendment is one of two great equality-protecting measures; the Fifteenth Amendment is the other. The Fifteenth Amendment provides that neither the federal government nor any state shall deny

104. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding university-level affirmative action programs under stringent conditions).

105. *See* Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) (striking down an overbroad affirmative action program at UC Davis medical school).

106. *See* Michelle Adams & Dereck W. Black, *Equality of Opportunity at the Schoolhouse Gate*, 128 YALE L.J. 2302 (2019) (discussing equality of opportunity and equality of effect and noting that many authorities support the former, but not the latter).

107. *See also* Delgado, *supra* note 2 (noting that hate speech and animus-laced invective are hard to correct when the President is the speaker).

108. *See* Korematsu v. United States, 323 U.S. 214 (1944) (declining to invalidate wartime internment for Japanese).

109. *See* Chae Chan Ping, 130 U.S 581 (1889) (announcing the plenary power doctrine according to which immigration decrees are largely beyond judicial review power).

110. Delgado, *supra* note 2, (noting that presidential hate speech lies largely beyond judicial purview).

"citizens of the United States [the right] to vote . . . on account of race, color, or previous condition of servitude."[111]

Voting can, theoretically, redress unfavorable treatment of one group by another. Yet Supreme Court rulings have permitted voter purges,[112] identification laws, and gerrymandering that have disproportionately affected the poor and minorities.[113] Previously, the Court approved poll taxes,[114] literacy tests,[115] and grandfather clauses.[116]

Even if citizens are theoretically free to "vote the rascals out," rulings like those mentioned above, coupled with modern ones like *Citizens United*[117] and *Shelby County v. Holder*[118] suggest that this is not so easy.

F. Economic Inequality

Declaring a constitutional right for something, all things considered, is apt to benefit those who enjoy a disproportionate ownership of the commodity at the time of the announcement.[119] For example, when the Constitution declared a due process right against the taking of a person's property, for example, the new protection benefitted property-holders, land-

111. U.S. CONST. amend. XV, § 1.

112. *See* Reis Thebault & Hannah Knowles, *Georgia Purged 390,000 Voters from its Rolls. It's the Second State to Make Cuts in Less than a Week*, WASH. POST (Dec. 17, 2019), https://www.washingtonpost.com/nation/2019/12/17/georgia-purged-voters-its-rolls-its-second-state-make-cuts-less-than-week/ (noting the increasing popularity of roll-purging in Republican states).

113. *Voter Identification Laws by State*, BALLOTPEDIA (2020), https://ballotpedia.org/Voter_ identification_laws_by_state.

114. Kelly Phillips Erb, *For Election Day, A History of the Poll Tax in America*, FORBES (Nov. 5, 2018), https://www.forbes.com/sites/kellyphillipserb/2018/11/05/just-before-the-elections-a-history-of-the-poll-tax-in-america/#7fb9b4aa4e44 (describing the development of this common voter-repression method).

115. *Literacy Tests*, NAT. MUSEUM OF AMER. HISTORY, https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/lieracy-tests (last visited Oct. 11, 2020).

116. *See* Guinn v. United States, 238 U.S 347 (1915) (discussing this common practice, especially in the South).

117. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that corporations may contribute a practically unlimited amount to political campaigns).

118. Shelby County v. Holder, 570 U.S. 529 (2013) (declaring unconstitutional two provisions of the federal Voting Rights Act requiring "preclearance" when certain jurisdictions made changes in voting procedures).

119. *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 79 TEX. L. REV. 1181 (1997) (discussing the consequences of attempting to frame or address legal issues affecting Latinos via a black-white binary paradigm of race).

owners, business-owners, slaveholders, and financiers.[120] "My property" became a refrain of the propertied, not the property-less or indigent, much less the slaves.

By the same token, the constitutionalization of equality stood to benefit those considered to be at the center of that new guarantee, namely African Americans, and not those who fell outside it, such as Native Americans, Latinos, Chinese, and newly arrived immigrants from southern or eastern Europe.[121]

This, in turn, raises for a second time the role of binary paradigms, this time in terms of their compounding effect on existing inequality. Any paradigm channels thought in ways the paradigm highlights and deems relevant. The black-white paradigm often plays a guiding role when government officials, program officers, and ordinary observers think about race. In a typical case, a church committee or panel of speakers at a public university resolves to do something about the "race problem" and reaches out for an African American speaker or resource person. That person may well end up performing excellently—but so might have a highly qualified Asian American, Latinx, or Native American speaker, who remains out of consideration because of the unconscious mindset of the member of the committee.[122]

G. There's Always an Exception

A final reason why equal protection often yields few breakthroughs is that under current doctrine, courts need not find an equal protection violation if the government can show that the two groups in question do not really stand on the same footing. Perhaps one is more deserving or hard-working than the other. Or perhaps the government has a good reason for treating the two groups in a differential fashion. Perhaps the administrator had an internal, perfectly sound, undisclosed reason for acting as he or she did. Perhaps the decision even reflected a compelling interest. Equal protection is a weak reed on which to base a claim for redress if an adjudicator can readily conjure up reasons why it should not apply to the case at hand.

