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KOREMATSU'S ANCESTORS

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Mark Killenbeck's *Korematsu v. United States*[1] has important affinities with *Dred Scott v. Sandford*.[2] Both decisions by promoting and justifying white supremacy far beyond what was absolutely mandated by the constitutional text merit their uncontroversial inclusion in the anticanon of American constitutional law.[3] *Dred Scott* held that former slaves and their descendants could not be citizens of the United States[4] and that Congress could not ban slavery in American territories acquired after the Constitution was ratified.[5] *Korematsu* held that the military could exclude all Japanese Americans from portions of the West Coast during World War II.[6] Both decisions nevertheless provided progressives with important doctrinal tools that they later employed when building a more egalitarian future. Chief Justice Taney's opinion in *Dred Scott* advanced a particularly robust notion of citizenship that Republicans, after ratification of the Thirteenth Amendment, cited when vesting newly freed persons of color with a substantial array of rights.[7] *Korematsu* introduced the strict scrutiny test into American law

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1. 323 U.S. 214 (1944).

2. 60 U.S. (19 How.) 393 (1856).

3. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406-12, 422-27 (2011); Mark R. Killenbeck, *Sober Second Thought?* Korematsu *Reconsidered*, 74 ARK. L. REV. 151, 151-52 (2021).

4. *See Dred Scott*, 60 U.S. at 423.

5. *See id.* at 452.

6. *See Korematsu*, 323 U.S. at 223-24.

7. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. app. 101 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 1231 (1866).

that the Warren and Burger Courts relied on when striking down numerous laws that discriminated against persons of color.[8]

Killenbeck celebrates strict scrutiny as a remarkable advance on the doctrines that structured the constitutional law of racial equality in the racist past of the United States.[9] Federal and state courts before the Civil War provided almost no protection for persons of color, even in the few instances when judges acknowledged that persons of color might be state or federal citizens.[10] At the turn of the twentieth century, federal and state courts did almost nothing to oppose the redemption of the South and the establishment of Jim Crow.[11] *Plessy v. Ferguson* sustained legislation mandating separate but equal.[12] *Giles v. Harris* announced courts could do little when states adopted subterfuges that disenfranchised almost all black citizens.[13] African Americans fared better in federal courts in the decades before *Korematsu*.[14] Still, most judicial successes before World War II were confined to particularly egregious facts and easily evaded.[15] The strict scrutiny test was the first occasion in which a Supreme Court majority announced a broad standard of review that could be wielded against white supremacy more generally rather than merely against discrete instances of white supremacy.[16]

This essay explores how the constitutional law of race equality has evolved in the United States in ways that provide

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8. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984). For the development of the strict scrutiny test in race cases, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275-78 (2007).

9. Killenbeck, *supra* note 3, at 189-201.

10. *See infra* notes 69-94 and accompanying text.

11. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8-60 (2004).

12. 163 U.S. 537, 550-51 (1896).

13. 189 U.S. 475, 487-88 (1903).

14. *See generally* KLARMAN, *supra* note 11.

15. The judicial decision outlawing state mandated residential segregation in *Buchanan v. Warley*, 245 U.S. 60, 82 (1917), was effectively undermined by the judicial decision sanctioning racially restrictive covenants in *Corrigan v. Buckley*, 271 U.S. 323, 332 (1926). The judicial decisions in *Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927), and *Nixon v. Condon*, 286 U.S. 73, 88-89 (1932), striking down state laws prohibiting persons of color from voting in Democratic primaries were effectively undermined by the judicial decision in *Grovey v. Townsend*, 295 U.S. 45, 54-55 (1935), which permitted the Democratic Party to prohibit persons of color from voting in Democratic primaries.

16. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

greater context for the strict scrutiny test and the *Korematsu* decision. The contemporary *Korematsu* regime is structured by the Equal Protection Clause of the Fourteenth Amendment, judicial supremacy, and strict scrutiny.[17] The Equal Protection Clause provides the textual hook for evaluating the constitutionality of race conscious measures, the Supreme Court of the United States is the institution primarily responsible for implementing the Equal Protection Clause, and strict scrutiny is the test or standard the Supreme Court uses to determine whether race conscious measures pass constitutional muster.[18] Other regimes have been structured by different textual hooks, alternative conceptions of institutional authority, and other tests or standards for evaluating race conscious measures. The *Turner* regime of the mid-1860s regarded the Thirteenth Amendment as the foundation for the constitutional law of racial equality.[19] The *Turner* regime and the successor *Strauder* regime of the 1870s and 1880s vested Congress with the primary responsibility of determining how to implement the constitutional obligation to end the slave system and make persons of color full citizens.[20] The *Strauder* regime and successor *Plessy* regime of the late nineteenth and early twentieth centuries banned, at least officially, all race discriminations.[21]

The *Korematsu* regime is clearly more egalitarian than the *Costin*/*Manuel* regime that structured the constitutional law of race equality before the Civil War, but the former has features that make that regime arguably less egalitarian in certain circumstances than the *Turner*, *Strauder*, and *Plessy* regimes. The *Turner* regime that based the constitutional law of racial equality on the Thirteenth Amendment was more open than the *Korematsu* regime to race conscious measures designed to benefit persons of color and had no state action limit on federal laws that mandated racial equality.[22] The *Turner* and *Strauder* regimes that

17. *See* Killenbeck, *supra* note 3, at 189-201.

18. *Id.*

19. *See In re* Turner, 24 F. Cas. 337, 339-40 (C.C.D. Md. 1867) (No. 14,247).

20. *Id.*; Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879).

21. *Strauder*, 100 U.S. at 310-12; Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

22. *Compare Turner*, 24 F. Cas. at 339-40, *with* Korematsu v. United States, 323 U.S. 214 (1944).

required Congress to be the first mover when implementing constitutional commitments to racial equality were more conducive to racial equality than the *Korematsu* regime whenever the national legislature had a more expansive understanding of racial equality than the national judiciary. The *Strauder* and *Plessy* regimes would, at least in theory, have declared unconstitutional the military order sustained in *Korematsu* because those regimes prohibited all race discriminations.

The following pages contextualize rather than praise or bury the *Korematsu* regime. Whether one particular regime better promotes racial equality than another depends on the particular problem, the balance of power in different institutions at a particular time, and particular perspectives. Strict scrutiny might be a better approach than a per se ban on race classifications when regulating racial gangs in prisons. The Supreme Court could not have decided *Brown v. Board of Education* when the *Turner* and *Strauder* regimes structured the constitutional law of racial equality because those regimes required Congress to be the first mover when implementing the post-Civil War Amendments. Whether a regime that permits affirmative action is better than one that does not depends on contested beliefs about whether affirmative action promotes race equality. The argument below is simply that the *Korematsu* regime is one way of structuring the constitutional law of racial equality, not the only way. That Americans committed to racial equality have adopted different regimes in the past opens questions about whether Americans might adopt different regimes in the future.

Strict scrutiny is a standard only for race conscious measures such as the military order banning Japanese Americans from the West Coast. That standard does not help determine whether a military order in 1943 banning disloyal citizens would have been considered a race discrimination if implemented only in California or, for that matter, whether the executive order at issue in *Trump v. Hawaii*[23] that Killenbeck explores with great sophistication[24] was a "Muslim ban." *Korematsu*'s ancestors

23. 138 S. Ct. 2392 (2018).

24. Killenbeck, *supra* note 3, at 201-23.

include such cases as *Costin v. Washington*,[25] *In re Turner*,[26] *Strauder v. West Virginia*,[27] and *Plessy v. Ferguson.*[28] These decisions considered whether explicit race conscious measures passed constitutional muster.[29] Although Killenbeck and the major opinions in *Trump* debated whether *Korematsu* belonged on *Trump*'s family tree,[30] *Trump*'s more legitimate lineal ancestors include *United States v. Cruikshank*,[31] *Williams v. Mississippi*,[32] and *McCleskey v. Kemp*.[33] The Justices in these instances refused to see or find race discrimination lurking behind laws or actions that on their face were not race conscious.[34]

This essay explores the constitutional law of explicit race conscious measures. This myopia admittedly exaggerates the egalitarian commitments of the *Turner*, *Strauder*, *Plessy*, and *Korematsu* regimes. Racial hierarchies in the United States in the past and at present are as often structured by the refusal to acknowledge race as by what Americans do when they acknowledge race. Americans, this essay documents, have often shamefully justified their willingness to use race conscious measures that discriminate against persons of color. Americans have even more shamefully refused to see race discrimination when government employs ostensibly neutral measures in ways that oppress, often by intention, black Americans and other persons of color.

I. THE *COSTIN*/*MANUEL* REGIME

Judge William Cranch's opinion in *Costin v. Washington* articulated the principles that structured the status of citizens of

25. 6 F. Cas. 612 (C.C.D.C. 1821) (No. 3,266).

26. 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

27. 100 U.S. 303 (1879).

28. 163 U.S. 537 (1896).

29. *See Costin*, 6 F. Cas. at 613-14; *Turner*, 24 F. Cas. at 339-40; *Strauder*, 100 U.S. at 303; *Plessy*, 163 U.S. at 540.

30. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *Id.* at 2447 (Sotomayor, J., dissenting); Killenbeck, *supra* note 3, at 152-159.

31. 92 U.S. 542 (1875).

32. 170 U.S. 213 (1898).

33. 481 U.S. 279 (1987).

34. *See Cruikshank*, 92 U.S. at 556; *Williams*, 170 U.S. at 225; *McCleskey*, 481 U.S. at 319.

color under antebellum constitutional law.[35] The issue in that case was the constitutionality of the onerous restrictions that the corporation governing Washington D.C. placed on persons of color.[36] Persons of color were required to register, provide bonds for good behavior, and obtain certificates from three white persons vouching for their character and employment.[37] In sharp contrast to Chief Justice Roger Brooke Taney's opinion in *Dred Scott*,[38] Cranch's opinion in *Costin* assumed that persons of color were citizens of the United States entitled to the rights of citizens of the United States.[39] *Costin* acknowledged that "the constitution gives equal rights to all the citizens of the United States."[40] Cranch insisted, however, that governing officials could make legal distinctions among citizens. Race was one important basis for legal distinctions. *Costin* stated:

> In all the states certain qualifications are necessary to the right of suffrage; the right to serve on juries, and the right to hold certain offices; and in most of the states the absence of the African color is among those qualifications. Every state has the right to pass laws to preserve the peace and the morals of society; and if there be a class of people more likely than others to disturb the public peace, or corrupt the public morals, and if that class can be clearly designated, it has a right to impose upon that class, such reasonable terms and conditions of residence, as will guard the state from the evils which it has reason to apprehend.[41]

The Supreme Court of North Carolina in *State v. Manuel* relied on similar principles when the judges concluded black citizenship was consistent with substantial race discrimination.[42] A unanimous court ruled that persons of color convicted of crimes could be hired out, even though white persons convicted of the

35. 6 F. Cas. 612, 613-14 (C.C.D.C. 1821) (No. 3,266).

36. *Id.*

37. *Id.*

38. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1856).

39. *Costin*, 6 F. Cas. at 613.

40. *Id. But cf. Dred Scott*, 60 U.S. at 404 (holding that persons of color were not citizens of the United States and were therefore not entitled to the rights of United States citizens).

41. *Costin*, 6 F. Cas. at 613.

42. 4 Dev. & Bat. 20, 37 (N.C. 1838).

same crimes could not suffer this sanction.[43] Judge William Gaston declared, "[h]is color and his poverty are the aggravating circumstances of his crime."[44] Gaston insisted that real differences between the races justified punishing citizens of color more severely than white citizens:

> Whatever might be thought of a penal Statute which in its enactments makes distinctions between one part of the community and another capriciously and by way of favoritism, it cannot be denied that in the exercise of the great powers confided to the legislature for the suppression and punishment of crimes, they may rightfully so apportion punishments according to the condition, temptations to crime, and ability to suffer, of those who are likely to offend, as to produce in effect that reasonable and practical equality in the administration of justice which it is the object of all free governments to accomplish.[45]

That William Manuel was a citizen of North Carolina did not immunize him from discriminatory punishments because he was in a racial class that the state legislature had determined needed more severe sanctions to deter them from crime.

The constitutional law of race equality in antebellum America was indistinguishable from the constitutional law of equality, more generally. The *Costin*/*Manual* regime emphasized arbitrary laws rather than suspect classifications.[46] No legal distinction was inherently more suspect than another or required legislators to meet a higher standard of proof—either as the end to be achieved or the relationship between the discrimination and that end. John Marque Lundin points out that while antebellum law respected principles of "equality, reasonableness, impartiality, and protection of fundamental rights, the prohibited classification principle" dates from Reconstruction.[47] Laws that singled out persons of color were constitutionally no different

43. *Id.*

44. *Id.* at 35.

45. *Id.* at 37.

46. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED 54-55 (Duke Univ. Press 1993); John Marquez Lundin, *The Law of Equality Before Equality Was Law*, 49 SYRACUSE L. REV. 1137, 1139 (1999).

47. Lundin, *supra* note 46, at 1139.

than laws that singled out bankers, taverns, women, or residents of E street.

The constitutionality of legal distinctions and discriminations depended on whether they were based on real differences between the regulated and unregulated classes and whether the distinction or discrimination served the public interest.[48] Any legislative distinction that served the public interest and was based on real differences between persons was constitutional. Howard Gillman notes that the master principle of nineteenth century constitutional law was that when "a statute is enacted applying only to a particular class, it must appear that the public welfare demands such legislation by reason of the distinguishing characteristic of the class."[49] Abolitionists and antislavery advocates aside,[50] no one considered race discriminations the paradigmatic example of an unconstitutional arbitrary distinction. Most successful equality claims concerned property rights[51] rather than discrimination based on race, gender, or ethnicity.[52] No state court opinion issued before the Fourteenth Amendment indicated that a central purpose of any constitutional provision mandating equality was to limit race discriminations, that race discriminations were particularly offensive in light of constitutional commitments to equality, or that race discriminations required a higher degree of judicial scrutiny than other legislative discriminations.[53]

Costin and *Manuel* were structured by this understanding of constitutional equality. Neither treats race distinctions as any

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48. *Id.* at 1184–85.

49. GILLMAN, *supra* note 46, at 93 (quoting Anonymous, *Some Restrictions upon Legislative Power*, 43 ALB. L.J. 25, 25–27 (1891)).

50. *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 95, 96-97 (Univ. of Cal. Press 1951); Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, *Part I*, 1950 WIS. L. REV. 479, 491, 506 (1950); Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, *Part II*, 1950 WIS. L. REV. 610, 613 (1950); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 18 (Harvard Univ. Press 1988).

51. *See* Planter's Bank v. Sharp, 47 U.S. (6 How.) 301, 325 (1848) ("This is . . . very invidious legislation, when applied to classes or to particular kinds of property before allowed to be held generally. Legislation for particular cases or contracts . . . is of very doubtful validity.").

