ESSAY

COLORBLINDNESS AND CONTEXT

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The Constitution, in the two centuries of its operation, has primarily been interpreted to facilitate rather than eliminate racial inequality. By express terms, it provided for continuation of the slave trade for two decades after ratification.[1] Until the Civil War, the Supreme Court consistently supported the institution of slavery.[2] The war between the States, however, did not mark the end of judicially sanctioned racism. The fourteenth amendment, although intended primarily to secure the rights of African-Americans, soon was transformed into the basis of the separate but equal doctrine.[3] Not until 1954 did the Court declare separate inherently unequal and draw upon the fourteenth amendment for remediation.[4] Even then, the resulting desegregation mandate was initially blunted by resistance and evasion on the part of state and local officials[5] and, more recently, by the Court's own limiting principles.[6]

Busing and other desegregative remedies prefaced the emergence of broader affirmative action concepts calculated to redress the legacy of unequal status and opportunity in education, employment, and other venues. This trend, however, was as short-lived as it was overdue. Last term, the Court rendered a series of decisions consistent with the sentiment that jurisprudence of the past quarter century has been too favorably disposed toward minorities. First, in *Wards Cove Packing Co. v. Atonio*,[7] the Court complicated the task of proving discrimination in the workplace. It did so by diminishing the significance of statistical disparities, even if they demonstrated a grossly racially stratified workforce,[8] and by imposing upon plaintiffs the burden of identifying specific illegal employment practices responsible for such variances.[9] Second, in *Martin v. Wilks*,[10] the Court found that actions taken pursuant to a valid consent decree, implementing an affirmative action plan to redress a city's

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1. U.S. CONST. art. I, § 9, cl. 1.
2. *See infra* notes 31-41 and accompanying text.
3. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).
4. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).
5. *See infra* note 57 and accompanying text.
6. *See infra* notes 62-83 and accompanying text.
7. 109 S. Ct. 2115 (1989).
8. *Id.* at 2121-23.
9. *Id.* at 2124.
10. 109 S. Ct. 2180 (1989).

lengthy history of discrimination in hiring and promoting firefighters,[11] could be challenged by nonparties to the original litigation.[12] By considering such a decree as a denial of a legally protected right rather than as a legitimate alteration of working conditions,[13] the Court exhibited a selective interest in disrupting finality and thus invited attacks on similar remediative programs. Further, in *Patterson v. McLean Credit Union*,[14] the Court construed a federal statute prohibiting racial discrimination in the making and enforcement of contracts[15] so that it did not reach post-formation racial harassment by an employer.[16] The Court thus departed from the general interpretive norm that legislative enactments "should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.' "[17] In this way, the Court created gaps in the federal scheme of prohibited employment practices that did not previously exist.[18]

Despite its significant reformulations of the law, the Court has steadfastly maintained that "[n]either our words nor our decisions should be interpreted as signaling one inch of retreat from . . . forbid[ding] discrimination in the private, as well as the public sphere."[19] Yet, by complicating or confounding the process of proving discrimination, undermining the viability of consent decrees, and limiting the ability to redress racial harassment, the Court's actions depart from its rhetoric.

Perhaps most illustrative of how equal protection and related concerns remain captive to majoritarian[20] convenience is the Court's determination, in *City of Richmond v. J.A. Croson Co.*,[21] that racial classifications should be strictly scrutinized under the equal protection clause of the fourteenth amendment regardless of whether they are conceived as burdensome or remedial.[22] Under the Constitution, modern scrutiny of classifications disadvantaging a racial minority ordinarily has translated into review that is "strict in theory

11. *Id.* at 2183.

12. *Id.* at 2185 (Stevens, J., dissenting).

13. *Id.* at 2188 (Stevens, J., dissenting).

14. 109 S. Ct. 2363 (1989).

15. 42 U.S.C. § 1981 (1982).

16. *Patterson*, 109 S. Ct. at 2372-73.

17. Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983) (quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963)).

18. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), broadly prohibits employment discrimination, but it contains several important limitations. Title VII does not cover small businesses, *id.* § 2000e(b), or contracts outside the workplace, and it makes no provision for compensatory damages. These restrictions do not apply to 42 U.S.C. § 1981 (1982). Consequently, by limiting § 1981's coverage, the Court in *Patterson* effectively removed certain areas of the job market from the reach of existing civil rights laws and may even have eliminated protection against certain types of discrimination in other venues.

