Freedom and Equality
Discrimination and the Supreme Court

Edited with introductions by
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Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

Volume Introduction

For more than a century, the Supreme Court's docket either ignored or skirted the most profound issues dealing with human freedom and equality. There were, of course, important matters of economic liberty, but these concerns almost always attached to the conditions of white men and corporations; they seldom translated into matters of human freedom broadly understood. The justices, in effect, turned a blind eye to racial, gender, and ethnic discrimination. The Court, for example, never ruled directly on the issue of whether slavery was constitutional and in *Dred Scott* v. *Sanford* (1857) it gave a ringing endorsement to the idea that persons of African heritage had no rights that white men were bound to respect. Throughout the nineteenth and well into the twentieth century it held the view that women were not due rights equal to those of men, in large measure because they were not the physical, social, or political equals of men. As late as 1961, in *Hoyt* v. *Florida*, a case involving the question of whether women could be excluded from juries, a majority of the Court held that such state-based discrimination did not violate the Fourteenth Amendment.

Economic liberty, freedom to contract, and substantive due process of law were important concepts in the development of property rights, but more often than not they were simply not implicated in what we have come to know today as human rights. Only in the last half of the twentieth century did matters of racial and gender equality garner significant attention from the Supreme Court. As the high court in the 1930s abandoned its role in shaping the American economy, it moved increasingly to deal with matters of civil rights. The high court's decisions were in part a reflection of underlying changes in the larger culture represented by the development of the National Association for the Advancement of Colored People and the National Organization for Women, both of which mounted powerful and sustained programs of constitutional litigation designed to compel the high court to pay attention to matters of racial and gender equality. Yet these same issues have also stimulated a profound debate about the role of the justices in dealing with the scope of the government's authority to promulgate affirmative action programs. This wide-ranging body of articles treats all of these issues, doing so from different political and ideological perspectives.

Contents

A HISTORICAL REVIEW OF AFFIRMATIVE ACTION AND THE INTERPRETATION OF ITS LEGISLATIVE INTENT BY THE SUPREME COURT

by

CARL E. BRODY, JR.*

"It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul."[1]

INTRODUCTION

In its recent decision in *Adarand Constructors v. Pena*,[2] the United States Supreme Court determined that federal racial classifications should receive strict scrutiny, thereby making it more difficult for these programs to pass constitutional muster. In an opinion authored by Justice O'Connor, the Majority argued that there is a similarity between affirmative action programs employing racial classifications for the benefit of minorities and invidious racial classifications excluding African-Americans from equal employment opportunities.[3] This interpretation fails to take into account the actuality that federal affirmative action programs emanate from Titles VI and VII of the Civil Rights Act of 1964,[4] which were meant to alleviate discrimination against minorities and women. The Supreme Court has consistently understood that "[T]he alleviation of discrimination against African-Americans was the import of the Fourteenth Amendment."[5] Further, the majority of these

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1. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

2. Adarand Constr. v. Pena, 115 S. Ct. 2097 (1995).

3. *Id.* at 2114. In explaining the newfound principle of consistency, Justice O'Connor explained that, "whenever the government treats any person unequally because of his or her race, that person suffers an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Id.*

4. 42 U.S.C. §2000d (1994) and 42 U.S.C. §2000e (1994) respectively.

5. *See* Miller v. Johnson, 115 S. Ct. 2475, 2497 (1995) (O'Connor, J., concurring) ("[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks."); *Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) ("Its [the Fourteenth Amendment's] aim was against discrimination because of race or color."); Slaughter-House Cases, 83 U.S. (16 Wall) (1873) (while not involving civil right issues, the Court expressly acknowledged the Fourteenth Amendment's intention to end discrimination against African-Americans). *See also* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 135-38 (1969); Robert M. Cover, *The*

programs do not require employers to hire minorities or women,[6] but merely encourage government employers, or private employers receiving government contracts, to treat all citizens fairly by becoming more inclusive in the employment process. The *Adarand* court has lost sight of the spirit of not only the Fourteenth Amendment, but also of the landmark remedial legislation enacted in 1964.