52. *See* Lundin, *supra* note 46, at 1141.

53. *See* Lundin, *supra* note 46, at 1181.

more or less offensive to the law than other distinctions. Both explore whether real differences exist between the races and whether the law based on these differences serves the public interest. Both conclude that racial differences exist that justify laws in the public interest.[54] Neither assumes a different mode of analysis would be appropriate if white persons were being legally burdened. Both treat constitutional equality as requiring justices to make fact judgments rather than rely on categorical analyses.[55]

Many antebellum judicial decisions justifying racial discrimination did so by claiming that the main difference between white persons and persons of color was that only white persons were citizens.[56] The Supreme Court of Tennessee, when sustaining a ban on black immigration to the state declared, "free negroes . . . are not citizens in the sense of the Constitution; and therefore when coming among us are not entitled to all the 'privileges and immunities' of citizens of this State."[57] The Supreme Court of South Carolina, in *White v. Tax Collector of Kershaw District*, determining that free blacks were subject to a special tax, declared, "[a] firm and wise policy has excluded this class from the rights of citizenship in this and almost every State in which they are found."[58] Slaves gained few rights, the Supreme Court of Georgia declared, when freed by their former masters.[59] *Bryan v. Walton* decreed, "the act of manumission confers no

54. Justice Lemuel Shaw in *Roberts v. City of Boston* engaged in similar analysis when holding that segregated schools were consistent with the equality and citizenship rights enjoyed by persons of color because separating the races promoted the public welfare. He claimed, the school board could reasonably conclude that "the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children . . . ." 59 Mass. (5 Cush.) 198, 209 (1849).

55. *See* Costin v. Corp. of Washington, 6 F. Cas. 612 (C.C.D.C. 1821) (No. 3,266); State v. Manuel, 3 & 4 Dev. & Bat. 20 (N.C. 1838).

56. *See* Pendleton v. State, 6 Ark. 509, 512, ___ S.W.3d ___, ___ (1846); Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 449 (Va. Gen. Ct. 1824) (declaring that persons of color were not "comprehended" by the state "Constitution or Bill of Rights"); Bryan's Heirs v. Dennis, 4 Fla. 445, 453–54 (1852) (declaring that free persons of color are "neither freemen nor slaves"); Amy v. Smith, 11 Ky. (1 Litt.) 326, 344 (1822); *see also* MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 29 (Cambridge Univ. Press 2006).

57. State v. Claiborne, 19 Tenn. (Meigs) 331, 341 (1838); *see* Pendleton, 6 Ark. at 509, ___ S.W.3d at ___ (sustaining a state ban on black immigration because persons of color could be neither citizens of the United States nor citizens of Arkansas).

58. 37 S.C.L. (3 Rich.) 136, 139 (S.C. Ct. App. 1846).

59. *See* Bryan v. Walton, 14 Ga. 185, 201-02 (1853).

other right but that of freedom from the dominion of the master, and the limited liberty of locomotion; that it does not and cannot confer *citizenship*, nor any of the powers, civil or political, incident to *citizenship*."[60] Florida case law maintained that free persons of color could not claim any rights at all as a matter of constitutional grace.[61] "[T]he rights of free negroes," *Clark v. Gautier* stated, "depend entirely upon municipal regulations."[62]

Costin and *Manual* established that black citizenship was no bar against race discrimination. Jacksonians were convinced that real differences existed between white persons and persons of color. Chancellor James Kent's extraordinarily influential *Commentaries on American Law* declared that "[t]he African race, even when free, are essentially a degraded caste, of inferior rank and condition in society."[63] Sidney George Fisher, a leading northern political and constitutional commentator, maintained:

> These races are distinguished by clearly defined and different organic physical structure, and also by different mental and moral traits, more especially by inequality of mental and moral force, and have been so distinguished, without change, in all ages.[64]

The same principles, at least in theory, governed actual laws that discriminated against persons of color as hypothetical laws that discriminated against white persons. The crucial issue in both circumstances was whether racial differences were real and whether the law served the public interest. This inquiry required justices to make fact inquiries. Constitutional decision makers had to determine whether a real difference existed between the races. They then had to determine whether the law based on that real difference served the public interest. Such laws, providing benefits to black Americans denied to their white neighbors, did not exist before the Civil War because neither Jacksonian legislators nor Jacksonian judges could imagine a real difference

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60. *Id.* at 198.

61. *See* Clark v. Gautier, 8 Fla. 360, 362 (1859).

62. *Id.* at 363.

63. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258 (John M. Gould ed., Little, Brown, & Co., 14th ed. 1896). *See, e.g.*, Crandall v. State, 10 Conn. 339, 346 (1834).

64. SIDNEY GEORGE FISHER, THE LAWS OF RACE, AS CONNECTED WITH SLAVERY 10 (Philadelphia, Willis P. Hazard 1860).

between white persons and persons of color that might justify a law that placed special burdens on white persons or gave special benefits to persons of color.[65]

Judges enforced the constitutional law of equality during the *Costin*/*Manual* regime. By the Civil War, a well-developed state jurisprudence existed establishing the basic parameters of constitutional equality.[66] The Supreme Court of Tennessee, which was quite deferential in *Manual* when sustaining race discriminations against persons of color, was a judicial leader in setting the standards for scrutinizing discriminations between different classes of white persons. *Wally's Heirs v. Kennedy*, when striking down a law that forbade courts from hearing certain lawsuits brought for the benefit of other persons, insisted that "every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void."[67] Justice Nathan Green elaborated on the judicial responsibility for implementing constitutional "law of the land" clauses, declaring, "[d]oes it not seem conclusive then, that this provision was intended to restrain the legislature from enacting any law affecting injuriously the rights of any citizen, unless at the same time the rights of all others in similar circumstances were equally affected by it?"[68]

An examination of race cases only would barely detect this commitment to judicial power. Courts sustained almost all race conscious measures that were adjudicated before the Civil War. With the exception of a California decision holding that a state

65. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 252–54 (1997).

66. *See* GILLMAN, *supra* note 46, at 54; Saunders, *supra* note 65, 252–54; *see also* Durkee v. City of Janesville, 28 Wis. 464, 465 (1871) (citing numerous cases from numerous state courts decided before 1865 for the "principle of constitutional law which prohibits unequal and partial legislation upon general subjects . . . .").

67. 10 Tenn. 554, 555 (1831); *see* Vanzant v. Waddel, 10 Tenn. 260, 269-70 (1829) ("That a partial law, tending directly or indirectly to deprive a corporation or an individual or rights to property, or to the equal benefits of the general and public laws of the land, is unconstitutional and void, we do not doubt."); James v. Adm'rs of G.W. Reynolds, 2 Tex. 250, 252 (1847) ("[G]eneral public laws, binding all the members of the community under similar circumstances, and not partial or private laws, affecting the rights of private individuals, or classes of individuals.").

68. State Bank v. Cooper, 10 Tenn. 599, 606 (1831).

tax on Chinese immigrants was inconsistent with federal commerce power,[69] no free state court declared unconstitutional any law discriminating against free persons of color.[70] Free state justices sustained or implemented without commentary laws limiting the testimony of persons of color,[71] allocating taxes on the basis of race,[72] mandating different guardianship rules on the basis of race,[73] prohibiting persons of color from attending public schools,[74] banning persons of color from voting[75] or holding public offices,[76] forbidding persons of color from marrying a white person[77] or performing marriages,[78] and refusing to permit persons of color to reside in the state.[79]

Southern courts were even worse. The Supreme Court of Georgia in *Bryan v. Walton* highlighted the narrow distance between the legal status of free persons of color and the legal status of slaves when noting that:

> [T]he *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by

69. People v. Downer, 7 Cal. 169, 171 (1857).

70. *But see* Op. of J. Appleton, 44 Me. 521, 575–76 (1857) (declaring in an advisory opinion that free persons of color had a right to vote in Maine).

71. *See* Clark v. Gautier, 8 Fla. 360, 361 (1859).

72. *See* White v. Tax Collector of Kershaw Dist., 37 S.C.L. (3 Rich.) 136, 136 (S.C. Ct. App. 1846).

73. *See* Thaxter v. Grinnell, 43 Mass. (2 Met.) 13, 14–15 (1840).

74. *See* Williams v. Dirs. of Sch. Dist., No. 6, Wright 579, 580 (Ohio 1834); Chalmers v. Stewart, 11 Ohio 386, 387 (1842); Lewis v. Henley, 2 Ind. 332, 332 (1850) (separate schools may be organized, but not constitutionally required); Draper v. Cambridge, 20 Ind. 268, 269 (1863).

75. *See* Hobbs v. Fogg, 6 Watts 553, 555-56 (Pa. 1837); State v. Deshler, 25 N.J.L. 177, 188 (N.J. 1855); People v. Dean, 14 Mich. 406, 438 (1866); Anderson v. Milliken, 9 Ohio St. 568, 570 (1859); Morrison v. Springer, 15 Iowa 304, 306 (1863).

76. *See* State *ex rel*. Dirs. of E. & W. Sch. Dists. v. Cincinnati, 19 Ohio 178, 197 (1850) (holding that a school board director is not an officer of the state that must be held by a white person).

77. *See* Samuel v. Berry, 7 Mich. 467 (1859); Bailey v. Fiske, 34 Me. 77, 78 (1852); Milford v. Worcester, 7 Mass. 48, 57 (1810).

78. State v. Ct. of Common Pleas, 1 Ohio Dec. Reprint 20, 22 (Ohio 1843).

79. People v. Downer, 7 Cal. 169, 170 (1857); Barkshire v. State, 7 Ind. 389, 389 (1856); Nelson v. People, 33 Ill. 390, 390 (1864); Glenn v. People, 17 Ill. 105, 106-07 (1855) (upholding a ban on persons of color residing in the state though refusing to enforce the ban on other grounds). Three Supreme Court Justices in the *Passenger Cases* approved state laws banning persons of color. Smith v. Turner, 48 U.S. (7 How.) 283, 429 (1849). *See also* People v. Williams, 17 Cal. 142, 146 (1860) (dicta suggesting that prosecutors should be permitted to present evidence that Chinese residents tend to resist tax collection).

> Statute; that he can neither contract, nor be contracted with; that the free negro can act only by and through his guardian; that he is in a state of perpetual pupilage or wardship; and that this condition he can never change by his own volition. . . . .
>
> He is associated still with the slave in this State, in some of the most humiliating incidents of his degradation. —Like the *slave*, the *free* person of color is incompetent to testify against a free white citizen. He lives under, and is tried by the same Criminal Code. He has neither vote nor voice in forming the laws by which he is governed. He is not allowed to keep or carry fire-arms. He cannot preach or exhort without a special license, on pain of imprisonment, fine and corporeal punishment. He cannot be employed in mixing or vending drugs or medicines of any description. A white man is liable to a fine of five hundred dollars and imprisonment in the common jail, at the discretion of the Court, for teaching a *free* negro to read and write; and if one *free* negro teach another, he is punishable by fine and whipping, or fine or whipping, at the discretion of the Court. To employ a free person of color to set up type in a printing office, or any other labor requiring a knowledge of reading or writing, subjects the offender to a fine not exceeding one hundred dollars.[80]

Free persons of color did not get an "0-fer" in slave state courts. *City of Memphis v. Winfield*[81] declared unconstitutional a curfew limited to free black citizens. The Supreme Court of Tennessee described the measure as "an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime . . . ."[82] The Supreme Court of Kentucky when declaring unconstitutional a law forbidding persons of color from defending themselves from an assault initiated by a white person declared that the legislative power in question "can not [be] exercise[d] over any man or class of men, be they aliens, free persons of color, or citizens."[83] The Supreme Courts of Virginia and Georgia held that a free person of color claimed as a slave had a right to habeas corpus, although both decisions interpreted statutes that did not

80. Bryan v. Walton, 14 Ga. 185, 198, 202-03 (1853).
81. 27 Tenn. 707, 709 (1848).
82. *Id.*
83. Ely v. Thompson, 10 Ky. 70, 75 (1820).

make explicit race discriminations.[84] After noting that the statute granting rights to habeas corpus did not make a racial distinction, Judge Tucker of the Virginia Supreme Court stated, "[a] free negro, as well as a free white man, must be entitled to the benefit of the *habeas corpus* act, both according to its language, which is broad and general, and still more according to its spirit, which is yet more liberal and beneficent."[85] Georgia justices in *State v. Philpot* stated, "the free person of color enjoying personal liberty has the benefit of the *habeas corpus* secured to him by a constitutional guaranty."[86] No state court reached the conclusion that the legislature had unconstitutionally discriminated against free blacks, that a law that subjected all persons to the disabilities the legislature had imposed solely on the basis of race would have been constitutional.

No consensus developed in the antebellum United States on the best textual hook to hang constitutional commitments to equality. Cranch did not point to any provision in any constitution when in *Costin* he claimed, "the constitution gives equal rights to all the citizens of the United States . . . ."[87] State courts were promiscuous when providing the constitutional underpinnings for equal rights.[88] State decisions were rooted in general equality provisions,[89] in "due process" or "law of the land" provisions,[90] on constitutional provisions prohibiting exclusive privileges or special laws,[91] on separation of powers grounds[92] or on general

84. DeLacy v. Antoine, 34 Va. 438, 449 (1836); State v. Philpot, 1 Dud. 46, 46 (Super. Ct. Richmond Cnty. 1831).

85. *DeLacy*, 34 Va. at 444.

86. 1 Dud. at 52.

87. Costin v. Corp. of Washington, 6 F. Cas. 612, 613 (C.C.D.C. 1821) (No. 3,266). *But see* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403-27 (1857).

88. Saunders, *supra* note 65, at 258.

89. *In re* Dorsey, 7 Port. 293, 360-61 (Ala. 1838); Lewis v. Webb, 3 Me. 326, 336-37 (1825); City of Lexington v. McQuillan's Heirs, 39 Ky. 513, 516 (1839) (relying on both the general equality provisions and provisions requiring "equal and uniform" taxation).

90. Budd v. State, 22 Tenn. 483, 490-93 (1842); Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 412 (Md. 1838); Sears v. Cottrell, 5 Mich. 251, 254 (1858).

91. *See* Thomas v. Bd. of Comm'rs., 5 Ind. 4, 8 (1854) (citing numerous Indiana decisions declaring legislation "not within the constitutional prohibition of special and local legislation"); Smith's Adm'rs. v. Smith, 2 Miss. 102, 103 (1834); McRee v. Wilmington, 47 N.C. 186, 190 (1855); Geebrick v. State, 5 Iowa 491, 496-97 (1858); Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19, 38 (1856).

