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Remembering How to Do Equality

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Decades ago, equal protection law helped to bring about great transformations in the status of African Americans, women, and other subordinated groups. Today, constitutional equality doctrine is too often employed by a conservative judiciary to preserve the status quo. To restore a progressive constitutional vision, we need to understand how equality law was hijacked in the first place. And we need to remember the doctrinal tools that courts *and* legislatures employed to vindicate equality norms in the civil rights era. Refreshing our collective memory will help us imagine the shape of the next reconstruction.

Redemptive Constitutionalism

The Reconstruction era amendments were aptly named; they were truly reconstructive. Their framers sought to make equal citizens of newly freed slaves. The great purpose of the Fourteenth Amendment was transformative: "to put the citizens of the several States on an equality with each other as to all fundamental rights" and to "abolish . . . all class legislation in the States and do . . . away with the injustice of subjecting one

caste of persons to a code not applicable to another."[1] The amendment's framers believed that all members of the political community were entitled to equal freedom, that law should not be used to create or maintain social caste, and that law should not single out groups for special burdens or benefits unrelated to important public purposes—the prohibition on so-called class legislation. Congress viewed itself as the first line of defense for these constitutional values. In section 5, Congress gave itself not only the power but also the responsibility to protect and enforce the Fourteenth Amendment's guarantees of equal citizenship.

The Fourteenth Amendment grew out of generations of abolitionist criticism of the founders' Constitution for its failure fully to guarantee basic rights and equality for all members of the political community. The amendment was an act of redemptive constitutionalism; it claimed to fulfill the greater purposes of the Constitution and the Declaration of Independence. The same constitutional text that made former slaves full citizens still demands equal freedom for all, announcing its commitments in a language of general applicability that each inheriting generation must decide how to honor.

When Americans make new claims on the Fourteenth Amendment, they reenact its origins. They invoke the amendment's text—as well as the Declaration—to dramatize the gap between our ideals and our practices. Sometimes, courts respond to these claims and help vindicate the amendment's transformative commitments, while at other times courts resist. Each generation builds on previous interpretations, preserving some and challenging others, with the goal of realizing equal freedom in its own time.

The post-ratification history of the Fourteenth Amendment is rich with examples of redemptive constitutionalism. Women in the abolitionist movement who worked for ratification of the Thirteenth Amendment in turn claimed equal rights under the Fourteenth Amendment. When the U.S. Supreme Court rejected their claims, women sought and ultimately gained the right to vote through the Nineteenth Amendment, ratified in 1920 and, fifty years later, secured guarantees of equal citizenship through new interpretations of the Fourteenth Amendment. Popular mobilizations of workers and others who needed government's help led the New Deal Court to reject the vision of liberty expressed in *Lochner v. New York*.[2] A long struggle for black civil rights led the Court in *Brown v. Board of Education*[3] to reject its previous apology for racial inequality in *Plessy v. Ferguson*.[4] In our own day, *Lawrence v. Texas*[5] overturned the Court's pinched vision of human freedom in *Bowers v. Hardwick*.[6] Over time, certain interpretations of the Fourteenth

Amendment have come to symbolize great wrongs that the American public has decisively rejected. *Plessy* and cases like it function as negative precedents. Their repudiation expresses our contemporary ideals of justice. They symbolize the country's continuing project of constitutional redemption.

As it was in the past, so it is in the present. After years of political retrenchment, the Court's equality doctrines now betray the Fourteenth Amendment's great promises. Increasingly, equality doctrine does not guarantee Americans equal liberty but instead protects the liberty of the privileged. Increasingly, equality doctrine does not challenge state action that preserves social caste but instead prevents government efforts to dismantle caste.

What Went Wrong?

Less than fifteen years after *Brown*, Americans began electing presidents who campaigned against the Warren Court and the civil rights revolution. These presidents appointed justices who changed the direction of equal protection law, claiming to condemn discrimination but defining it in increasingly narrow terms.