19. *Patterson*, 109 S. Ct. at 2379.

20. "Majoritarian" for purposes of this Article refers to the dominant white culture which, although not monolithic in its existence, standards, and ways, nonetheless is a force which equal protection analysis consistently has accounted for and deferred to despite its amorphousness.

21. 109 S. Ct. 706 (1989).

22. *Id.* at 720-21 (plurality opinion); *see also id.* at 735 (Scalia, J., concurring).

and fatal in fact."[23] If applied without differentiating classifications on the basis of their exclusionary or inclusionary design, such a standard would largely foreclose the legality of affirmative action by state and local government.[24]

Insistence upon racial neutrality is not without allure. Unfortunately, the command follows a two-century history of racism and its consequences for racial minorities today. Nascent emphasis upon a colorblind constitution comes belatedly and, to the extent it is inimical to remediation, serves as a standard for perpetuating majoritarian advantage.

Given their timing and context, modern demands for racial neutrality are reminiscent of the Court's unfriendly attitude toward civil rights a century ago. Two decades after emancipation and less than a decade after Reconstruction, the Court declared that "there must be some stage . . . when [a person] takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights . . . are to be protected in the ordinary modes by which other men's rights are protected."[25] Premature abandonment of constitutional sentience was followed by formalized societal division and inequality. Given the enduring consequences of that legacy, today's Court is no less susceptible to the charge that it has rushed toward colorblind standards without fully accounting for enduring color sensitivity and distinction in this country.

As evidenced by the Supreme Court's endorsement of slavery, articulation of the separate but equal doctrine, and formulation of limiting principles that eviscerated the desegregation mandate, constitutional interpretation consistently has been skewed toward majoritarian interests when addressing ques-

23. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

24. Given the Court's observation that the record in *Croson* contained an insufficient showing of past discrimination, *Croson*, 109 S. Ct. at 723-25, the decision does not seem to foreclose all possibilities of remediation. The continued existence of remedial options, however, may be more theoretical than real. The present reality is that proving discrete episodes of discrimination has become virtually impossible. Although the Court acknowledges the existence of societal discrimination, it refuses to validate remediation directed toward that reality alone. *Croson*, 109 S. Ct. at 724.

Furthermore, the fourteenth amendment's equal protection clause does not apply to private institutions or to the federal government. Although the fifth amendment's due process clause, applicable to the federal government, has been found to have an equal protection component, *see* Bolling v. Sharpe, 347 U.S. 497 (1954), the Court also has stated that Congress, unlike the states, has special authority under § 5 of the fourteenth amendment to take affirmative action to achieve racial equality. *See* Fullilove v. Klutznick, 448 U.S. 448, 478 (1980).

25. The Civil Rights Cases, 109 U.S. 3, 25 (1883). The *Civil Rights Cases* concerned prosecutions of private individuals brought under sections 1 and 2 of the Civil Rights Act of 1875, which made it a federal misdemeanor to deny any citizen "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement." Civil Rights Act of 1875, ch. 114, §§ 1-2, 18 Stat. 335, 336. The Court held sections 1 and 2 of the Act unconstitutional finding that the fourteenth amendment did not authorize Congress "to create a code of municipal law for the regulation of private rights by individuals," and that "civil rights . . . guaranteed by the Constitution" can be impaired by official but not private action. *The Civil Rights Cases*, 109 U.S. at 25.

tions of racial dimension. Insistence upon a genuinely colorblind constitution at the republic's inception would have betokened a meaningful commitment to values eventually enshrined in the equal protection clause. Following two centuries of institutional and constitutional disadvantage on the basis of race, demands for absolute racial neutrality invite skeptical appraisal. Colorblindness was an inconvenient notion when formal segregation afforded a means for the white race to secure a dominant position in American society. Insofar as it can be used to shed any responsibility for remediation, colorblindness may now serve as a means for preserving that advantage. Given a society still characterized by racial disparities and disposed toward making racial distinctions functionally, if not by law, colorblind standards merit evaluation as to whether they adhere to or depart from a legacy of racial inequality.