92. *See Regents of Univ. of Md.*, 9 G. & J. at 411.

constitutional principles.[93] The Supreme Court of Vermont, in *Ward v. Barnard*, without citing any particular provision in the state constitution, struck down a legislative act on the ground that "[a]n act conferring upon any one citizen, privileges to the prejudice of another, and which is not applicable to others, in like circumstances . . . , does not enter into the idea of municipal law, having no relation to the community in general."[94] *Costin* appears to have relied on the same belief that equality was implicit in American constitutionalism, even when not explicitly provided for by constitutional text.

II. THE *TURNER* REGIME

Chief Justice Salmon Chase's brief opinion on circuit in *In re Turner* captured the constitutional law of race equality during Reconstruction.[95] Elizabeth Turner was emancipated by the Constitution of Maryland on November 1, 1864.[96] She was almost immediately indentured to her former master Philemon T. Hambleton.[97] The Maryland law of indentures at the time made a sharp distinction between whites and persons of color.[98] As Chase summarized:

> The petitioner, under this indenture, is not entitled to any education; a white apprentice must be taught reading, writing, and arithmetic. The petitioner is liable to be assigned and transferred at the will of the master to any person in the same county; the white apprentice is not so liable. The authority of the master over the petitioner is

93. *Norwich Gaslight Co.*, 25 Conn. at 38.

94. Ward v. Barnard, 1 Aik. 121, 128 (Vt. 1825); *see Lewis*, 3 Me. at 332-34; Reed v. Wright, 2 Greene 15, 27, 28 (Iowa 1849) (treating "law of the land" as a general principle); Holden v. James, 11 Mass. 396, 404-05 (1814); Jones' Heirs v. Perry, 18 Tenn. 59, 70-71 (1836); State Bank v. Cooper, 10 Tenn. 599, 606 (1831); Wally's Heirs v. Kennedy, 10 Tenn. 554, 555 (1831); Jones v. Vanzandt, 13 F. Cas. 1047, 1048 (C.C.D. Ohio 1843) (No. 7,502).

95. 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247). For a discussion of *Turner*, see HAROLD H. HYMAN, THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: IN RE TURNER AND TEXAS V. WHITE 127-39 (University Press of Kansas: Lawrence, KS, 1997).

96. *Turner*, 24 F. Cas. at 339.

97. *Id.*

98. *Id.*

> described in the law as a 'property and interest;' no such description is applied to authority over a white apprentice.[99]

Chase granted Turner's petition for habeas corpus, releasing her from Hambleton's custody on two grounds. First, he declared that the indenture was an involuntary servitude that directly violated Section One of the Thirteenth Amendment.[100] Second, Chase ruled that the Maryland indenture law violated the Civil Rights Act of 1866, which was a constitutional exercise of congressional power under Section Two of the Thirteenth Amendment. *In re Turner* stated:

> [T]he indenture set forth in the return does not contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indenture of white apprentices, and is, therefore, in contravention of that clause of the first section of the civil rights law enacted by congress on April 9, 1866, which assures to all citizens without regard to race or color, "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[101]

The constitutional law of racial equality in the *Turner* regime had three foundations. The Thirteenth Amendment supplied the textual hook. Congress was the institution primarily responsible for implementing the constitutional ban on slavery. Chase declared Hambleton's failure to provide Turner with the benefits the Maryland law mandated for white persons violated federal legislation passed under Section Two of the Thirteenth Amendment.[102] He did not maintain that those provisions of the indenture would be unconstitutional in the absence of federal legislation. Congress was the first mover. Congress when implementing the Thirteenth Amendment could take all steps necessary to ensure that former slaves were transformed into full citizens. Chase claimed the Civil Rights Act of 1866 was constitutional because "[c]olored persons equally with white persons are citizens of the United States."[103]

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99. *Id.*
100. *Id.*
101. *Turner*, 24 F. Cas. at 339.
102. *Id.*
103. *Id.* at 340.

Republicans when debating the Civil Rights Act of 1866 and the Second Freedmen's Bureau Act emphasized the Thirteenth Amendment as the proper textual hook for the constitutional law of racial equality.[104] Senator Lyman Trumbull's speech introducing the Civil Rights Act of 1866 to the Senate declared with reference to the Black Codes, "[t]he purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment."[105] The Thirteenth Amendment's ban on slavery extended to discriminations against persons of color because race discriminations in both the free and slave states were "badges of servitude made in the interest of slavery and as part of slavery."[106] Trumbull asserted, "[t]hey never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also."[107]

Republican members of the House and Senate during early Reconstruction insisted that Congress was the institution primarily responsible for implementing the Thirteenth Amendment's commitment to racial equality. Their Thirteenth Amendment empowered Congress to legislate, not courts to constrain. Senator Charles Sumner spoke of a "pledge[] to *maintain* the emancipated slave in his freedom," a pledge that "must be performed by the national government."[108] "[W]hat makes this constitutional amendment a practical, living thing," Senator William Stewart of Nevada stated, "is the power given to Congress to enforce it by appropriate legislation."[109] In his view, "it must for years be the effective power of Congress, cooperating with the Executive, that will protect the freedmen from oppression . . . ."[110] Litigation standing alone, Republicans insisted, could not destroy the badges and incidents of slavery or the slave system. When Senator Edgar Cowan of Pennsylvania suggested that persons of color sue to protect their rights, Senator Henry Wilson of Massachusetts responded, "the Senator says that

104. CONG. GLOBE, 39th Cong., 1st Sess., 474 (1865).
105. *Id.*
106. *Id.* at 322.
107. *Id.*
108. *Id.* at 91.
109. CONG. GLOBE, 39th Cong., 1st Sess., 110 (1865).
110. *Id.*

the Constitution of the United States protects these people. I agree that it does so far as the Constitution can do it; and the amendment to the Constitution empowers us to pass the necessary legislation to make them free indeed . . . ."[111] Representative Ignatius Donnelly of Minnesota stated, "a grand abstract declaration, unenforced by the arm of authority, is not a protection."[112]

Congress was empowered under the Thirteenth Amendment to pass any legislation that helped transform former slaves into full citizens. The revised Second Freedmen's Bureau Bill covered:

> [A]ll loyal refugees and freedmen, so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of States, and by constitutional amendment, available to them and beneficial to the republic.[113]

Senator Lyman Trumbull of Illinois maintained:

> [U]nder the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. The various State laws to which I have referred—and there are many others—although they do not make a man an absolute slave, yet deprive him of the rights of a freeman; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is

111. *Id.* at 340.
112. *Id.* at 588.
113. CONG. GLOBE, 39th Cong., 1st Sess. 173-74 (1866).

> certainly a law in violation of the rights of a freeman, and being so may properly be declared void.[114]

This power to strike a death blow to slavery included the power to eradicate the slave system as well as slavery. "Having prohibited slavery," Donnelly insisted, "we must not pause for an instant until the spirit of slavery is extinct, and every trace left by it in our laws is obliterated."[115] Congress had to grant persons of color sufficient rights so that no vestige of human bondage remained. Sumner stated, "[b]eyond all question the protection of the colored race in civil rights is essential to complete the abolition of slavery . . . ."[116]

Trumbull captured the essence of the *Turner* regime when he declared:

> I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. If we believe a Freedmen's Bureau necessary, if we believe an act punishing any man who deprives a colored person of any civil rights on account of his color necessary—if that is one means to secure his freedom, we have the constitutional right to adopt it. If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so, and not only the power, but it becomes its duty to do so.[117]

The Thirteenth Amendment prohibited discrimination against persons of color when prohibiting slavery. Congress was the

114. *Id.* at 475.
115. *Id.* at 585.
116. *Id.* at 684.
117. *Id.* at 322.

institution authorized to determine the constitutional law of racial equality. Congress could pass any measure that promoted racial equality and full citizenship.

The logic of Thirteenth Amendment foundations for the constitutional law of racial equality supported race conscious programs that benefitted persons of color as well as antidiscrimination measures.[118] The fundamental question in the *Turner* regime was whether the law undermined slavery, the slave power, or the slave system.[119] Laws that prevented discrimination against persons of color and laws that provided specific benefits to persons of color were both constitutional means for undermining the slave system and for making former slaves full citizens of the United States. Representative Samuel W. Moulton of Illinois stated, "[t]he very object of the [Second Freedmen's Bureau Bill] is to break down the discrimination between whites and blacks . . . . Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people."[120] Race conscious measures that protected persons of color were justified because real differences existed between longstanding white citizens and newly freed slaves.

> [N]ever before in the history of this Government have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for . . . . [C]an we not provide for those among us who have been held in bondage all their lives, who have never been permitted to earn one dollar for themselves, who, by the great constitutional amendment declaring freedom throughout the land, have been discharged from bondage to their masters who had hitherto provided for their necessities in consideration of their services?[121]

Laws that discriminated against persons of color, by comparison, sought to re-establish in different form rather than eradicate

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118. This paragraph relies heavily on Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

119. *In re* Turner, 24 F. Cas. 337, 388 (C.C.D. Md. 1867) (No. 14,247).

120. CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866).

121. *Id.* at 939.

human bondage. Trumbull stated, "under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing."[122]

The Thirteenth Amendment law of racial equality did not have a state action limitation. Chase in *Turner* declared the indenture unconstitutional, not the state law mandating different treatment for white apprentices and apprentices of color.[123] "The alleged apprenticeship in the present case is involuntary servitude," he maintained, "within the meaning of the[] words in the amendment."[124] Chase then observed "the indenture" violated the Civil Rights Act because that private bargain "d[id] not contain important provisions for the security and benefit of the apprentice, which are required by the laws of Maryland in indentures of white apprentices . . . ."[125]

Charles Sumner when making a Thirteenth Amendment defense of what became the Civil Rights Act of 1875 made no reference to any state action limit on federal authority to make persons of color equal citizens. The senior Senator from Massachusetts insisted that the scope of Congressional power under the constitutional ban on slavery was as broad as the scope of government power.[126] If the federal or state government could regulate an institution, the federal government under the Thirteenth Amendment could require that institution to refrain from discriminating against persons of color. Sumner declared, "[s]how me . . . a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color."[127] "Theaters and other places of public amusement" could be prohibited from engaging in race discrimination, even if they had no common law obligation to serve all customers because "they are public institutions, regulated if not created by law . . . ."[128] Congress had the power

122. *Id.* at 322.
123. *Turner*, 24 F. Cas. at 339.
124. *Id.*
125. *Id.*
126. CONG. GLOBE, 42d Cong., 2d Sess. 825 (1870).
127. *Id.* at 242.
128. *Id.* at 383.

to "open to all persons, without distinction of color" all "institutions which have the sanction of law, which depend upon law, which depend upon State or municipal authority."[129] Regulations could be benefits. "Whoever seeks the benefit of the law," Sumner declared, "must show equality."[130] He insisted that private colleges be prohibited from discriminating against persons of color. "I wish under this law to make it impossible for Harvard College to close its gates against a colored person[,]" he declared on May 21, 1873.[131] "Take all our great institutions of learning. They are not sustained by 'moneys derived from general taxation,' but they are 'authorized by law.'"[132] Sumner's Civil Rights Act would have prohibited religious institutions from engaging in discrimination. "[W]hen a church organization asks the benefit of the law by an act of incorporation," Sumner stated, "it must submit to the great primal law of this Union—the Constitution of the United States, interpreted by the Declaration of Independence."[133]

III. THE *STRAUDER* REGIME

The Supreme Court in the 1870s modified the *Turner* regime by changing the textual hook for the constitutional law of racial equality. *Strauder v. West Virginia*,[134] *Ex parte Virginia*,[135] and *Commonwealth v. Rives*[136] completed the process by which the Equal Protection Clause of the Fourteenth Amendment replaced the Thirteenth Amendment as the foundation for attacks on race discrimination. The shift in textual hook had doctrinal consequences. The cabining of the Thirteenth Amendment and corresponding rise of the Fourteenth Amendment, Section One

129. CONG. GLOBE, 42d Cong., 1st Sess. 144 (1869).

130. CONG. GLOBE, 42d Cong., 2d Sess. 280 (1869); *see id.* ("[A]ll that my bill proposes is that those who enjoy the benefits of law shall treat those who come to them with equality.").

131. CONG. GLOBE, 42d Cong., 2d Sess. 3267 (1870).

132. *Id.*

133. *Id.* at 823; *see id.* at 896 ("[T]o apply to an incorporated association the great principles of our Government . . . does not in any respect interfere with religion . . . ."); CONG. GLOBE, 42d Cong., 2d Sess. app. 3 (1870).

134. 100 U.S. 303, 306 (1879).

135. 100 U.S. 339, 344 (1879).

136. 100 U.S. 313, 317 (1879).

introduced the state action doctrine to the constitutional law of the United States.[137] Constitutional decisionmakers interpreting the race-neutral Equal Protection Clause were far more prone to use colorblind rhetoric than Republicans during early Reconstruction who spoke of a constitutional obligation to transform former slaves into full citizens.[138] Intimations of legislative supremacy morphed into commitments to legislative primacy. Congress remained the institution constitutionally charged with implementing the Equal Protection Clause, but the Supreme Court determined the scope and nature of that constitutional commitment to racial equality.

The *Strauder* regime was anticipated by influential dicta in the *Slaughter-House Cases* asserting that the Equal Protection Clause of the Fourteenth Amendment banned race discrimination and only race or analogous discrimination.[139] Justice Samuel Miller's brief analysis in that case on the constitutional ban on slavery limited the scope of the Thirteenth Amendment to "servitude."[140] The Fourteenth Amendment, in his view, contained the provisions that protected the rights of newly freed slaves.[141] The Equal Protection Clause, Miller declared, was the constitutional provision that banned race discrimination.[142] "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Equal Protection C]lause . . . ."[143] The *Slaughter-House* majority severed equal protection completely from the antebellum concerns with arbitrary discriminations that structured the *Costin*/*Manuel* regime and help explain why the persons responsible for the Fourteenth Amendment preferred race neutral language to a more explicit ban on race discrimination.[144]

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137. U.S. CONST. amend. XIV, § 1.

138. *Strauder*, 100 U.S. at 309.

139. 83 U.S. (16 Wall.) 36, 81 (1872).

140. *Id.* at 69; *see also* Civil Rights Cases, 109 U.S. 3, 24 (1883) (rejecting a claim that private discrimination violates the Thirteenth Amendment).

141. *Slaughter-House*, 83 U.S. at 81.

142. *Id.*

143. *Id.*

144. The best discussion of the Joint Committee on Reconstruction's decision to adopt a race neutral Equal Protection Clause rather than an explicit ban on race discrimination is

Slaughter-House's Equal Protection Clause prohibited race discrimination, whether arbitrary or not, and hardly any, if any, other discriminations, no matter how arbitrary. Miller concluded:

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[145]

The Supreme Court in *Strauder* officially made the Fourteenth Amendment the constitutional foundation for the law of racial equality.[146] Justice William Strong's majority opinion, after quoting the text of Section One, declared:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[147]

Racial discriminations stood on a different constitutional footing than other discriminations. States, Strong wrote, "may confine [jury] selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational

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Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L. Q. 287 (2015).