In the 1970s, a newly constituted Court began to define discrimination as a problem of forbidden classifications in law—not social subordination by law. This body of doctrine divided the world into laws with forbidden classifications, which courts would closely scrutinize, and laws without forbidden classifications, which courts presumed were wholly within the prerogative of the legislature. Reasoning in this fashion, the Court ruled that "equal protection" barred state action that expressly classified on the basis of race, yet permitted facially neutral laws that foreseeably burdened minorities.[7] The Court held that facially neutral laws were unconstitutional if enacted with a purpose to discriminate, but it defined discriminatory purpose extremely narrowly, requiring evidence of state action akin to malice.[8] At the same time that the Court limited judicial scrutiny of facially neutral laws with a disparate impact on minorities, the Court expanded judicial scrutiny of laws designed to help minorities.[9] It held that express classifications designed to help subordinated groups were as constitutionally suspect as those designed to keep subordinated groups down.[10]

In the early twenty-first century, then, equal protection doctrine focuses on *deliberate classification by the state* as the main cause of inequality

in American society and *strict scrutiny by judges* as the main remedy. This framework entrenches inequality in at least four important ways.

First, the law defines inequality *underinclusively*, either as group classification or thinly concealed malice. But not all state action that subordinates employs group-based classifications, and not all inequality is produced by evil minds. Social stratification by gender and race has been sustained by many different kinds of public and private action. Bias in decision making often plays a role but so, too, do institutional arrangements and rules that entrench unequal resources and opportunities. Today's equal protection law tends not to reach these forms of bias. Instead, constitutional doctrine prohibits the kinds of openly invidious laws that legislatures no longer enact—while allowing laws whose hidden, unconscious, or structural bias is not openly expressed. In this way, equality law legitimates and immunizes laws that entrench structural inequalities that accumulated over the generations in which the United States openly enforced race and gender hierarchies.

Second, equal protection doctrine's focus on group classifications defines inequality *overinclusively*, because not all group classifications subordinate. The Court now treats race-based classifications that try to remedy inequalities and break down social stratification with the same degree of scrutiny—and judicial hostility—as classifications that deliberately advantaged dominant groups in the past. As Justice John Paul Stevens put it, the law professes not to know the difference between a welcome mat and a No Trespassing sign.[11]

Third, because doctrines of heightened scrutiny deny judges discretion in evaluating group-based classifications, judges are extraordinarily resistant to extending heightened scrutiny to new groups, even groups widely acknowledged to have suffered invidious treatment. In fact, the Supreme Court has not conferred suspect status on any group since the 1970s.

Fourth, current doctrine is based on a *bifurcated framework of review* that splits authority between legislatures and courts and discourages dialogue between them. Either, legislation is presumptively unconstitutional and the Court decides what constitutional equality requires; or legislation bears an almost irrebutable presumption of democratic legitimacy, and neither the Court nor the political branches has the authority or the obligation to promote the Fourteenth Amendment's guarantees.

This all-or-nothing vision is false to the original vision of the Fourteenth Amendment, which grants Congress the power to enforce the amendment's provisions by appropriate legislation. These days,

Congress is no longer the first defender of equality; sometimes, it seems to have no obligations at all. And when Congress does use its section 5 powers, the Court treats these acts of legislative constitutionalism as presumptively unconstitutional encroachments on the Court's own interpretive authority—all the more so if Congress tries to prohibit forms of discrimination the Court itself has not deemed suspect. There is little in current doctrine that encourages dialogue between courts and the political branches about the meaning of the Fourteenth Amendment; nor is there much recognition that different branches of government could bring their distinctive authority and competence to the great task of vindicating the Constitution's guarantee of equality.