At its inception, the Constitution was a hostage of forces inimical to the interests of racial minorities. An explicit guarantee[26] that the slave trade would continue unimpaired until 1808 was a concession necessary to ensure ratification by southern states and their participation in the Union.[27] Luminaries including Hamilton, Franklin, and Madison were among many founders who regarded slavery as inconsistent with the principles upon which the nation was predicated.[28] Madison eventually freed his slaves upon realizing that he could not reconcile the practice with the "liberty for which we have paid the price of so much blood, and have proclaimed so often to be the right . . . of every human being."[29] Nonetheless, Madison himself noted that, pernicious as slavery might be, dismemberment of the Union was worse.[30] Hence, the founders' desire to incorporate all of the former colonies into a viable political and economic system, commenced what would become a well-practiced custom of subordinating principles of racial equality to competing interests.

Although the slave trade eventually lost its constitutional protection, Supreme Court decisions buttressed the system of slavery for another half century. The Court upheld federal legislation establishing the right of slaveowners to reclaim slaves who fled to free states.[31] Laws punishing persons harboring fugitive slaves were sustained,[32] whereas laws punishing persons kidnapping fugitive slaves were invalidated.[33] Claims of freedom were adjudicated under the law of the jurisdiction in which the slaveowner resided.[34] These decisions fortified the institution of slavery and constituted significant

26. U.S. CONST. art. I, § 9, cl. 1.

27. W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 322-25, 1550-812 (1968).

28. *Id.* at 282, 323-26, 344.

29. *Id.* at 303-04.

30. *Id.* at 324.

31. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847).

32. Moore v. Illinois, 55 U.S. (14 How.) 13 (1853).

33. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

34. Strader v. Graham, 51 U.S. (10 How.) 82 (1850).

waystations in the march toward civil war. Ultimately, they culminated in the determination that no African-American person, slave or free, could be an American citizen.[35] The conclusion that African-Americans were property rather than persons,[36] and "might justly and lawfully be reduced to slavery,"[37] represented a default of vision evoking depiction of the Court as "the citadel of Slaveocracy."[38] Nonetheless, except for a decade or two in the mid-twentieth century, the Court has never committed itself to redressing the legacy to which it significantly contributed.

Chief Justice Taney, author of the Court's opinion in *Scott v. Sanford*, rested his decision in part upon the premise that the founders regarded African-Americans as inferior and conferred no rights upon them.[39] In writing the decision more expansively than was necessary,[40] the Court's moral compass was set toward the interests of southern plantation society.[41] Neither advertence to original intent nor the absence of a fourteenth amendment at the time, however, exonerates the Court from charges of intellectual and moral bankruptcy.[42]

Subsequent to the Civil War, the fourteenth amendment incorporated equal protection into the nation's constitutional scheme. Within a few years of ratification, the Court observed that "the one pervading purpose" of the post-Civil War amendments was to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[43] Soon thereafter, the Court found a state law excluding African-Americans from juries to be a denial of equal protection[44] and reiterated the fourteenth amendment's central purpose of securing "all the civil rights that the superior race enjoy."[45]

Since that time, however, the Supreme Court's reading of the fourteenth amendment has often been difficult to reconcile with the provision's aims. Much of the Court's analytical energy has been spent providing rationalizations for the impairment, rather than effectuation, of equal protection concepts

35. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) [hereinafter *Scott*].

36. *Id.* at 410-11, 451.

37. *Id.* at 407.

38. A.T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 16 (1968).

39. *Scott*, 60 U.S. (19 How.) at 404-12. The Court, for instance, assumed inferiority to the point that an African-American "might justly and lawfully be reduced to slavery for his benefit." *Id.* at 407.

40. The Court could have resolved the case by determining that federal diversity jurisdiction was absent, *see id.* at 427, or that it was bound by the state where the slaveowner resided, *see id.* at 452-53.

41. C. SWISHER, ROGER B. TANEY 505-09 (1935).

42. Even the most ardent proponents of judicial restraint refer to the *Scott* case as a "derelict[ ] of constitutional law." Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 989 (1987).

43. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872).

44. Strauder v. West Virginia, 100 U.S. 303 (1879).

45. *Id.* at 306.

that meaningfully would advance interests of racial minorities. By the turn of the century, the Court had candidly deferred to racist tradition, custom, and sentiment and embraced the concept of separate but equal.[46] The separate but equal doctrine legalized a system that in theory and in practice was calculated to promote separateness rather than equality. By observing that official racial classifications were justified by community custom and tradition and the public interest in peace, comfort, and order,[47] the Court expressed its own sense that separation was in society's best interest. As a consequence, "equal protection" countenanced official segregation for over half of the twentieth century.