145. *Slaughter-House*, 83 U.S. at 81.

146. For an important discussion of *Strauder*, see Sanford Levinson, *Why* Strauder v. West Virginia *is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS L. J. 603 (2018).

147. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879).

qualifications."[148] Echoing *Slaughter-House* on the limited scope of equal protection, the *Strauder* opinion continued, "[w]e do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color."[149]

Strong endorsed the *Turner* regime's commitment to an absolute ban on discrimination against former slaves.[150] The *Strauder*/*Virginia*/*Rives* opinions followed *Turner* by not exploring whether real differences existed between white persons and persons of color that might justify limiting juries only to white people. Strong never discussed whether the West Virginia law prohibiting persons of color from serving on criminal juries served a social interest. He did not consider whether real differences existed between white persons and persons of color that justified excluding persons of color from juries. What mattered for the purpose of the constitutional law of equality under the Fourteenth Amendment was that the State had engaged in race discrimination. Strong's majority opinion in *Rives* declared, "[t]he plain object of [the post-Civil War Amendments] was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."[151] *Ex parte Virginia* reiterated this claim.[152] Strong asserted:

> One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.[153]

148. *Id.* at 310.

149. *Id.*; *see also* State v. Underwood, 63 N.C. 98, 99 (1869) (striking down without explaining in any detail a state law prohibiting persons of color from testifying against white persons as inconsistent with the state constitution, the Thirteenth Amendment, and the Civil Rights Act of 1866).

150. *Strauder*, 100 U.S. at 310.

151. Virginia v. Rives, 100 U.S. 313, 318 (1879).

152. *See* 100 U.S. 339, 344-45 (1879).

153. *Id.*; *see also* Underwood, 63 N.C. at 98-99.

Justice John Harlan's famous dissent in *Plessy* more explicitly captured the distinction the *Turner* and *Strauder* regimes made between sociological difference and racial equality.[154] Harlan endorsed the *Costin*/*Manuel* regime's understanding that real differences exist between the races. He wrote:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.[155]

These sociological differences, however, did not make a legal difference. Harlan continued:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[156]

Discrimination was unconstitutional, Harlan made clear, even when real differences existed between the races.

Strauder broke from the *Turner* regime by adopting what later became known as a "banned categories" approach rather than a ban on discrimination against persons of color.[157] Congress, when implementing the Thirteenth Amendment's mandate for racial equality, had passed race conscious measures that favored former slaves, while insisting that persons of color enjoy the civil rights of white persons.[158] *Strauder* and subsequent cases ruled out legislation making African Americans "the special favorite of the laws . . . ."[159] A constitutional law of

154. *See* Plessy v. Ferguson, 163 U.S. 537, 554-56 (1896) (Harlan, J., dissenting).
155. *Id.* at 559.
156. *Id.*
157. *See* RONALD DWORKIN, LAW'S EMPIRE 383-84 (Harvard Univ. Press 1986).
158. *See supra* notes 126-33 and accompanying text.
159. Civil Rights Cases, 109 U.S. 3, 25 (1883).

racial equality rooted in the Equal Protection Clause of the Fourteenth Amendment was designed to secure a "perfect equality of civil rights" rather than provide former slaves and persons of color with the rights and resources necessary to become full American citizens.[160]

The late *Strauder* regime introduced the state action doctrine to American law.[161] The Thirteenth Amendment that provided the foundations for the *Turner* regime banned slavery in toto, not merely state laws that sanctioned slavery.[162] *Turner* working within those parameters explored whether the agreement between Hambleton and Turner was constitutional and whether that agreement violated federal laws implementing the Thirteenth Amendment.[163] Justice John Harlan's dissent in the *Civil Rights Cases* articulated the *Turner* regime's understanding that individual behavior as well as government action was subject to constitutional regulation. He maintained:

> Congress, therefore, under its express power to enforce [the Thirteenth A]mendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.[164]

The Fourteenth Amendment that provided the foundation for the *Strauder* regime excluded private discrimination when declaring, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[165] The majority opinion in the *Civil Rights Cases* emphasized the insertion of "No State" in Section One.[166] Justice Joseph Bradley insisted:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-

160. *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879).
161. *See Civil Rights Cases*, 109 U.S. at 6.
162. U.S. CONST. amend. XIII, § 1.
163. *See In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247).
164. *Civil Rights Cases*, 109 U.S. at 36 (Harlan, J., dissenting).
165. U.S. CONST. amend. XIV, § 1.
166. *Civil Rights Cases*, 109 U.S. at 11-12.

> matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws . . . . It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.[167]

In sharp contrast to *Turner*'s focus on the legal relationship between Hambleton and Turner, Justice Bradley's opinion discussed only what state officials had done and had not done. The relationship between Robinson and the Memphis & Charleston Railroad Company under the *Strauder* regime was none of the Constitution's business.[168]

Strong's majority opinions in *Ex parte Virginia*, *Strauder*, and *Rives* modified the *Turner* regime's institutional commitments by developing what we might call legislative primacy.[169] *Ex parte Virginia* introduced legislative primacy to the constitutional law of the United States when declaring:

> It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting

167. *Id.*

168. *See id.* at 13.

169. *See generally Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1879).

> the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[170]

The constitutional law of race equality under legislative primacy requires that Congress be the first mover. Litigants may assert rights under the Equal Protection Clause only after Congress passes a statute implementing the Equal Protection Clause. Congress may implement, but not interpret the Fourteenth Amendment. Federal courts must review all exercises of congressional power under Section Five of the Fourteenth Amendment to ensure that Congress, when regulating race discrimination, has remained within judicially enforceable constitutional limits on federal power.[171]

Strauder illustrates legislative primacy in action. Strong insisted the litigants base their claim on federal constitutional and federal statutory law.[172] After "[c]oncluding . . . that the statute of West Virginia, discriminating in the selection of jurors . . . against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man," he did not immediately declare the law unconstitutional.[173] Instead, Strong turned to federal statutory law. *Strauder* continued, "it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the

170. *Ex parte Virginia*, 100 U.S. at 345-46.
171. *See* U.S. CONST. amend. XIV, § 5.
172. *See Strauder*, 100 U.S. at 305.
173. *Id.* at 310.

Revised Statutes."[174] Strauder succeeded in *Strauder* because Congress had passed a law implementing his right against race discrimination in jury selection and the Justices independently determined that the federal law in question passed constitutional muster.[175] *Strauder* and *Ex parte Virginia* were correct because the West Virginia state legislature and Virginia bench were violating a congressional ban on race discrimination in jury selection and Congress had the power to pass that ban under Sections One and Five of the Fourteenth Amendment.[176] At no point did any decision in the *Strauder*/*Virginia*/*Rives* trilogy indicate the federal judiciary could in the absence of a federal statute declare unconstitutional under Section One of the Fourteenth Amendment state laws limiting juries to white citizens.

Federal judicial practice in race cases during the late nineteenth century was structured by this institutional commitment to legislative primacy. From 1868 until 1896, every case the Supreme Court decided on the constitutional meaning of racial equality concerned the constitutionality and scope of federal laws implementing the Thirteenth, Fourteenth, or Fifteenth Amendments.[177] Some cases were brought by persons of color claiming rights under the federal statutes Congress passed when implementing the post-Civil War Constitution.[178] Other cases were brought by white persons claiming the federal law under which they were indicted was not warranted by the post-Civil War Constitution or that their indictments were not warranted by federal laws implementing the post-Civil War Constitution.[179] The Justices acknowledged in dicta the

174. *Id.*

175. *Id.* at 310-11.

176. U.S. CONST. amend. XIV, §§ 1, 5.

177. *See infra* notes 178-79 and accompanying text.

178. Yick Wo v. Hopkins, 118 U.S. 356, 365 (1886); Bush v. Kentucky, 107 U.S. 110, 113-14 (1883); Neal v. Delaware, 103 U.S. 370, 379-80 (1880); *Strauder*, 100 U.S. at 304; Virginia v. Rives, 100 U.S. 313, 315 (1879). In *Pace v. Alabama*, Justice Stephen Field declared that the plaintiff claimed that laws prohibiting interracial marriage "conflict[] with . . . the Fourteenth Amendment . . . ." 106 U.S. 583, 584 (1883). Field's brief analysis, however, also maintained that the prohibition did not conflict with the Civil Rights Act of 1866. *Id.* at 584-85.

179. Baldwin v. Franks, 120 U.S. 678, 681-82 (1887); United States v. Harris, 106 U.S. 629, 641 (1883); Civil Rights Cases, 109 U.S. 3, 4-5 (1883); *Ex parte* Virginia, 100 U.S.

possibility of claims to racial equality that had no statutory foundation. "Th[e] [Thirteenth A]mendment, as well as the Fourteenth," Justice Joseph Bradley's opinion in the *Civil Rights Cases* declared, "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances."[180] Nevertheless, the Supreme Court for a quarter of a century did not adjudicate a single claim that persons had rights under the post-Civil War Amendments independent of the rights Congress had granted by federal law. Judge William Woods in *United States v. Hall* captured the foundational institutional principle of judicial practice in cases raising constitutional questions about racial equality when he declared, "to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the [Fourteenth A]mendment gives congress the power to enforce its provisions by appropriate legislation."[181] When discussing the Equal Protection Clause in particular, Woods asserted, "[C]ongress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation . . . ."[182]

IV. THE *PLESSY* REGIME

The Supreme Court in *Plessy* maintained the textual hook of the *Strauder* regime, while abandoning post-Reconstruction institutional commitments and modifying racial equality

339, 340 (1879); United States v. Cruikshank, 92 U.S. 542, 544-46 (1875); United States v. Reese, 92 U.S. 214, 215-16 (1875); *see also* Blyew v. United States, 80 U.S. (13 Wall.) 581, 590 (1871) (finding that Civil Rights Act of 1866 did not permit removal of a case to federal court when state law forbade the witnesses of color from testifying in a criminal case). The Supreme Court in a series of cases also sustained federal laws protecting persons of color as constitutional exercises of congressional power under Article I, Section 4 or inherent federal authority to protect the integrity of federal elections or federal prisoners. *See* Ku-Klux Cases, 110 U.S. 651, 662 (1884) (Congress has power independently of the post-Civil War Amendments to prohibit private persons from preventing persons of color from voting); Logan v. United States, 144 U.S. 263, 284 (1892). For an important discussion of these powers, *see generally* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (Cambridge Univ. Press 2011).

180. 109 U.S. at 20.

181. 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282).

182. *Id.* at 81.

doctrine.[183] The Equal Protection Clause of the Fourteenth Amendment during the late nineteenth and first part of the twentieth centuries provided the textual foundation for the constitutional law of racial equality. Federal courts replaced Congress as the institution primarily responsible for implementing the constitutional commitment to racial equality. The constitutional law of racial equality bifurcated. Racial discriminations remained per se unconstitutional. Racial distinctions were constitutional if, as the revived antebellum *Costin*/*Manuel* regime mandated, they were rooted in real differences between the races and advanced the public welfare.[184]

Plessy further entrenched the Fourteenth Amendment as the textual hook for the constitutional law of racial equality. Justice Henry Billings Brown's majority opinion, following *Slaughter-House*[185] and the *Civil Rights Cases*,[186] cast aside arguments that race discrimination was an aspect of slavery or a slave system. "Slavery," he said when rejecting a Thirteenth Amendment attack on a Louisiana law mandating race segregation in street cars, "implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services."[187] As Miller asserted in *Slaughter-House*,[188] Brown in *Plessy* maintained the Fourteenth Amendment was enacted because the constitutional ban on slavery did not cover the Black Codes or related discriminations against former slaves.[189] The Thirteenth Amendment, he stated, "was regarded

183. *See* Plessy v. Ferguson, 163 U.S. 537, 543-44 (1896).

184. *See id.* at 543-44, 548, 550-52; Costin v. Washington, 6 F. Cas. 612, 613-14 (C.C.D.C. 1821) (No, 3,266); State v. Manuel, 3 & 4 Dev. & Bat. 20, 37 (N.C. 1838).

185. *See Plessy*, 163 U.S. at 542 (construing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1872)).

186. *See* 109 U.S. 3, 24-25 (1883).

187. *Plessy*, 163 U.S. at 542.

188. *See Slaughter-House Cases*, 83 U.S. at 70-71 (the Black Codes "forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment . . . .").

189. *See Plessy*, 163 U.S. at 542-44.

by the statesmen of that day as insufficient to protect the colored race from certain laws which have been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens . . . ."[190] The Fourteenth Amendment was Brown's source for the constitutional commitment to "the absolute equality of the two races before the law . . . ."[191] The ensuing discussion in *Plessy* elaborated on the Fourteenth Amendment as a whole. Brown did not consider the distinctive meaning of any provision in Section One. *Plessy* concluded, "we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws . . . ."[192]

The Equal Protection Clause of the Fourteenth Amendment became the specific textual hook for the constitutional law of racial equality over the next thirty years. Justice John Harlan did not mention the Due Process Clause when discussing what clauses in the Fourteenth Amendment supported a judicial decision sustaining a local law that provided high school education for white children but not for children of color. His opinion in *Cumming v. Richmond County Board of Education* declared:

> [W]e cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States.[193]

Gong Lum v. Rice omitted the Privileges and Immunities Clause as a textual hook for the constitutional law of racial equality.[194] Chief Justice William Howard Taft's unanimous opinion stated:

> The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, the equal protection of the laws, by giving her the opportunity for a

190. *Id.* at 542.
191. *Id.* at 543.
192. *Id.* at 548.
193. 175 U.S. 528, 545 (1899).
194. *See* 275 U.S. 78, 85 (1927).

> common school education in a school which receives only colored children of the brown, yellow or black races.[195]

When federal courts immediately before the New Deal spoke on the constitutional law of racial equality, they interpreted the Equal Protection Clause and only the Equal Protection Clause. Justice Oliver Wendell Holmes Jr., in *Nixon v. Herndon* declared unconstitutional a state law prohibiting persons of color from voting in primary elections because the Fourteenth Amendment "denied to any State the power to withhold from [African Americans] the equal protection of the laws."[196]

The *Plessy* regime divided the law of racial equality into the law of race discriminations and race distinctions. Gilbert Thomas Stephenson's influential *Race Distinctions in American Law* detailed the nature and significance of these categories. He wrote:

> [T]here is an essential difference between race distinctions and race discriminations. North Carolina, for example, has a law that white and Negro children shall not attend the same schools, but that separate schools shall be maintained. If the terms for all the public schools in the State are equal in length, if the teaching force is equal in numbers and ability, if the school buildings are equal in convenience, accommodations, and appointments, a race distinction exists but not a discrimination.[197]

Race discriminations were per se unconstitutional. Such a law, Stephenson declared, "necessarily implies partiality and favoritism."[198] Race distinctions were constitutional if, as the *Costin*/*Manuel* regime required, they were based on real differences between the races and promoted the good of both races. *Race Distinctions in American Law* explained:

> Identity of accommodation is not essential to avoid the charge of discrimination. If there are in a particular school district twice as many white children as there are Negro

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195. *Id.*

196. 273 U.S. 536, 541 (1927); *see also* Nixon v. Condon, 286 U.S. 73, 89 (1932) ("The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.").

197. GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 2-3 (1910).

198. *Id.* at 4.

> children, the school building for the former should be twice as large as that for the latter. The course of study need not be the same. If scientific investigation and experience show that in the education of the Negro child emphasis should be placed on one course of study, and in the education of the white child, on another; it is not a discrimination to emphasize industrial training in the Negro school, if that is better suited to the needs of the Negro pupil, and classics in the white school if the latter course is more profitable to the white child. There is no discrimination so long as there is equality of opportunity, and this equality may often be attained only by a difference in methods.[199]

State courts during the second half of the nineteenth century had struggled with whether to distinguish race discriminations from race distinctions. Sumner, serving as counsel in *Roberts v. City of Boston*, insisted that Boston engaged in unconstitutional race discrimination when mandating separate schools for white children and children of color.[200] He declared, "[t]he separation of children in the public schools of Boston, on account of color or race, is in the nature of caste, and is a violation of equality."[201] Chief Justice Lemuel Shaw's unanimous opinion in *Roberts* maintained that government authorities had made a constitutional race distinction. Shaw "[c]onced[ed] . . . in the fullest manner, that colored persons . . . are entitled by law . . . to equal rights,"[202] but insisted that governing authorities could consistently develop, with this state constitutional commitment to equality, a "system of distribution and classification" as long as "this power is reasonably exercised" and served "the best interests of both classes of children . . . ."[203] Controversies over segregation intensified in state courts after the Civil War.[204] Some state courts

199. *Id.* at 3.

200. *See* 59 Mass. (5 Cush.) 198, 201-03 (1849).

201. *Id.* at 202 (argument of Charles Sumner).

202. *Id.* at 206.

203. *Id.* at 209. For a detailed account of the debate over segregated schools in Boston, see J. Morgan Kousser, *"The Supremacy of Equal Rights": The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941 (1988).

204. For the struggle over school segregation in state constitutional law and practice during the fifty years after ratification of the Fourteenth Amendment, see J. Morgan Kousser, Inaugural Lecture Delivered Before the University of Oxford (Feb. 28, 1985), *in* DEAD END:

in the late nineteenth and early twentieth centuries took Sumner's position that state segregation laws were racial discriminations. The Supreme Court of Iowa, when declaring unconstitutional a local ordinance segregating schools, deduced from the principle that "all the youths are equal before the law" the holding that a school board could not constitutionally "deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like."[205] Other state courts followed *Roberts* and sustained such measures as race distinctions. The Supreme Court of Ohio channeled Chief Justice Shaw when concluding, "[e]quality of rights does not involve the necessity of educating white and colored persons in the same school . . . ."[206] "Any classification which preserves substantially equal school advantages," Judge Day's unanimous opinion concluded, "is not prohibited by either the State or federal constitution . . . ."[207]

Plessy sided with Ohio against Iowa when sustaining a local ordinance mandating state segregation on streetcars.[208] Brown's opinion cited *Roberts* when anticipating Stephenson's distinction between race discriminations and race distinctions.[209] He declared:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the

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THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS (1986).

205. Clark v. Bd. of Sch. Dirs., 24 Iowa 266, 277 (1868); *see also* People v. Quincy, 101 Ill. 308, 314-15 (1882); Crawford v. Sch. Bd. for Sch. Dist. No. 7, 137 P. 217, 220 (Or. 1913).

206. State *ex rel.* Garnes v. McCann, 21 Ohio St. 198, 211 (1871); *see also* Puitt v. Comm'rs of Gaston Cnty, 94 N.C. 709, 719 (1888); State *ex rel.* Stoutmeyer v. Duffy, 7 Nev. 342, 347-48 (1872).

207. *Garnes*, 21 Ohio St. at 211.

208. *See* Plessy v. Ferguson, 163 U.S. 537, 545 (1896) (referencing *Garnes*, 21 Ohio St. at 210).

209. *See id.* at 544 ("The great principle . . . is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law . . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.") (internal quotations marks omitted) (quoting Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1849)).

> nature of things it 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.[210]

Race discriminations that abridged "the absolute equality of the two races before the law" were per se unconstitutional.[211] Brown cited *Strauder* and other cases in which courts had ruled persons of color were unconstitutionally denied rights granted to white people.[212] None of these cases required investigation into real differences between the races and whether the law advanced the public good. Racial distinctions, by comparison, were governed by the antebellum principle that different treatment passed constitutional muster if the different treatment was based on real differences between people and promoted the public good. Brown's opinion in *Plessy* declared, "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[213]

The Louisiana segregation law satisfied both prongs of the constitutional test for race distinctions.[214] The *Plessy* majority had no doubt that real differences existed between the races. "[D]istinction[s] which [are] founded in the color of the two races," Brown confidently stated, "must always exist so long as white men are distinguished from the other race by color . . . ."[215] The judicial majority was as confident that race segregation promoted the public welfare. Brown maintained that state legislatures, when mandating racial separation, had acted "with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[216]

Harlan appears to have accepted *Plessy*'s differentiation between race distinctions and race classifications, but not the *Plessy* majority opinion's application of those categories. Harlan

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210. *Id.*
211. *Id.*
212. *See id.* at 545-46.
213. *Plessy*, 163 U.S. at 550.
214. *Id.* at 550-51.
215. *Id.* at 543.
216. *Id.* at 550.

famously claimed in *Plessy* that "[o]ur Constitution is color-blind,"[217] but he was willing in other cases to treat race conscious measures as making race distinctions rather than race discriminations.[218] His opinion in *Cumming*,[219] after noting that the plaintiff had not attacked the constitutionality of race segregation per se,[220] endorsed differential racial treatment that, Harlan claimed, was based on real differences between the races and advanced the public good. His unanimous opinion for the court held that a local school board decision could constitutionally meet a financial crisis by closing the high school for students of color while keeping open the high school for white students when the alternative was closing the elementary school for children of color.[221] The school board's decision to keep open the school more children of color attended, Harlan concluded, "was in the interest of the greater number of colored children . . . ."[222] The ordinance at issue in *Plessy* did not meet this public good standard. Harlan pointed out, "[e]very one knows that the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons."[223] Segregation in this instance, he continued, did not advance the good of all races but was rooted in unconstitutional notions "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens[.]"[224] Harlan repeated this emphasis on public purposes when dissenting in *Berea College v. Kentucky*.[225] Government could regulate private education, in his view, when "such instruction is . . . harmful to the public morals or imperils the public safety."[226] Harlan thought the Kentucky ban on integrated private schools did not meet this standard because students of

217. *Id.* at 559 (Harlan, J., dissenting).

218. Justice Harlan joined the Supreme Court's decision in *Pace v. State*, 106 U.S. 583 (1883), which sustained an Alabama law banning interracial marriage and punishing sexual relationships outside of marriage more severely when the participants were of different races.

219. *See* Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 541-45 (1899).

220. *See id.* at 543-44.

221. *See id.* at 544-45.

222. *Id.* at 544.

223. Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

224. *Id.* at 560.

225. *See* 211 U.S. 45, 67-69 (1908) (Harlan, J., dissenting).

226. *Id.* at 67.

different races were "receiving instruction which is not in its nature harmful or dangerous to the public . . . ."[227]

The *Plessy* regime abandoned the *Strauder* regime's eroding institutional commitment to legislative primacy in race cases. That commitment never took hold outside of the constitutional law of race equality. No Supreme Court opinion, when discussing the constitutional rights of butchers and women in the *Slaughter-House Cases*[228] and *Bradwell v. Illinois*,[229] respectively, maintained or implied that the judicial role under the post-Civil War Constitution was limited to determining whether congressional statutes implementing Section One of the Thirteenth and Fourteenth Amendments were constitutional. The judicial decisions that provided the foundations for the freedom of contract assumed that federal courts had independent power to declare state laws unconstitutional and need not wait for congressional guidance.[230] Dicta shortly after *Strauder* was decided indicated that, in a proper case, the Justices would abandon legislative primacy when determining the constitutional law of race equality. "Th[e Thirteenth] Amendment, as well as the Fourteenth," Justice Joseph Bradley's opinion in the *Civil Rights Cases* declared, "is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances."[231] The Justices in 1896 finally harmonized the constitutional law of race equality with the constitutional law of other facets of the Fourteenth Amendment. *Plessy* and the *Plessy* regime exhibited the same commitments to judicial supremacy that developed in other areas of constitutional law during the late nineteenth centuries.[232]

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227. *See id.* at 68 (citing in support of dissent freedom of contract cases that insisted that government regulations that imposed differential burdens had to be based on real differences between people and serve the public good, but did not cite *Strauder* or any case declaring race discriminations to be per se unconstitutional).

228. 83 U.S. (16 Wall.) 36 (1873).

229. 83 U.S. (16 Wall.) 130 (1873).

230. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897); Munn v. Illinois, 94 U.S. 113, 132-33 (1876).

231. Civil Rights Cases, 109 U.S. 3, 20 (1883).

232. *See* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989).

Plessy was the first case discussing the constitutional law of racial equality in which the Justices, following existing practice in non-race cases, discussed only the meaning of Section One of the Fourteenth Amendment.[233] No opinion commented on existing federal legislation or the debates in Congress over race segregation that occurred when Congress was considering what became the Civil Rights Act of 1875.[234] Justice John Marshall Harlan's dissent in *Plessy* assumed that federal courts had independent authority to implement Section One of the Fourteenth Amendment. He wrote, "[h]owever apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States."[235] At no point did that dissent consider or even mention the Civil Rights Act of 1866, or any other law Congress had passed implementing the constitutional guarantee of equal protection.[236] Justice Henry Billings Brown's majority opinion did not point to that failure to provide a statutory as well as a constitutional hook for Plessy's complaint. Brown assumed, with Harlan, that the sole issue in *Plessy* was whether segregation was consistent with the post-Civil War Constitution and not whether the judiciary, rather than Congress, was empowered to make that determination.[237]

Plessy set the tone for the next fifty years. Congress did not pass legislation implementing the post-Civil War Amendments.[238] Courts did not first look to legislation already

233. *See* Plessy v. Ferguson, 163 U.S. 537 (1896); *see also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1120-31 (1995).

234. S*ee* McConnell, *supra* note 233, at 1120-31 (discussing such debates).

235. *Plessy*, 163 U.S. at 553 (Harlan, J., dissenting).

236. Homer Plessy's lawyers also discussed only constitutional issues. *See* Brief for Plaintiff in Error at ___, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1896 WL 13990; Brief for Plaintiff in Error, Plessy v. Ferguson at ___, 163 U.S. 537 (1896) (No. ___), 1893 WL 10660.

237. *Plessy*, 163 U.S. at 542 ("The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.").

238. *See* Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before* Katzenbach v. Morgan, 113 NW. U. L. REV. 47, 56, 82 (2018) (noting that Congress debated at some length between Reconstruction and the Great Society measures designed to implement the Fourteenth Amendment but did not pass any legislation).

on the books when determining the constitutional law of equal protection. *Williams v. Mississippi*, decided two years after *Plessy*, implicitly affirmed *Plessy*'s unspoken institutional premise.[239] Justice Joseph McKenna's majority opinion held that Mississippi's voting laws that were race neutral on their face did not violate Section One of the Fourteenth Amendment because plaintiffs had to prove discriminatory administration, not merely discriminatory motivation.[240] As in *Plessy*, the Justices discussed only the constitutional rules. McKenna did not consider whether the plaintiff might have a claim under federal statutory law, nor did he treat federal statutory law as relevant to judicial power under the post-Civil War Constitution.[241] Subsequent cases declaring race discriminations violated the Equal Protection Clause were as oblivious to national legislation as subsequent cases holding that race distinctions were constitutional. Federal courts had become the first mover in the constitutional law of race equality. Whether and when states could implement race conscious legislation depended entirely on the judiciary. Persons reading such decisions as *Gong Lum* or *Herndon* would have no clue that Section 5 of the Fourteenth Amendment vested Congress with the power to implement the Equal Protection Clause or even that Article I of the Constitution established a national legislature.

V. THE *KOREMATSU* REGIME

The *Korematsu* regime abandoned the doctrine of the *Plessy* regime, while maintaining that regime's textual hook and institutional commitments. The Justices in *Korematsu* insisted that the constitutional law of racial equality required courts to employ a balancing test, with a strong thumb on the side of formal racial equality.[242] One size fits all. Strict scrutiny became the governing standard whether the law at issue made what the *Plessy* regime classified as a race discrimination or a race distinction, and whether that law discriminated in favor of white persons or

239. 170 U.S. 213 (1898).
240. *Id.* at 222-23.
241. *See id.*
242. *See* Korematsu v. United States, 323 U.S. 214, 216-20 (1944).

persons of color.[243] The Equal Protection Clause remained the source for the constitutional law of racial equality.[244] Federal courts cited the Equal Protection Clause of the Fourteenth Amendment when determining whether race conscious state measures passed the strict scrutiny test.[245] The justices maintained the Due Process Clause of the Fifth Amendment "reverse incorporated" the Equal Protection Clause against the federal government when determining whether race conscious congressional measures passed the strict scrutiny test.[246] Legislative primacy was consigned to oblivion. Federal courts were often the first mover in determining the constitutional law of racial equality. That constitutional law, with the exception of some flirtations by Warren Court Justices with legislative supremacy, was what courts said was the constitutional law of racial equality.

Korematsu introduced the strict scrutiny test to American constitutional law.[247] The first substantive paragraph of Justice Hugo Black's majority opinion declared:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[248]

Chief Justice Harlan Fiske Stone's majority opinion in *Hirabayashi v. United States* seemed to reach the same conclusion that racial discrimination would be constitutionally

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243. *Id.*

244. *Id.*

245. *Id.*

246. For reverse incorporation, see Mark A. Graber, *Subtraction by Addition? The Thirteenth and Fourteenth Amendments,* 112 COLUM. L. REV. 1501, 1532-34 (2012); Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, *in* BENCHMARKS: GREAT CONTROVERSIES IN THE SUPREME COURT (Terry Eastland ed., 1995).

247. *See Korematsu*, 323 U.S. at 216-20.