The Lost Tools of the Second Reconstruction

By 2007, in the *Parents Involved* decision,[12] the Court had come full circle—wielding the power it once used to strike down laws enforcing segregation to strike down laws promoting integration. Five justices read *Brown v. Board of Education* as a case demanding strict scrutiny for all racial classifications, even those designed to further integration. Only Justice Anthony Kennedy's concurrence kept the Court from rendering a wide variety of integration-promoting practices illegal. In *Parents Involved*, the plurality led by Chief Justice John Roberts misremembers *Brown*. It misstates the law of that case and misunderstands its spirit. *Brown* did not use the language of strict scrutiny; it held that racial separation caused stigmatic and emotional harm to minority schoolchildren. The Court did not embrace a general principle of strict scrutiny until it was finally ready to strike down laws against interracial marriage in the 1960s. Even then, strict scrutiny applied only to race-conscious policies that enforced segregation and white supremacy. Only after a new group of conservative justices joined the Court did strict scrutiny begin a new life in the 1970s and 1980s as a device to hold affirmative action programs unconstitutional.[13]

Although courts now identify strict scrutiny with the goals and purposes of the civil rights revolution, other pathways for protecting equality during the opening decades of the Second Reconstruction were far more important. They included:

1. *Legislative and executive constitutionalism*. The model of strict scrutiny assumes that legislatures and executive officials lack the desire, the obligation, and the authority to promote equality values. Their only

responsibility is to refrain from using suspect classifications. Yet the political branches took the lead during the Second Reconstruction, just as the original Reconstruction Congress had intended. Congress prohibited discrimination through superstatutes like the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. At the same time, Congress promoted equality for the poor through the Elementary and Secondary Education Act of 1965 and other War on Poverty and Great Society programs like Head Start. In 1972, Congress applied the 1964 Civil Rights Act to government employers and sent an Equal Rights Amendment to the states, emphasizing Congress' commitment to abolish sex discrimination as well as race discrimination. In the executive branch, administrative agencies implemented the new laws with regulations that promoted equality, including guidelines for school desegregation, rules to combat sex discrimination in the workplace, and antipoverty programs that promoted local participation by the poor. The Court worked with Congress; it read the new civil rights statutes broadly to promote egalitarian goals; and it looked to the president and Congress to secure enforcement of its rulings.

2. *Promoting equality through protecting civil liberties*. Dominant groups rarely give up their status willingly. Laws dismantling status hierarchies cannot redistribute opportunities to subordinate groups too transparently; they risk generating backlash, aggravating the very social dynamics they seek to abate. Indirection is often a friend of change. During the Second Reconstruction, the Court and Congress often promoted the equality of subordinated groups through doctrines that provided fair procedures and individual liberty for all. The Warren Court's revolution in criminal procedure protected racial minorities from police abuse, secured basic rights of legal representation, and limited prosecution tactics that played on racial prejudice. Through its free speech doctrines, the Court protected the right of the National Association for the Advancement of Colored People (NAACP) to organize and student groups to protest Jim Crow. In *Griswold v. Connecticut*,[14] *Eisenstadt v. Baird*,[15] and *Roe v. Wade*[16] the Court struck down criminal laws that helped enforce traditional gender roles in sex and reproduction. These decisions not only protected women's autonomy but also their equality in civil society, in ways that particularly benefited poor women. Through these different branches of constitutional law, the Warren and Burger Courts protected the politically weak through doctrines that protected the liberties of all.

3. *Fundamental interests and protection of the poor*. Finally, the Supreme Court recognized a set of fundamental interests protected by the Equal

Protection Clause that gave poor Americans access to key institutions of civil society. These decisions removed user fees and other resource-related restrictions on core forms of civic participation and limited some of the harsher expressions of class (and race and sex) inequality. They improved access to the criminal process,[17] lifted welfare-related burdens on the right to travel,[18] and guaranteed the right to vote without having to pay poll taxes.[19]

The executive, legislative, and judicial branches of government worked together during the civil rights era. Drawing on their distinctive forms of authority and competence, the different branches of government promoted equality in different ways. The Court interpreted the Constitution to prohibit unfair treatment on the basis of race and sex. But the Court also promoted equal rights for Americans by promoting their individual liberty and their practical freedom, constraining the use of general laws and discretionary law enforcement practices that bore harshly on the most vulnerable members of society.