Dissenting in *Plessy v. Ferguson*, Justice Harlan observed that the formula announced by the majority was an affirmative means for protecting the advantages of a dominant race at the expense of African-Americans.[48] Not long after the decision in *Plessy*, however, Harlan authored a decision in which the Court unanimously upheld the closure of an African-American high school, while allowing a white high school to remain open.[49] Such consequences evidence how even the form of the doctrine was disrespected when majoritarian convenience so directed. Thus, the Court determined that the fourteenth amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[50] Although subsequent equal protection standards have challenged this premise,[51] the practical implications of this doctrine largely have gone uncontested.

Given the manifestly racist nature of the separate but equal doctrine, it is not surprising that official policy accentuated separation at the expense of equality.[52] In light of the determination that separation of the races comported with distinctions "in the nature of things,"[53] overt and pervasive discriminatory practices became the norm rather than the exception.

Announcement of the desegregation mandate in 1954 constituted a radical revision of equal protection thinking to the extent it focused on equality of educational opportunity as the primary mechanism of effectuating equal protection goals.[54] The eventual operation and devolution of the principle, however, manifested continued sensitivity and deference to majoritarian convenience. Conscious of both the incendiary potential of the desegregation decree and its own inability to enforce compliance, the Court factored in the likelihood of extensive public opposition. Rather than demanding immediate compliance, consideration of a remedy for segregation was put off for a full

46. *See* Plessy v. Ferguson, 163 U.S. 537, 550 (1896).
47. *See id.* at 550-51.
48. *Id.* at 560 (Harlan, J., dissenting).
49. Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 532 (1899).
50. *Plessy*, 163 U.S. at 544.
51. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954).
52. *See generally* A. LEWIS, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 20 (1964).
53. *Plessy*, 163 U.S. at 544.
54. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

term.[55] The delay was calculated to afford state and local governments affected by the decision an opportunity to provide input on how relief should be contoured. A consequent order for desegregation "with all deliberate speed"[56] may have been cast in terms that would make change more comfortable for the dominant culture. What followed was widespread resistance, delay, and evasion by state and local officials which was abetted by mutinous lower courts.[57]

Token compliance with or total disregard of the desegregation mandate continued for ten years until the Court finally abandoned the deliberate speed standard and insisted upon more immediate remedies.[58] Just as the desegregation mandate had been preceded by extended service to majoritarian convenience, the Court's eventual insistence upon remedial plans that "promis[e] realistically to work *now*"[59] was preceded by a prolonged period during which another generation's equal protection interests were deferred.

Assertiveness in effectuating desegregation soon yielded to majoritarian sentiment. As the focus upon segregated schools expanded northward and westward, and remedial busing of students became an increasingly divisive issue, the eventual reach of the desegregation principle became a prominent political concern. The matter was a critical factor in the 1968 presidential campaign. George Wallace packaged his vocal opposition to desegregation into a candidacy that siphoned off enough Democratic votes to make Richard Nixon victorious.[60] Nixon himself opposed busing and appended his criticism with the promise to appoint "strict constructionists" to the Court.[61] Implicit was a pledge to designate judges with less fertile equal protection imaginations, who would be less inclined to order busing or other aggressive remedies disquieting to majoritarian concerns.

As the Warren Court became the Burger Court, it began to formulate a set of constraints that undermined the only constitutional precept ever formulated to address racial inequality assertively and on a wholesale basis. The first key limiting principle conditioned any obligation to desegregate upon

55. Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955) (second opinion of the Court establishing equitable standards for remediation).

56. *Id.* at 301.

57. *See* 2 N. DORSEN, P. BENDER, B. NEUBORNE, & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, Ch. XXVIII, § 625-43 (1976); A. LEWIS, *supra* note 52, at 32-45, 104-10, 251-58. Not suprisingly, actual movement toward widespread desegregation was minimal. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966); *see also* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102-22 (1987).

58. Green v. County School Bd., 391 U.S. 430, 439 (1968) (quoting Griffin v. School Bd., 377 U.S. 218, 234 (1964)).

59. *Id.*

60. T. WHITE, THE MAKING OF THE PRESIDENT 1968, at 343-51, 396-97 (1969); E. ROSEBOOM, A HISTORY OF PRESIDENTIAL ELECTIONS: FROM GEORGE WASHINGTON TO RICHARD M. NIXON 610-13 (3d ed. 1970).