248. *Id.* at 216; *see also* Hirabayashi v. United States, 320 U.S. 81, 111 (1943) (Murphy, J., concurring) ("Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment.").

tolerated only when state or federal laws were motivated by pressing public necessity.[249] Stone stated:

> Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.[250]

The strict scrutiny test, as applied in *Korematsu* and *Hirabayashi*, was arguably less protective of Japanese Americans than the standards laid down during the *Strauder* and *Plessy* regimes. The Japanese exclusion order was a race discrimination rather than a race distinction. In sharp contrast to *Cumming*, no justice maintained that removal benefited more Japanese Americans than the order harmed. No justice pretended that the military believed with Stephenson that "equality of opportunity" on the West Coast for white persons and persons of color was best "attained only by a difference in methods."[251] The burdens of exclusion fell entirely on Japanese Americans. Constitutional decision makers from Reconstruction to World War II had insisted that such race discriminations were per se unconstitutional. *Plessy* stated, "[t]he object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the law . . . ."[252] *Korematsu* and *Hirabayashi* violated that principle. The *Korematsu* regime was the first to interpret the post-Civil War Constitution as permitting constitutional authorities to engage in race discrimination when that race discrimination served a public interest, albeit a very pressing public interest.[253] Justice Frank Murphy in *Hirabayashi* observed, "[t]oday is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of

249. 320 U.S. at 113-14.
250. *Id.* at 100.
251. STEPHENSON, *supra* note 197, at 3.
252. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
253. *Korematsu*, 323 U.S. at 217-19.

citizens of the United States based upon the accident of race or ancestry."[254]

Korematsu was a clearer break from the official constitutional law of the *Plessy* regime than from the racist constitutional practices of that time. A strong case can be made that constitutional authorities at the turn of the twentieth century would have held constitutional federal or state laws that imposed a wartime curfew on persons of color or excluded such persons from certain jurisdictions during wartime had such measures been promulgated and subjected to constitutional scrutiny during the *Strauder* and *Plessy* regimes. Equally as strong a case can be made that those constitutional authorities would have reworked the *Strauder*/*Plessy* ban on race discriminations to encompass situations when "pressing public necessity" was thought to require imposing unique burdens on members of one race.[255] Faced with a *Korematsu*-like fact situation, the racist Fuller Court would have almost certainly adjusted the line between race discriminations and race distinctions, and not have applied mechanically the existing ban on all race discriminations.[256] Rather than maintain, as Stephenson did, that a race discrimination "necessarily implies partiality and favoritism[,]"[257] constitutional authorities might have tweaked that claim so that only policies that "implie[d] partiality and favoritism[]"[258] were race discriminations. The point is that such a move was not explicitly made before World War II. *Korematsu*, from the perspective of 1944, weakened the *Plessy* regime's commitment to racial equality, even if that weakening was more likely in theory than in actual practice.

Korematsu improved upon standards the *Plessy* regime employed when considering race classifications, but that improvement was limited and may have been more theoretical than real. Black's opinion suggests that only race discriminations

254. *Hirabayashi*, 320 U.S. at 111 (Murphy, J., concurring).

255. *Korematsu*, 323 U.S. at 216.

256. *See generally* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 at 352 (2006) (discussing the racism of the Fuller Court).

257. STEPHENSON, *supra* note 197, at 4.

258. *Id.*

that advance vital social purposes pass constitutional muster.[259] Preventing racial mixing on street cars might not meet that standard. Still, *Korematsu* did not overrule *Plessy* or comment adversely on any past decision sustaining an alleged race classification. A racist southern constitutional decisionmaker during the first half of the twentieth century would have little difficulty finding that preventing racial amalgamation or fights between the races was a "[p]ressing public necessity . . . ."[260] The Supreme Court of Virginia, when justifying bans on interracial marriage, declared:

> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius.[261]

A judge more attentive to strict scrutiny might have tweaked this opinion a bit but would not have changed the result.

Korematsu retained the *Plessy* regime's and, for that matter, the *Costin*/*Manuel* regime's deference to elected officials when determining whether race conscious means advanced pressing social ends. The strict scrutiny test in *Korematsu* and *Hirabayashi* was limited to ends. The federal government was entitled to impose a curfew on Japanese Americans and exclude Japanese Americans from the West Coast because such regulations were designed to prevent sabotage and a successful Japanese invasion of California.[262] Preventing a Japanese invasion of California was a compelling government end.

259. *Korematsu*, 323 U.S. at 216-20.
260. *Id.* at 216.
261. Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).
262. *Korematsu*, 323 U.S. at 216-20.

Korematsu was excluded from the West Coast, *Korematsu* asserted, "because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast . . . ."[263] The Supreme Court did not heighten the degree to which justices had previously scrutinized race conscious means to purported government ends. Government officials had to establish only some relationship between the race conscious measure and the end to be achieved. Stone in *Hirabayashi* stated, "it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made."[264] Justice William O'Douglas's concurring opinion in that case stated, "[w]here the orders under the present Act have some relation to 'protection against espionage and against sabotage,' our task is at an end."[265] The Justices were as deferential to governing officials when determining whether the exclusion orders satisfied the requirement that race conscious measures be based on real differences between the races. If the military had some basis for determining that real differences existed between Japanese Americans and other citizens, that was good enough during World War II to sustain a race conscious measure discriminating against some persons of color. Black stated, "[t]here was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short."[266] "The fact alone that attack on our shores was threatened by Japan rather than another enemy power," Stone declared in *Hirabayashi*, "set those citizens apart from others who have no particular associations with Japan."[267]

Three developments occurred after World War II that made the *Korematsu* regime more racially egalitarian than the *Plessy*

263. *Id.* at 223; *see also* Hirabayashi v. United States, 320 U.S. 81, 94-95 (1943) ("The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage").

264. *Hirabayashi*, 320 U.S. at 102.

265. *Id.* at 106 (Douglas, J., concurring).

266. *Korematsu*, 323 U.S. at 223-24.

267. *Hirabayashi*, 320 U.S. at 101.

regime.[268] First, the Supreme Court obliterated the *Plessy* regime's distinction between race distinctions and race discriminations. Second, the Supreme Court required that government officials adopting race conscious measures meet a higher standard for means as well as for ends. Third, constitutional decision makers became far more suspicious than the *Korematsu* majority that race conscious measures were actually based on real differences between the races.

The *Korematsu* regime clearly broke from the *Plessy* regime only when the justices abandoned the distinction between constitutional race distinctions and unconstitutional race discriminations. This process began during the 1950s when the Supreme Court indicated that government actions that made race relevant to a person's legal standing were subject to strict scrutiny, even if in a formal sense those measures did not treat persons of color worse than white persons.[269] *Bolling v. Sharpe* held that statutes mandating race segregation had to meet the same standard *Korematsu* demanded for race discriminations.[270] Citing both *Korematsu* and *Hirabayashi*, Chief Justice Earl Warren's majority opinion declared, "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[271] Race consciousness by the 1960s was the touchstone for strict scrutiny rather than discrimination between white persons and persons of color who had engaged in the same behavior. Justice Byron White's majority opinion in *McLaughlin v. Florida*, when striking down a state law that punished interracial premarital sex more severely than premarital sex between persons of the same race, declared, "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation."[272]

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268. *See* Fallon, Jr., *supra* note 8, at 1273-74 (discussing the development of strict scrutiny).

269. *Id.* at 1277.

270. 347 U.S. 497, 499 (1954).

271. *Id.* at 499.

272. 379 U.S. 184, 191 (1964).

The mature *Korematsu* regime insisted on scrutinizing race conscious means as strictly as *Korematsu* purportedly scrutinized government ends. By the mid-1960s, government officials could no longer point to a rational basis or the equivalent of "evidence of disloyalty on the part of some" when defending race classifications or discriminations.[273] The constitutional law of racial equality required race conscious measures to be necessary or narrowly tailored means to their purported government ends. "[N]ecessity," Justice Harlan's concurring opinion in *McLaughlin* declared, "not mere reasonable relationship, is the proper test."[274] Government officials at the turn of the twenty-first century could no longer blithely expect judicial deference when they insisted a race conscious measure was based on real differences between the affected races. Justice Sandra Day O'Connor insisted that "skepticism" rather than deference was the attitude courts should take when determining whether a race conscious measure was a narrowly tailored means to a compelling government end.[275] "Any preference based on racial or ethnic criteria," she declared in *Adarand Constructors, Inc. v. Pena*, "must necessarily receive a most searching examination."[276]

Korematsu did not specify the textual hook for the constitutional law of racial equality when the federal government adopted race conscious policies. Black placed more emphasis on constitutional powers than constitutional rights. His opinion noted that the military orders at issue in *Korematsu* were attacked "as an unconstitutional delegation of power . . . beyond the war powers of the Congress, the military authorities and of the President," and "a constitutionally prohibited discrimination . . . ."[277] The express holding of *Korematsu* focused entirely on the Article I powers of Congress and the Article II powers of the President. Black declared, "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude

273. Korematsu v. United States, 323 U.S. 214, 223 (1944).

274. *Bolling*, 379 U.S. at 197 (Harlan, J., concurring); *see id.* at 194 ("Such classifications bear a far heavier burden of justification."); *see also id.* at 196 ("Such a law . . . bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.").

275. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-24, 227 (1995).

276. *Id.* at 223 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 276, 273 (1986)).

277. *Korematsu*, 323 U.S. at 217.

those of Japanese ancestry from the West Coast war area at the time they did."[278] When discussing what constituted "a constitutionally prohibited discrimination,"[279] Black did not mention much less discuss the meaning of the Equal Protection Clause, another provision of the Fourteenth Amendment, the Thirteenth Amendment or any provision in the Bill of Rights.

Hirabayashi was more forthcoming. Justice Stone announced that the Fifth Amendment provided the textual hook for the constitutional law of racial equality when the federal government adopted race conscious policies. "The questions for our decision," he stated, "are whether the particular restriction . . . was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment."[280] At the onset of the *Korematsu* regime, a gap existed between the rights enumerated in the first eight amendments to the Constitution and the rights enumerated by the post-Civil War Amendments. The Supreme Court during World War II was no more willing to interpret the Fifth Amendment as holding the federal government to standards mandated by the Equal Protection Clause of the Fourteenth Amendment than the justices had been willing to interpret the Fourteenth Amendment as holding the states to the standards mandated by the Fifth Amendment.[281] Stone in *Hirabayashi* declared, "[t]he Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."[282] While "[i]t is true," Murphy agreed:

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278. *Id.* at 217-18.

279. *Id.* at 217.

280. *See* Hirabayashi v. United States, 320 U.S. 81, 83 (1943); *see also id.* at 89 (Appellant's "contentions are only that Congress unconstitutionally delegated its legislative power to the military commander by authorizing him to impose the challenged regulation, and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibits the discrimination made between citizens of Japanese descent and those of other ancestry.").

281. *See* Palko v. Connecticut, 302 U.S. 319, 323 (1937).

282. *Hirabayashi*, 320 U.S. at 100.

> [T]hat the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws . . ., [i]t by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of laws as that term is used in the Fifth Amendment.[283]

As both the Stone and Murphy opinions indicated, the *Korematsu* regime regarded the Equal Protection Clause as the appropriate textual hook for determining whether state race conscious policies were constitutional.[284] The Equal Protection Clause provided the constitutional foundations for the judicial decisions declaring state mandated segregation unconstitutional. The Supreme Court in *Brown* framed the question before the Justices as whether "segregation . . . deprive[d] the plaintiffs of the equal protection of the laws under the Fourteenth Amendment."[285] *Loving v. Virginia* held that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[286] Justices in the *Korematsu* regime determined whether race conscious measures that benefited persons of color passed constitutional muster by analyzing the constitutional meaning of "equal protection." Justice Lewis Powell's opinion in *Regents of University of California v. Bakke* understood affirmative action as raising the question whether under the "Equal Protection Clause . . . discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'"[287] Justice William Brennan's separate opinion in *Bakke* was similarly grounded on an "analysis of the Equal Protection Clause of the Fourteenth Amendment."[288]

The gap between the due process law of racial equality that governed federal race conscious measures and the equal protection law of racial equality that governed state race conscious measures vanished as the *Korematsu* regime matured. The *Brown* line of decisions began the process of obliterating the

283. *Id.* at 112 (Murphy, J., concurring).
284. *Korematsu*, 323 U.S. at 234-35, 242; *Hirabayashi*, 320 U.S. at 100.
285. 347 U.S. 483, 488 (1954).
286. 388 U.S. 1, 12 (1967).
287. 438 U.S. 265, 294 (1978).
288. *Id.* at 355 (Brennan, J., concurring in part and dissenting in part).

differences between the federal and state law of equal protection. Schools segregated by federal law met the same fate as schools segregated by state law. "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools," Chief Justice Earl Warren stated in *Bolling*, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[289] By the turn of the twenty-first century, the Justices were insisting that race conscious federal policies had to meet the same strict scrutiny standards as race conscious state policies.[290] O'Connor in *Adarand* declared "congruence" to be a fundamental principle underlying the constitutional law of racial equality.[291] Her opinion eviscerating any remaining space between federal and state obligations declared, "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment . . . ."[292]

The Thirteenth Amendment remained largely moribund as an alternate textual hook for the constitutional law of racial equality. The Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, was the exception that proved the rule.[293] The Justices in that case held that Congress under the Thirteenth Amendment could prohibit race discrimination in private housing markets.[294] Justice Potter Stewart's majority opinion declared that "the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."[295] Neither Congress nor the Supreme Court made any further effort to integrate this element of the *Turner* regime into the *Korematsu* regime. The path-breaking federal antidiscrimination laws passed during the Great Society did not

289. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
290. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
291. *Id.* at 224.
292. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).
293. 392 U.S. 409, 413 (1968).
294. *Id.* at 439.
295. *Id.* at 443.

mention the constitutional ban on slavery.[296] No Supreme Court opinions sustaining these measures discussed whether these measures might have Thirteenth Amendment foundations.[297] The Supreme Court's affirmative action jurisprudence paid no heed to the Thirteenth Amendment but focused entirely on the constitutional law of equal protection.[298]

The resulting Fourteenth Amendment law of racial equality was not as friendly to affirmative action programs as Thirteenth Amendment law had been during Reconstruction. In sharp contrast to the *Turner* regime, which maintained race conscious programs were a legitimate means for implementing the Thirteenth Amendment's commitment to ending both slavery and the slave system, the *Korematsu* regime insisted on a race neutral interpretation of the phrase "equal protection."[299] Justice Lewis Powell's crucial opinion in *Bakke* stated, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[300] "The standard of review under the Equal Protection Clause," O'Connor's opinion in *Adarand* agreed, "is not dependent on the race of those burdened or benefited by a particular classification."[301] Strict scrutiny was not quite as strict when race

296. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

297. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Remarkably, the petitioners in *Heart of Atlanta Motel* raised a Thirteenth Amendment claim when they insisted that the prohibition of race discrimination was an "involuntary servitude." *Heart of Atlanta Motel*, 379 U.S. at 243-44.

298. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). A cottage industry has developed, however, on the Thirteenth Amendment as an alternative source for fundamental rights, including constitutional rights to racial equality. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 1 (1995); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 BOS. U. L. REV. 255 (2010); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459 (2012); Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447 (2012); James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

299. Korematsu v. United States, 323 U.S. 214, 223 (1944).

300. *Bakke*, 438 U.S. at 289-90.

301. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

conscious measures benefited persons of color. O'Connor in *Adarand* "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact[]'" when government attempted to deal with "the lingering effects of racial discrimination."[302] Still, Congress and state legislatures at the turn of the twenty-first century did not enjoy the same leeway under the Fourteenth Amendment as the Reconstruction Congress had under the Thirteenth Amendment to promote racial equality by employing race conscious measures.[303]

All the Judges on the *Korematsu* court took for granted that federal courts were responsible for determining the constitutional law of racial equality. The majority opinions and dissents quarreled over whether justices should defer to the military judgment that excluding Japanese from the West Coast was necessary to prevent a possible Japanese invasion.[304] None suggested that implementing the constitutional law of racial equality was primarily a legislative task. As was the case with *Plessy*, all the Justices on the *Korematsu* court assumed that they had the final say in determining whether a measure unconstitutionally discriminated on the basis of race.[305] Justice Frank Murphy's concurring opinion in *Hirabayashi* stated: "We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold."[306] "While this Court sits," he asserted, "it has the inescapable duty of seeing that the mandates of the Constitution are obeyed."[307] Justice Wiley Rutledge's concurring opinion in *Hirabayashi* rejected claims that "the courts have no power to review any action a military officer may 'in his discretion' find it necessary

302. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

303. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 613 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 487 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

304. *Korematsu*, 323 U.S. at 223-24; *Id.* at 248 (Jackson, J., dissenting).

305. Plessy v. Ferguson, 163 U.S. 537, 559 (1896); *Korematsu*, 323 U.S. at 223.

306. Hirabayashi v. United States, 320 U.S. 81, 110 (1943) (Murphy, J., concurring).

307. *Id.* at 113.

to take with respect to civilian citizens in military areas or zones . . . ."[308]

Ironically, the *Plessy* regime's abandonment of legislative primacy made possible the Supreme Court's decision in *Brown*.[309] Under the *Turner* and *Strauder* regimes, Congress had to be the first mover when the constitutional law of racial equality was established. Courts could not consider whether race conscious measures were unconstitutional race discriminations or constitutional race distinctions unless Congress had passed a law prohibiting the race conscious measure under constitutional attack.[310] Senator Charles Sumner insisted during the early 1870s that Congress prohibit segregated schools[311] because he assumed that courts were unlikely to declare segregated schools unconstitutional in the absence of federal law banning such institutions. When introducing what became the Civil Rights Act of 1875, he spoke of "the absolute necessity of congressional legislation for the protection of equal rights . . . ."[312] Sumner's last speech in Congress maintained with respect to segregated schools, "I most solemnly believ[e] that the only true remedy is in a national statute, uniform and complete in its operation everywhere throughout the land . . . ."[313] No such congressional legislation was on the books when *Brown* was decided. Justice Robert Jackson's comment in oral argument, "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress[,]"[314] reflected the *Plessy* and

308. *Id.* at 114 (Rutledge, J., concurring).

309. *Plessy*, 163 U.S. at 554-55; Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

310. *In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247); Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879).

311. *See* CONG. GLOBE, 42d Cong., 1st Sess. 144 (1871) (statement of Sen. Charles Sumner).

312. CONG. GLOBE, 42d Cong., 2d Sess. 381 (1871) (statement of Sen. Charles Sumner); *see* CONG. GLOBE, 42d Cong., 2d Sess. 432 (1872) (statement of Sen. Charles Sumner) ("[T]hose axiomatic and self-evident truths . . . shall be maintained by the legislation of Congress carrying out the provisions of the Constitution of the United States.").

313. 2 CONG. REC. 949 (1874) (statement of Sen. Charles Sumner).

314. Schmidt, *supra* note 238, at 65 (quoting LEON FRIEDMAN, ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 244 (1969)). Jackson repeated this claim in his unpublished draft concurrence in *Brown*. *Id.* He declared, "We are urged . . . to supply means to supervise transition of the country from segregated to nonsegregated schools upon the basis that Congress may or probably will refuse to act. That assumes nothing less than that we must

Korematsu regimes' commitment to permitting federal courts to be the first mover in determining the constitutional law of racial equality. Just as no judge on the *Plessy* Court considered federal statutory law relevant to determining whether states could mandate segregated street cars, so no judge on the *Brown* Court, following the practice entrenched only during the *Plessy* regime, considered federal statutory law relevant to determining whether states could mandate segregated public education.

The *Korematsu* regime replaced legislative primacy with judicial supremacy. The Justices when implementing *Brown* not only did not bother looking for guidance from the elected branches of the national government but insisted that all government officials were to be guided by the Supreme Court's interpretation of the constitutional commitment to racial equality. In an opinion signed by all nine Justices on the Supreme Court, Chief Justice Earl Warren in *Cooper v. Aaron* declared, "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle . . . [is] a permanent and indispensable feature of our constitutional system."[315] Justice Felix Frankfurter's concurring opinion piled on. He wrote, "[o]ur kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is 'the supreme Law of the Land.'"[316]

While the Supreme Court remained the managing partner throughout the *Korematsu* regime, the role of Congress in implementing the constitutional commitment to racial equality was sometimes analogous to senior partner, sometimes analogous to junior partner, and sometimes closer to summer associate. *Katzenbach v. Morgan* indicated that remedying race discrimination might be a joint enterprise, with federal courts and the federal legislature equally empowered to make the constitutional law of racial equality.[317] Justice William Douglas's

act because our representative system has failed." DAVID M. O'BRIEN, JUSTICE ROBERT H. JACKSON'S UNPUBLISHED OPINION IN BROWN V. BOARD 129 (2017).

315. 358 U.S. 1, 18 (1958).

316. *Id.* at 24 (Frankfurter, J., concurring); JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS: ANDREW JACKSON (2004).

317. 384 U.S. 641, 659 (1966).

majority opinion held that Congress could forbid states from denying the ballot to Spanish speakers educated in Puerto Rico, even though the Supreme Court had previously ruled that literacy tests were constitutional.[318] "Congress might . . . have questioned," Douglas wrote, "whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise."[319] *City of Boerne v. Flores* withdrew any suggestion in *Morgan* that Congress might be authorized to interpret independently the post-Civil War Amendments.[320] Congress was authorized to remedy, identify, and prevent constitutional violations, but not determine what actions constituted a violation of the equal protection or any other clause in the Fourteenth Amendment.[321] Justice Anthony Kennedy's majority opinion condemned the elected branches of the national government for trying to overturn a judicial decision narrowing the free exercise rights protected by the First and Fourteenth Amendments.[322] He asserted, "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed."[323] *Shelby County v. Holder* further reduced congressional power to implement the post-Civil War Amendments.[324] Chief Justice John Roberts brazenly challenged whether thousands of pages of congressional factfinding justified legislation extending the preclearance provisions of the Voting Rights Act of 1965.[325] Congress, he insisted, had to demonstrate

318. *See* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959); United States v. Classic, 313 U.S. 299, 320 (1941).

319. *Morgan*, 384 U.S. at 654; *see* South Carolina v. Katzenbach, 383 U.S. 301, 342 (1966).

320. City of Boerne v. Flores, 521 U.S. 507, 536 (1997); *Morgan*, 384 U.S. at 654.

321. *City of Boerne*, 521 U.S. at 524-29.

322. Emp. Div. v. Smith, 494 U.S. 872, 876-77 (1990); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

323. *City of Boerne*, 521 U.S. at 536.

324. *See generally* 570 U.S. 529 (2013).

325. *Id.* at 554.

"'exceptional' and 'unique' conditions" when legislation implementing the constitutional commitment made during Reconstruction to racial equality trenched on an early constitutional commitment to state sovereignty.[326]

A. Compared to What

Whether *Korematsu* or the *Korematsu* regime should be celebrated depends on what the *Korematsu* regime is being compared to. *Korematsu* fares well when compared to the *Costin* regime, which permitted states to make race discriminations on the ground that persons of color were racially inferior to white people.[327] The comparison between the *Korematsu* regime and the *Turner*, *Strauder*, and *Plessy* regimes is more complicated. Each of the latter three regimes has at least one element that arguably better promotes racial equality than the *Korematsu* regime. The *Plessy* and *Strauder* regimes treat race as a banned category.[328] The *Strauder* and *Turner* regimes require Congress to be the first mover in implementing the post-Civil War Amendments.[329] The *Turner* regime treats the Thirteenth Amendment as the textual hook for the constitutional law of racial equality.[330] These differences make a difference, particularly with respect to the law of affirmative action and the state action doctrine. Whether the *Korematsu* regime improved upon these past regimes depends on whether one thinks affirmative action promotes racial equality, whether some version of the state action doctrine is an appropriate limit on the constitutional commitment to race equality, and what institution in general at present is most likely to best implement the constitutional commitment to race equality.

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326. *Id.* at 555; South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (1966).

327. Korematsu v. United States, 323 U.S. 214, 224 (1944); Costin v. Corp. of Washington, 6 F. Cas. 612, 613 (C.C.D.C. 1821) (No. 3,266).

328. Plessy v. Ferguson, 163 U.S. 537, 552 (1896); Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879).

329. *Strauder*, 100 U.S. at 310; *In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247).

330. *Turner*, 24 F. Cas. at 339.

1. Banned Categories

A contemporary *Strauder* or *Plessy* regime by taking a banned categories rather than a strict scrutiny approach to race conscious discriminations would reverse the result in *Korematsu*, at least in theory,[331] and the result in *Grutter*.[332] Both the Japanese exclusion order and affirmative action admissions programs are race discriminations as race discriminations were understood at the turn of the twentieth century. Each burdens or benefits members of one race without providing the same or equivalent burden or benefit for members of another race.[333] As such, both are per se unconstitutional under the *Strauder* and *Plessy* regimes, but may be constitutional under the *Korematsu* regime, which permits government officials to adopt race conscious measures when doing so is a narrowly tailored means of achieving a compelling governmental end.[334] Whether returning to this banned categories doctrine of the *Strauder* and *Plessy* regimes improves upon the strict scrutiny doctrine of the *Korematsu* regime depends on the most likely forms of race conscious legislation, whether governing officials can be trusted to use race conscious measures to promote racial equality, and whether race conscious measures inherently violate constitutional commitments to race equality.

For most of American history, *Plessy*'s banned categories approach, even restricted to race discriminations as opposed to race distinctions, would have better promoted race equality than *Korematsu*'s strict scrutiny test. A few Reconstruction measures aside,[335] race conscious federal and state laws from the ratification of the Constitution to the Great Society were means of maintaining white supremacy and almost always provided

331. *Strauder*, 100 U.S. at 306-07; *Plessy*, 163 U.S. at 552; *Korematsu*, 323 U.S. at 224.

332. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

333. Although, a good lawyer would claim all persons, even white persons rejected on racial grounds, enjoy the benefits of diversity. *See* NATASHA K. WARIKOO, THE DIVERSITY BARGAIN AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES (Univ. of Chicago Press 2016).

334. *Strauder*, 100 U.S. at 306-07; *Plessy*, 163 U.S. at 552; *Korematsu*, 323 U.S. at 224.

335. Lundin, *supra* note 46, at 9.

benefits only to white people or imposed burdens only on persons of color. A banned category standard would have outlawed the common race discriminations that dotted the antebellum American legal landscape and prohibited the Black Codes that former confederate states adopted in the immediate aftermath of the Civil War.[336] A banned category standard applied to all race classifications would have prevented Jim Crow segregation.

Many contemporary progressives have come to prefer strict scrutiny to banned categories because only during the last thirty or forty years have most explicit race conscious measures purported to provide benefits only to persons of color or burden only white persons. A fair case can be made that from a progressive point of view, the benefits of a strict scrutiny review that allows some affirmative action admissions policies in higher education and some minority set-asides in government contracting to pass constitutional muster[337] outweigh the occasional explicit racial profiling by law enforcement officers that might meet that constitutional smell test.[338] Justice Stephen Breyer believes that the contemporary constitutional law of race equality must give educators at the turn of the twenty-first century some leeway to make race conscious decisions. His dissenting opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* asserted:

> The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play.[339]

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336. For the Black Codes, see THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (Univ. of Alabama Press: Tuscaloosa eds., 1965).

337. *See, e.g.*, *Grutter*, 539 U.S. 306; Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1171 (10th Cir. 2000) (holding that a minority set-aside program satisfied strict scrutiny).

338. The issue in most racial profiling cases is providing race consciousness, not determining whether an explicit race conscious profiling policy satisfies the strict scrutiny test. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996).

339. 551 U.S. 701, 861 (2007) (Breyer, J., dissenting).

Strict scrutiny, or even a lesser form of scrutiny, is superior to banned categories from a progressive perspective because race conscious measures may promote as well as frustrate the constitutional commitment to race equality as antisubordination or anticaste.[340] Justice John Paul Stevens articulated the antisubordination conception of equal protection in his *Adarand* dissent. Condemning the judicial tendency to lump all race conscious programs, Stevens asserted:

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market.[341]

Some higher degree of scrutiny is necessary to distinguish the "No Trespassing" sign from the welcome mat, but a banned categories approach throws out the equality promoting baby with the racist bathwater, so to speak.

Conservatives prefer the *Strauder* regime to the *Korematsu* regime. Justice Clarence Thomas sees no differences between the race conscious measures of the late *Korematsu* regime and those of the *Plessy* regime. Giving contemporary "school boards a free hand to make decisions on the basis of race," he maintains, is "an approach reminiscent of that advocated by the segregationists in *Brown*."[342] Contemporary government officials have no more capacity to make race conscious policies than the white supremacists of the past. Thomas asks, "[c]an we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a

340. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1471, 1493, 1540 (2004).

341. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

342. *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring).

relic of the past or that future theories will be nothing but beneficent and progressive?"[343] More to the point, conservatives insist that a banned categories approach recognizes how race classifications are inherently injurious and by their very nature are inconsistent with the constitutional commitment to race equality. Thomas articulates the central understanding of the anticlassification understanding of equal protection when he insists, "[t]he Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans all of us."[344]

Strict scrutiny, these brief observations highlight, suffers from a Goldilocks problem. Progressives find the test too hot. A lower level of scrutiny in the twenty-first century is more than sufficient to root out the racist race conscious measures of the past,[345] while permitting contemporary race conscious measures that promote racial equality. Conservatives find the test too cold. Too often, in their view, strict scrutiny permits university administrators and others to mask old fashioned race discrimination under the guise of diversity.[346] The standard that is "just right" awaits a less racially polarized United States.