In short, the Second Reconstruction promoted equality by promoting *equal liberty*. Equal liberty should not be confused with either formal liberty or formal equality. The practical reality of freedom matters as much as its formal possibility. When the Court protected liberty during the Second Reconstruction, it paid attention to the inequalities of resources and roles that shaped ordinary people's daily lives and their encounters with the law.

Prospects and Possibilities

How can we restore constitutional equality in the twenty-first century? Here are a few suggestions:

1. *Use liberty to promote equality*. The framers of the Fourteenth Amendment understood that liberty and equality are deeply intertwined. They originally hoped to secure equality for freed slaves not only through an Equal Protection Clause but also by guaranteeing the privileges and immunities of national citizenship. A guarantee of freedom can secure equality, just as a guarantee of equality can secure freedom. Sometimes, protecting liberties for all is an effective way of protecting minorities and unpopular groups from special impositions and affirming their equal citizenship. Gay rights is the most obvious example. *Lawrence v. Texas* protects the freedom of gays to enter into sexual relationships, yet equality values suffuse the opinion's talk of liberty and dignity: *Lawrence*

reasons that same-sex intimacy should be treated with the same respect that the law offers to cross-sex relations.

A liberty framework has proved particularly attractive for gay rights because it doesn't require that courts define a protected class. Sexual minorities do not have to understand themselves as part of a single group with a single identity in order to secure the right to equal treatment and equal respect. Using liberty to help minorities also avoids the problem—most obvious in affirmative action cases—of appearing to favor one group over another.

Protecting women's choices about sex and reproduction helps secure their equality with men, as the Supreme Court has increasingly come to recognize. Under prevailing social arrangements, rights to contraception and abortion promote both liberty and equality. Giving women control over the number and timing of their children helps women negotiate social and economic arrangements that presuppose the traditional division of family labor; it allows women to bear children with less harm to their employment prospects and their family's well-being. Once again, liberty and equality reinforce each other: Equality doctrines protect women's choices in their life pursuits, while liberty doctrines promote women's equality in making those choices.

The Warren Court also pioneered the idea of protecting fundamental rights and fundamental interests—rights that, once granted, must be granted equally. These rights and interests promote equality along class lines without using suspect classifications based on poverty or race.

Finally, criminal procedure guarantees and restrictions on state detention and surveillance also demonstrate how protecting liberty also protects equality. It is no accident that the Warren Court revolutionized criminal procedure while it promoted civil rights for minorities; it knew that the mistreatment of minorities in the criminal justice system entrenched their subordinate social status. In a post–9/11 world, where majorities seem only too happy to surrender other people's rights, we need civil liberties to limit the harassment of Muslims and immigrants and to prevent abusive racial profiling schemes.

2. *Decalcify doctrine*. Although the Equal Protection Clause is not the only vehicle for securing equality, it is still a crucial one. It cannot serve its purposes until we undo some of the problems that current doctrine has created.

Courts must give up their preoccupation with formal classification, which is neither a necessary nor sufficient marker of laws that threaten equal citizenship. We need new ways to decide which laws burdening women and minorities deserve closer scrutiny. One way to do this, borrowed from

the law of employment, juries, and voting rights, is to make more use of rebuttable presumptions when policies have significant disparate impact, perpetuate traditional forms of inequality, or significantly contribute to social stratification. Courts need not invalidate these arrangements, but they can make the political branches accountable for them by requiring legislatures to explain why they chose policies that entrench historic forms of inequality or have strongly inegalitarian effects.

Courts should also give the political process more latitude in deciding when race or sex-conscious laws are needed to dismantle caste and secure equal opportunity. Even the most determined advocates of color blindness are usually willing to accept benign race-conscious motivations for facially race-neutral methods like Texas's "10 percent plan"—which guarantees college admission to the top students at all of the state's public high schools—or class-based affirmative action. That would make little sense if they thought that there were really no difference between benign and invidious motivation. The real issue isn't color blindness; it is how the burdens of these programs are distributed on ordinary people and whether the programs are structured in ways that provoke resentment. Courts should give institutional actors more latitude to create race-conscious policies that are designed to remedy past discrimination or to promote integration so long as the programs make efforts to diffuse the burdens on members of dispreferred groups.