61. *See* B. SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 24 (1986).

proof that racial separation was the product of official intent.[62] The Court reasoned that unless segregation was attributable to purposeful state action, remediation would not be required.[63] This distinction between de jure and de facto segregation, even if more illusory than real, was a crucial one. Government essentially was absolved of responsibility for the existence of segregated residential communities. By generally excluding residential segregation from constitutional purview, the Court exempted much of the North and West from having to perform any desegregation duties.[64]

Although the line between de jure and de facto segregation dramatically narrowed the reach of the desegregation mandate, its etching seems to have been guided more by political concern than by logic. Close examination reveals that residential segregation is as much a descendant of intentional discrimination as the formal segregation policies which the Court condemned. Patterns of migration and settlement were influenced by government action which, until 1948, enforced restrictive covenants[65] and, thereafter, continued to foster racially discrete neighborhoods pursuant to official red-lining policies.[66] Because the Federal Housing Administration considered racial mixing an adverse influence upon neighborhoods, and adopted a formal policy of refusing loans that would create such circumstances, official action was highly influential in formalizing and perpetuating residential segregation.[67] Governmental decisions concerning the location of public housing and schools and the distribution of urban development funds also represent state action in the constitutional sense.[68] Although perhaps not always as blatantly discriminatory as laws requiring racial separation, the design and effect of such policies and actions nonetheless were unmistakably segregative.[69]

Despite the manifest linkage between intentional state action and residential segregation, the Court deemed such separation constitutionally tolerable in challenges to segregated school systems.[70] Moreover, proof of discriminatory intent became a general prerequisite for establishing any claim of official discrimination. Allegations of segregation in housing,[71] discrimination in employment,[72] and other equal protection violations thus confronted the often impossible task of establishing wrongful motive. Illegal motive, when not

62. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 205-14 (1973).

63. *Id.* at 212.

64. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

65. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

66. *See* P. JACOBS, PRELUDE TO RIOT: A VIEW OF URBAN AMERICA FROM THE BOTTOM 139-41 (1967).

67. *See id.*; G. MYRDAL, AN AMERICAN DILEMMA 625 (1962).

68. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 216 (1973) (Douglas, J., concurring); Karst, *Not One Rule at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383, 388-89.

69. *Keyes*, 413 U.S. at 216 (Douglas, J., concurring).

70. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974) [hereinafter *Milliken I*].

71. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

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

overt, is highly elusive and has been rightly condemned as a standard of review.[73] Even some who subscribe to the intent requirement for purposes of equal protection review have been quick to criticize it in other contexts.[74] Efforts to determine an illicit motive behind policies affecting commerce, expression, and religion have been objected to as futile, because a collective intent seldom exists.[75] If a purpose is wrongful, moreover, it likely will be disguised. At least one justice in *Keyes v. School District No. 1* recognized that selective resort to a discriminatory intent standard, under the circumstances, constituted a device for curtailing the desegregation principle and assuaging majoritarian anxieties.[76]

A subsequent determination that interdistrict remedies could not be ordered unless state or suburban officials actively and proximately had facilitated segregation also was responsive to majoritarian sentiment.[77] This limiting principle immunized most of the North and West from any prospect of forced integration. The mass exodus of whites from cities to suburbs effected a demographic mutation rendering desegregation concepts a practical fiction.[78] While the law remained fixed upon overt and purposeful segregation, educational equalization interests increasingly were subverted by the drift toward better funded predominantly white suburban schools and underfunded largely African-American urban schools.[79] When given the opportunity to recalibrate equal protection doctrine in order to make it responsive to modern circumstances, the Court declined.[80] Instead, the Court rejected findings of multi-district discrimination and reversed the lower court's metropolitan desegregation order.[81] Consequently, the Court ensured that desegregation remedies would not affect those white families who had left the city for the suburbs.

By effectively insulating suburban education from the prospect of desegregation, the Court further diminished the potential of the mandate and severely crippled its practical efficacy. To obtain a remedy, it first was necessary to carry the heavy burden of demonstrating discriminatory intent. Even then, meaningful relief was unlikely when racially discrete school districts were not the function of overt official manipulation transcending boundary lines.[82] Finally, the Court announced that once a previously dual system was declared

73. *Keyes*, 413 U.S. at 227 (Powell, J., concurring and dissenting).

74. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

75. *See supra* note 74; United States v. O'Brien, 391 U.S. 367, 383-84 (1968).

76. *Keyes*, 413 U.S. at 218-20 (Powell, J., concurring and dissenting).

77. *Milliken I*, 418 U.S. at 744-45.

78. *See id.* at 732.

79. *See* Milliken v. Bradley, 433 U.S. 267, 271 n.3 (1977) [hereinafter *Milliken II*]; Riddick v. School Bd. of Norfolk, 784 F.2d 521, 528 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986).

80. *Milliken I*, 418 U.S. at 766-68 (White, J., dissenting).

81. *Id.* at 767.

82. Keyes v. School Dist. No. 1, 413 U.S. 189, 240-42 (Powell, J., concurring and dissenting).

unitary, school officials would no longer be obliged to make adjustments in response to residential changes resulting in resegregation unless discriminatory intent was proved anew.[83] Implicit in this result is the possibility that once a school district achieves unitary status, historical evidence of segregation will not have relevance in the event of a later constitutional claim. If so, the relatively short-term process of dismantlement would be the reference point for future analysis rather than prior historical conditions.

Consequently, the desegregation mandate, despite the clamor and turmoil it engendered, has become largely irrelevant to contemporary realities. Although introduced as a means of actuating the guarantee of equal protection, it ironically has yielded education that is both separate and unequal.[84] That reality, however, has proved insufficient to induce a serious reexamination of constitutional standards or a forthright acknowledgment of the majoritarian impulses responsible for them. The recent emphasis upon colorblindness and devaluation of disparate impact analysis for proving statutory violations in the employment context[85] suggest instead a continuing manipulation of criteria to serve majoritarian ends.

The case against remediation thus arises against a backdrop of doctrine that consistently has catered to or quickly succumbed to majoritarian inclinations and reasonably evokes suspicion regarding the real purpose of colorblindness. Color sensitivity consistently has been factored into legal doctrine to create benefits and burdens on the basis of race. Given that legacy, it does not require extraordinary cynicism to question whether colorblindness now will function to preserve rather than alter the status quo. Because race persists as a relevant factor in contemporary society, doctrine that would eliminate it as a reference point in the context of remediation is disturbing both for its prematurity and for what it may intimate. A conclusion that remedial preferences promote rather than defeat negative stereotypes, and hold society captive to racial politics,[86] offers the Court an analytical symmetry for all racial classifications that may be facially appealing. By declining any meaningful responsibility for the forces and influences which shaped modern realities, however, the Court reveals a mind-set that should occasion concern for where its sensitivities lie. These sensibilities, if misplaced, portend a disquieting doctrinal continuity in actual effect if not in stated principle.

The overdue jurisprudential assertion, that "separate . . . [is] inherently unequal,"[87] was qualified by the implicit notation that remediation would be deferred. The determination that change would not be effectuated immediately ensured that the original complainants and their contemporaries would not be the actual beneficiaries of the judgments in their favor. Prolonged

83. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435-37 (1976).
84. *Milliken I*, 418 U.S. at 782 (Marshall, J., dissenting).
85. *See supra* text accompanying notes 7-9.
86. Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989) (plurality opinion).
87. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

resistance and eventual circumscription of the desegregation mandate led to its devitalization. When viewed in light of that historical backdrop, a sudden and undifferentiating emphasis upon colorblindness, in response to challenges of inclusionary remedies rather than exclusionary wrongs, raises the possibility that equal protection delays quietly are being transformed into effective denials. Insistence upon racially neutral policies regardless of circumstance and a history of racism that predates and shapes the Constitution itself suggests the possibility that standards are still being manipulated to service majoritarian convenience.

Modern jurisprudence on matters of race does not facially resemble its antecedents because until now colorblindness was incompatible with racist notions, whether consciously or unconsciously harbored. The ultimate lesson of history for a society governed by majoritarian impulse may be that the guarantee of equal protection is an empty promise if not an actual deceit. A rush toward colorblind standards, at a time when they finally coincide with the dominant culture's convenience, suggests an analytical structure consistent with, rather than deviating from, old patterns. Insofar as broader calibrations remain constant, colorblindness will function as another interpretative device utilized to impede rather than "deliver [on] the century-old promise of equality of opportunity."[88]

88. Fullilove v. Klutznick, 448 U.S. 448, 463 (1980).