120. *Id.* at 1190 (noting that new rights generally benefit those who are their immediate holders).

121. *See* text at *supra* note 19–20, discussing Perea's influential article.

122. *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle*, 75 TEX. L. REV. 11811, 1195 (1997) (discussing the "out of mind" phenomenon).

IV. Racial Binaries

As mentioned previously, any legal approach based on principles of equality is apt to proceed by comparing two groups, hence the term "racial binary."[123] This approach, which is not at all necessary or inevitable, invites critical reconsideration.

A. Inhibiting Coalition

As Juan Perea has noted, any decision that purports to consider two racial groups, and two only, tends to marginalize other groups and discourage them from making common cause with the group that finds itself at the center.[124] It can also pit groups against each other, when they would do better to join forces in an attempt to enlarge opportunities that both might enjoy.[125] By the same token, it can interfere with group members' ability to generalize, appreciate their common dilemma, and to see the big picture.[126]

B. Inducing Dependence on Whites

Not only does the black-white binary paradigm of race discourage minority groups of color from working together, it can impede reform efforts by encouraging one group in a coalition to secede and join forces with the superior group that had been oppressing both.[127] This can happen when a group decides to ignore history and patterns of repression and betrayal by the dominant group.[128] It can also occur when a group disdains an opportunity to forge coalitions with similarly-situated minority groups in hopes of finding favor elsewhere.[129]

123. *See* text at *supra* notes 16–21.

124. *See* Perea, *supra* note 20. *See also* Richard Delgado, *Derrick Bell's Toolkit: Fit to Dismantle that Famous House?*, 75 NYU L. REV. 283, 290-95 (2000) (discussing some of the problems inherent in the black-white binary approach to racial problems).

125. Delgado, *supra* note 122.

126. *Id.* at 296–99.

127. Delgado, *supra* note 122, at 299–300.

128. *See* Perea, *supra* note 20. *See also* Delgado, *supra* note 122 (discussing some of the problems inherent in the black-white binary approach to racial problems).

129. *Id.* (citing examples where rigid black/white thinking impairs flexibility and creation coalition-making).

C. Multi-Group Oppression and the New Southern Strategy

Earlier, we noted how some of these adverse forces were already at play in the South and nationally. In a number of articles,[130] we noted the recent appearance of what we termed the "new Southern Strategy." In this strategy, members of the Republican Party attempt to deport and marginalize the numbers and political participation of Latino/a immigrants with the end goal of eliminating most forms of welfare and forcing Black people to accept work, such as cleaning houses, serving food, or picking crops, that reminds them of slavery.[131]

A prime goal of civil rights struggles might well be to free ourselves from binary thinking of all kinds. If each group insists on maintaining its own binary framework, the other groups will correctly perceive that it is, even if unintentionally, marginalizing them and steer clear of coalitions that could benefit them all. The framework of civil rights action must take different forms for each group and take into account their distinct histories and experiences—slavery, removal, Conquest, exclusion. The groups need to converge if, in the end, any of them is likely to make much progress.

Conclusion

When examined critically, equality turns out to be at best an occasionally useful tool for redressing racial wrongs. As has been seen, it is less helpful for nonblack minorities, like Native Americans, Latinos/as, and Asian Americans than it is for Blacks. Moreover, persisting in it can lead to a black-white binary approach that suffers a number of deficiencies and can affirmatively make matters worse for Blacks. Social science, as well as racial history, show that much more stands to be gained from reform efforts based on struggle, solidarity, struggle, voting, and righteous indignation, performed, if possible, in coalition with others.

130. *See* Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303 (2015); Richard Delgado, *Rodrigo's Footnote: Multi-Group Oppression and a Theory of Judicial Review*, 51 U.C. DAVIS L. REV. 1 (2017); Richard Delgado, *A New Strategy of Multi-Group Oppression*, 7 CALIF. L. REV. ONLINE 49 (2016).

131. *E.g.*, Delgado, *supra* note 128.

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