Finally, courts should replace the bifurcated model of responsibility for protecting equality. That means adopting a suggestion made long ago by Justice Thurgood Marshall—a sliding scale approach to judicial scrutiny.[20] In addition, courts can use a variety of doctrinal moves to disturb existing structures and spur legislatures to act to promote constitutional values of equality, as described below.

3. *Share responsibility for guaranteeing equality*. Instead of treating policies that increase social stratification as presumptively legitimate, courts could adopt solutions that make legislatures accept responsibility for their decisions and give them a stake in promoting and enforcing constitutional equality. Courts can be catalysts, shaking up existing political coalitions and social practices and requiring legislatures to give reasons and make hard choices when their policies exacerbate inequality and place disproportionate burdens on minorities or the poor. Among other things:

(a) Courts can *name inequalities* produced by existing policies and require the political branches to justify policies that exacerbate inequality. Courts can employ *discourse-forcing* methods that require the political branches to explain how their policies respond to specific constitutional values.

(b) Courts can *interpret statutes and regulations* to avoid entrenching inequality and require legislatures either to accept the interpretations or publicly renounce them.

(c) Courts can introduce *rebuttable presumptions*—already used in jury, voting, and employment discrimination law—under which disparate impact triggers a duty to explain and justify policies. For example, courts could order "equality impact statements" that would require state actors to focus on and report on the effects of their policies on social stratification by race, gender, class, or other criteria. Without absolving or condemning legislatures, courts could force the political branches to take the political heat for what they are doing.

(d) Courts can declare existing policies unconstitutional, explain the constitutional principles at stake, and *let the political branches craft a remedy* that honors those principles. Courts can give the outward boundaries of a constitutional remedy, state the parameters they will use in reviewing the remedy, or explain what kinds of reasons and justifications the legislatures must provide. For example, in *Baker v. State*, the Vermont Supreme Court declared that the state's marriage laws discriminated against gays but instead of creating a judicial right to gay marriage, it asked the legislature to craft a solution.[21] The legislature responded with the country's first civil unions bill. State supreme courts protecting the right to education have also put the burden on state legislatures to craft workable guarantees of rights to education.

(e) Courts can *create safe harbors* that give incentives for political branches to reform their current practices in order to avoid liability. For example, in sexual harassment law, courts have given employers safe harbors for vicarious liability if they produce mechanisms for preventing harassment and resolving disputes. Safe harbors change the balance of incentives, giving the political branches reasons to be proactive in promoting equality values.

These strategies share responsibility and make the practice of equality a more dialogic enterprise between the courts and the political branches. Consider how this might work in the area of criminal law. Doctrines of strict scrutiny are ill suited to remedying the inequalities of race and poverty in the U.S. criminal justice system. Courts can't oversee the entire criminal justice system, yet the system's unequal impact on the poor and racial minorities is everywhere. Indeed, the system actually uses racial classifications in suspect descriptions and racial profiling, while facially neutral rules of criminal law have unmistakable racial impact. The proper response is not to insist, as the Supreme Court repeatedly has, that there are no constitutional issues

of equality at all. That gives law enforcement officials carte blanche and lets the political branches completely off the hook. Instead, courts should try to make the political branches take political responsibility for the decisions they make, expressing constitutional concerns so that lawmakers and law enforcement officials feel pressure to take equality issues into account.