2. Congress or Courts

A contemporary *Turner* or *Strauder* regime, by adopting an institutional commitment to legislative primacy, would maintain *Grutter* but reverse *Brown*.[347] Courts in a regime committed to legislative primacy are limited to implementing federal legislation and determining whether federal legislation implementing the post-Civil War Amendments is constitutional. A Supreme Court committed to legislative primacy would sustain

343. *Id.* at 781-82.

344. Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2215 (2016).

345. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) (claiming that Japanese exclusion order was not "reasonably related to a public danger").

346. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 380-85 (2003) (Rehnquist, J., dissenting) (noting that the admissions at the University of Michigan Law School are more consistent with commitments to quotas than commitments to diversity).

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

the University of Michigan's race conscious admissions program as long as the Justices determined that affirmative action violated no federal law.[348] Courts would sustain segregated schools in Topeka, Kansas, for the same reason. Congress as of 1954 had passed no laws prohibiting race segregation in public schools.

The result in *Korematsu* depends on the version of legislative primacy employed by government officials. Both the *Turner* and *Strauder* regimes required Congress to be the first mover. Courts had no independent authority to secure racial equality in the absence of a federal law mandating racial equality. Legislative primacy in the *Turner* regime, at least as understood by congressional radicals, bordered on legislative supremacy. Congress was empowered to determine the constitutional meaning of racial equality as well as the legislation that best implemented the constitutional commitment to racial equality. Courts had no business interfering when federal officials determined that Japanese Americans had to be excluded from the West Coast. Legislative primacy in the *Strauder* regime was weaker. Federal courts had no independent power to enforce the constitutional commitment to racial equality, but they were empowered to determine whether federal legislation was implementing that constitutional commitment. The justices could not interfere with a state exclusion policy that Congress had not prohibited, but federal courts could independently determine whether a congressional exclusion policy met constitutional standards.

Comparing the virtues and vices of the *Turner*/*Strauder* regime's commitment to legislative primacy to those of the *Korematsu* regime's commitment to independent judicial review is difficult. A cottage industry exists comparing judges and elected officials as rights protectors.[349] Much of that literature highlights the relative contributions the national judiciary and

348. *Bakke*'s holding that crucial provisions of federal antidiscrimination law were coextensive with the Equal Protection Clause complicates this analysis. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 406 (1978).

349. *See, e.g.*, REBECCA ZIETLOW, ENFORCING EQUALITY: CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS (NYU Press: New York eds., 2006); JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS (Univ. Press of Kansas: Lawrence, KS eds., 1998).

national legislature have made to racial equality in the United States.[350] On the one hand, independent judicial review was once the only means by which persons of color could obtain relief from a white supremacist regime. A court committed to legislative primacy would not have reached any of the Supreme Court decisions that declared unconstitutional state race conscious measures handed down before the passage of the Civil Rights Act of 1964.[351] On the other hand, independent judicial review at present is at least as much a boon to white persons challenging race conscious laws promoting racial equality as to persons of color challenging race conscious laws preserving white supremacy. Federal law now protects numerous rights of race equality and almost certainly would protect against all manifestations of twentieth century Jim Crow if constitutional doctrine required Congress to pass additional laws prohibiting traditional forms of race segregation. State affirmative action policies and state minority set-aside programs are the two most prominent race conscious measures that contemporary courts committed to legislative primacy would not adjudicate.

Disaggregating judicial decisions and federal laws for the purpose of determining the merits of legislative primacy compounds these difficulties. Some scholars think Supreme Court decisions independently implementing the post-Civil War Amendments inspired federal laws prohibiting garden-variety race discriminations.[352] Michael Klarman's backlash thesis proposes that massive resistance to *Brown* stirred northerners to support such measures as the Civil Rights Act of 1964, and the Voting Rights Act of 1965.[353] Legislative primacy, in this view, ignores how judicial decisions often spur vital congressional actions promoting race equality. Gerald Rosenberg insists that

350. *See, e.g.*, KLARMAN, *supra* note 11; LESLIE F. GOLDSTEIN, THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL (Edward Elgar Publishing: Cheltenham, UK eds., 2017).

351. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); Smith v. Allwright, 321 U.S. 649 (1944); Guinn v. United States, 238 U.S. 347 (1915).

352. *See* ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 241-42 (Wesleyan Univ. Press: Middleton, CT eds., 1982).

353. *See* Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85 (1994).

independent judicial review is a distraction.[354] *Brown* and related judicial decisions neither directly achieved much desegregation nor inspired federal legislation prohibiting segregation.[355] Legislative primacy, in this view, is institutional acknowledgement that federal legislation and executive enforcement are the necessary ingredients of a regime committed to racial equality.

Matters are further complicated when the distinction between strong *Turner* legislative primacy and weak *Strauder* legislative primacy are thrown into the comparative mix. *Turner*'s combination of legislative primacy and legislative supremacy keeps judicial hands off federal affirmative action programs and voting rights laws, as well as off all state race conscious measures that are not forbidden by federal law. *Strauder*'s legislative primacy and judicial supremacy empowers courts to determine the constitutionality of federal laws mandating affirmative action programs and implementing the Fifteenth Amendment, but not race conscious state laws, unless those state laws are prohibited by federal law. The *Korematsu* and *Strauder* regime's commitment to judicial supremacy permitted the Supreme Court to strike down the preclearance formula Congress mandated when reauthorizing the Voting Rights Act of 1965, but the result in *Shelby County* could not have been reached by judges who adopted the legislative supremacy commitments of radical Republicans during the *Turner* regime.

Legislative primacy is most attractive when the dominant national party has the commitment and power necessary to enact comprehensive measures promoting race equality. This combination of commitment and power has occurred only twice in American history and for relatively short periods of time.[356] A burst of civil rights legislation occurred during Reconstruction and during the Great Society.[357] During these periods, elected

354. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 420-29 (Univ. of Chicago Press: Chicago eds., 2d ed. 2008) (discussing "The Fly-Paper Court").

355. *See id.* at 39-169.

356. *See* PHILIP A. KLINKNER, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 79-81 (Univ. of Chicago Press: Chicago eds., 1999).

357. *Id.*

officials could be trusted to implement the constitutional commitment to racial equality at least as extensively (weak legislative primacy) and probably more extensively (strong legislative primacy) as federal courts. At all other times in American history, justices have been more committed to racial equality than elected officials, even when that judicial commitment is quite weak.[358]

Americans may be entering a third period in which some version of legislative primacy is an attractive means for securing racial equality, at least as racial equality is understood by contemporary progressives.[359] Democrats in the 2020 national election gained control of all three branches of the national government. Persons of color make up a substantial part of the Democrat electorate and compose an increasing percentage of the Democrats in the legislative and executive branches of government.[360] By comparison, the judicial branch of the national government for the foreseeable future, the Supreme Court in particular, will be controlled by very conservative Republicans. Five of these Justices are older white men who are not old enough that one could safely predict they will leave the bench in the foreseeable future. Given the dramatically different understandings of racial equality likely to animate the elected branches of the national government and the national judiciary, progressives might be better off returning to the weak legislative primacy of the *Strauder* regime, which did not permit the Supreme Court to strike down state laws in the absence of a federal law prohibiting such measures, and even better off returning to the strong legislative primacy championed by Republican radicals during the *Turner* regime, which vested Congress with the power to determine the constitutional meaning of racial equality.

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358. *See* GOLDSTEIN, *supra* note 350, at 372, 375.

359. This paragraph relies heavily on Jack M. Balkin, *Race and The Cycles of Constitutional Time*, MO. L. REV. (forthcoming 2021), [https://perma.cc/28PQ-GZT3].

360. *In Changing U.S. Electorate, Race, and Education Remain Stark Dividing Lines*, PEW RSCH. CTR. (June 2, 2020), [https://perma.cc/5B94-T2LH]; Anna Brown & Sara Atske, *Black Americans Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RSCH. CTR. (Jan. 22, 2021), [https://perma.cc/5NW5-QGTT].

3. Thirteenth or Fourteenth Amendment

The *Turner* regime that regarded the Thirteenth Amendment as the textual hook for the constitutional law of racial equality might reverse *Korematsu*, but not *Grutter*. The point of the constitutional law of racial equality, from the perspective of the Thirteenth Amendment, is to ensure that former slaves and other victims of racial prejudice are treated as equal members of the American polity. Race neutrality is a means to that end and not the end sought. *Korematsu* was wrongly decided because the exclusion of Japanese Americans from the West Coast was rooted in historical prejudices against immigrants from Japan and other Asian countries. *Grutter* was rightly decided because affirmative action programs are designed to help persons of color become equal citizens, do not reflect historic prejudice against white persons, and are not designed to reduce white persons to second-class citizenship.

The merits of the Thirteenth Amendment law of race equality are partly yoked to the merits of affirmative action. Progressives are likely to celebrate a Thirteenth Amendment law of race equality because the constitutional ban on slavery provides stronger foundations for affirmative action programs than does the Fourteenth Amendment. The Thirteenth Amendment is about caste. Congress is empowered to eradicate slavery and the slave system. The persons who have rights under the Thirteenth Amendment are those who have experienced slavery, the slave system, the badges and incidents of slavery, or the aftereffects of slavery. White persons have no rights under the Thirteenth Amendment because members of that class have never experienced slavery, the slave system, the badges and incidents of slavery, or the aftereffects of slavery. Conservatives are more likely to celebrate a Fourteenth Amendment law of racial equality that is more open to being interpreted as articulating a constitutional commitment to race neutrality or colorblindness. The text of the Fourteenth Amendment provides no special treatment for former slaves or their descendants. All persons, whatever their race, must be treated equally. White persons complaining about affirmative action programs have some history as well as text on their side. The evidence suggests

that the Joint Committee on Reconstruction abandoned a version of Section One of the Fourteenth Amendment limited to race discrimination in favor of the race neutral Equal Protection Clause precisely because the latter was thought to better protect persons of all races.[361]

The merits of the Thirteenth Amendment law of race equality are even more firmly yoked to the state action doctrine. Justices in the *Strauder*, *Plessy*, and *Korematsu* regimes insisted that the state action requirement was a necessary element of the Fourteenth Amendment's law of race equality.[362] The *Turner* regime, which regarded the Thirteenth Amendment as the source of the constitutional law of race equality, had no state action requirement.[363] This state action requirement clearly inhibits efforts to achieve race equality in the United States. Justices have wielded state action when striking down federal bans on discrimination against persons of color in places of public accommodation,[364] when permitting racially restrictive covenants in American housing markets,[365] and when allowing private clubs with state liquor licenses to refuse to admit black members or guests.[366] A Thirteenth Amendment law of race equality might permit the Justices to reach a more racially egalitarian result in each of these circumstances on the ground that private discrimination is a feature of a slave system or a badge and incident of slavery.[367] The *Korematsu* regime's commitment to a state action doctrine that imposes limits on efforts to secure race equality can be justified, if justified at all, only if state action has other constitutional benefits that outweigh the costs that doctrine imposes on efforts to remove the substantial race prejudice vestiges of the American slave system.

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361. *See* Earl M. Maltz, *Moving Beyond Race: The Joint Committee on Reconstruction and the Drafting of the Fourteenth Amendment*, 42 HASTINGS CONST. L. Q. 287, 297, 315 (2015).

362. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883); Corrigan v. Buckley, 271 U.S. 323 (1926); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

363. *See In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412-13 (1968).

364. *See, e.g.*, *Civil Rights Cases*, 109 U.S. 3.

365. *See, e.g.*, *Corrigan*, 271 U.S. 323.

366. *See, e.g.*, *Moose Lodge*, 407 U.S. 163.

367. *See supra* notes 362-66 and accompanying text.

4. Packages

Doctrines, institutional authority, and textual hooks come in packages. Legislative primacy complements the Thirteenth Amendment as the textual hook for the constitutional law of race conscious measures. Congress is better positioned than the Supreme Court to determine what practices maintain the status hierarchies first established by the antebellum slave system and how those status hierarchies are best dismantled without harming other social interests. The number of employees that should trigger antidiscrimination obligations raise questions of constitutional policy best resolved by a legislature rather than questions of constitutional law best adjudicated by a court. The Equal Protection Clause of the Fourteenth Amendment is more conducive to the rule-bound analysis typically performed by justices. The closer to "sameness" the rules for implementing the constitutional commitment to race equality, the better courts are at constitutional decision making. The Justices who adjudicated the cases challenging school segregation could have easily determined that school districts were employing race conscious measures,[368] that the schools for students of color were inferior to the schools for white students,[369] and that in the United States students of color could have never enjoyed equal education in racially segregated schools.[370]

The *Korematsu* regime may be the best package Americans can achieve. That regime offers a Goldilocks solution to the problem of legislative discretion. The *Costin* and *Turner* regimes give elected officials too much power over race conscious measures. The banned categories approach of the *Strauder* and *Plessy* regimes gives elected officials too little discretion. Strict scrutiny with judicial review is "just right." Affirmative action policies pass constitutional muster, as long as they do not use racial quotas explicitly and give individualized consideration to all applicants.[371] The state action doctrine remains a limit on efforts to achieve race equality. Nevertheless, as Terri Peretti has

368. *See* Sipuel v. Bd. of Regents, 332 U.S. 631, 632-33 (1948).
369. *See* Sweatt v. Painter, 339 U.S. 629, 633 (1950).
370. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
371. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

detailed, the justices tend to apply that requirement only when race is not on the table.[372] Goldilocks strikes again, achieving a balance between prohibiting private race discrimination and maintaining individual freedom that is close to "just right."

Comparing the *Korematsu* regime only to the *Costin* regime or the worst features (of which there were many) of the *Plessy* regime forecloses discussion of the contributions the Thirteenth Amendment, legislative primacy, and banned categories might make to the constitutional law of race equality. The *Turner*, *Strauder*, and *Plessy* regimes all promote racial equality in some instances when the *Korematsu* regime tolerates race conscious measures that discriminate against persons of color. The *Turner* regime's commitment to the Thirteenth Amendment facilitates bans on private discrimination. The *Turner* and *Strauder* regime's commitment to legislative primacy gives Congress the leeway to determine how best to dismantle racial hierarchies. The *Strauder* and *Plessy* regime's commitment to banned categories forecloses legislative excuses for race discrimination. *Korematsu* is not the only way, these alternatives demonstrate, even if that way is better than much of what preceded that understanding of the constitutional law of race equality.

372. *See* Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 L. & SOC. INQUIRY 273, 275 (2010).