Or take welfare policy. In *Dandridge v. Williams*,[22] the Court upheld a draconian cap on welfare benefits that penalized beneficiaries for increases in family size. Justice Potter Stewart, hemmed in by the bifurcated framework of equality law, threw up his hands. He did not want to treat poverty as a suspect classification subject to strict scrutiny. But he believed that the alternative, asking whether there was any rational basis for the challenged legislation, foreclosed courts from doing anything at all. He noted that laws regulating "the most basic economic needs of impoverished human beings" raised very different issues from the "state regulation of business or industry" upheld during the New Deal: "We recognize the dramatically real factual difference . . . but we can find no basis for applying a different constitutional standard."[23] Stewart was disabled by an unworkable doctrinal structure. Yet this is not a case of either-or. Without making poverty a suspect classification, courts could use statutory interpretation or rebuttable presumptions to send the problem back to legislatures. They could require legislatures to demonstrate why their policies do more good than harm.

4. *Take advantage of jurisdictional redundancy*. America's federal system and the constitutional separation of powers give many different actors an opportunity to declare what the Constitution means. Equality law can benefit from having courts, legislatures, and executive officials all take responsibility for promoting equality. For similar reasons, we should not forget the role that federalism can play. Although the standard story of the civil rights revolution is that it fought against states' rights, it's worth remembering that much of the early progress in civil rights for African Americans came from enlightened state laws and judicial decisions and later spread nationally. Long before the 1964 Civil Rights Act, many states already had passed public accommodation laws, and by the time of *Brown*, the majority of states had banned de jure segregation either through statute or judicial decision. Many of the equality issues of the future will be worked out in state and local governments first. Similarly, decisions of state constitutional courts often pave the way for later interpretations of the federal Constitution.

Many of the most important tools for protecting equality in the twenty-first century will be dialogic—involving a back and forth between

courts, the public, and the political branches. We are hardly alone in this conclusion. Many other countries already achieve similar effects through their different constitutional structures, including, most prominently, Canada's notwithstanding provision and the United Kingdom's use of declarations of incompatibility with the European Convention on Human Rights. Indeed, American constitutionalism has used these dialogic practices for generations without fully acknowledging them. We tend to associate equal protection with strict scrutiny of suspect classifications, but in fact many other practices have played a crucial role in promoting equality for historically subordinated groups. With a richer account of our own past practice, we might recognize commonalities between other constitutional traditions and our own.

Several of the chapters in this volume emphasize how legislative and executive constitutionalism can safeguard social and economic rights like housing, education, and health care. Often courts cannot mandate specific institutional reforms in these areas, but they can spur them on by creating incentives for the political branches to take constitutional values into account. Courts can also work constructively with government officials who try to put constitutional norms into practice. For example, in *Nev. Dep't of Human Res. v. Hibbs*,[24] the Court upheld the Family and Medical Leave Act; it recognized that Congress had the institutional capacity to enforce constitutional guarantees of sex equality in ways that courts could not. The path to greater equality in the twenty-first century will require the cooperation of all the branches of government. And it will bring us back to a vision of egalitarian liberty that redeems the promises of the Fourteenth Amendment.

Notes

1. Cong. Globe, 39th Cong., 1st sess., at 2766 (May 23, 1866) (remarks of Senator Jacob Howard).
2. 198 U.S. 45 (1905).
3. 347 U.S. 483 (1954).
4. 163 U.S. 537 (1896).
5. 539 U.S. 558 (2003).
6. 478 U.S. 186 (1986).
7. See *Washington v. Davis*, 426 U.S. 229 (1976).
8. See *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979).
9. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
10. See *Adarand Constructors v. Pena*, 515 U.S. 200, 245 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988).
11. See *Adarand* at 245 (Stevens, J., dissenting).
12. *Parents Involved in Community Schools v. Seattle School District No.* 1, 127 S. Ct. 2738 (2007).

13. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004).

14. 381 U.S. 479 (1965).

15. 405 U.S. 438 (1972).

16. 410 U.S. 113 (1973).

17. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

18. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

19. See *Harper v. Va. Board of Elections*, 383 U.S. 663 (1966).

20. *San Antonio Metro. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70, 98–110 (1973) (Marshall, J., dissenting).

21. 170 Vt. 194 (1999).

22. 397 U.S. 471 (1970).

23. *Id.* at 485.

24. 538 U.S. 721 (2003).