The Supreme Court should respect the original intent of the framers of the Fourteenth Amendment and the Civil Rights Acts, and acknowledge the underlying rationale for affirmative action programs in formulating the appropriate analysis to be used in scrutinizing federal, state, and private affirmative action programs. Particularly, the Court should understand the historical context motivating the enactments of the Fourteenth Amendment and the 1964 Civil Rights Act.[7] Therefore, I argue that by applying a strict contructionist interpretation to the legislative intent of these civil rights laws, the Supreme Court should affirm the underlying rationale for affirmative action programs and return to a more lenient level of scrutiny when analyz-

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Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287, 1295 (1982); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 416-420 (1990).

6. *See, e.g.*, Equal Employment Opportunity Commission, BRIEFING BOOK ON THE STATUS OF EQUAL EMPLOYMENT OPPORTUNITY IN THE AMERICAN WORKFORCE (March 24, 1995) (providing the differing statistical balance as between minorities, women, and white males). "Affirmative action is lawful *only when it is designed to respond to a demonstrated and serious imbalance in the work force, is flexible, time-limited, applies only to qualified workers, and respects the rights of non-minorities and men*." *Id.* [emphasis added].

7. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). This argument was advanced in the Amicus Curiae Brief for the NAACP Legal Defense Fund in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), as it pertains to the Fourteenth Amendment. Schnapper meticulously reviews the arguments advanced for and against the earliest forms of reparations for African-Americans during the Reconstruction Era. *See also*, John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Law,"* WASH. U. L.Q. 421 (1972) (discussing the political realities of the time and explaining how the Fourteenth Amendment was intended to satisfy the abolitionist faction of the Republican party); James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383 (1988) (discussing the history of affirmative action and examining the expansion of these remedial programs). Therefore, the most accurate reflection of the intent of the Fourteenth Amendment must be analyzed in relation to the era of Reconstruction. *See also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (providing a point by point discussion by the legislators enacting the Fourteenth Amendment and their intention to end discrimination against the freedmen); U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT; A REPORT (1970). The report by the Commission explains that the meaning behind the Equal Protection Clause of the Fourteenth Amendment, the Executive Orders of the previous Presidents, the Civil Rights Act of 1964, and the many other civil rights laws, were intended to combat the denial of the right to full equality in the nation. The general tenor of the Commission also shows an understanding of the real discrimination visited against minorities.

ing these programs.[8]

In Part I, I will discuss the history of pre-affirmative action programs. This involves an analysis of the original intent of the Fourteenth Amendment, its related remedial legislation,[9] as well as several of the New Deal Acts prohibiting employment discrimination. Part II will analyze the advent of affirmative action, from its inception with the 1957 and 1960 Civil Rights Acts, and trace its development through Executive Orders 12250 and 12259, which constitute the last major expansion in affirmative action doctrine. Part III will examine the period between 1978 and 1991, where the Supreme Court's attempts to find a consistent interpretation of the Equal Protection Clause and the level of scrutiny applicable to affirmative action programs will be addressed. Part IV will examine *Adarand*,[10] and the reasoning behind the decision. Finally, I will conclude with the direction courts should take in future cases involving affirmative action programs.

PART I: THE PRE-AFFIRMATIVE ACTION ERA

The first major piece of civil rights legislation in the United States, the Thirteenth Amendment, was enacted to abolish slavery.[11] This amendment was the first proactive advancement in race relations in the history of this country, and was designed to end the virulent racism that had always been present. President Lincoln's Emancipation Proclamation not only liberated the slaves in the Confederacy, but allowed slavery to continue in unincorporated areas.[12] Therefore, it was necessary to alter the Constitution in order to put an end to slavery in all parts of the country.

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8. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 309-316 (1991) (explaining the inconsistency in the arguments made by those members of the Supreme Court who are opposed to the constitutionality of affirmative action programs because these are also the same Justices who claim to demand conformity with the original intent of the Framers). Also, as will be discussed later, the Court previously applied an intermediate level of scrutiny when analyzing cases involving affirmative action programs.

9. The Civil Rights Acts of 1866, 1875, 1964, 1965, 1991, and The Freedmen's Bureau Acts of 1864 and 1866.

10. Adarand Constr. v. Pena, 115 S. Ct. 2097 (1995).

11. U.S. CONST. amend. XIII, § 1, provides: "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 granted Congress the power to enforce Section 1. *See* G. Sidney Buchanan, *The Quest For Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 7-8 (1974) (providing an excellent background understanding of the implementation of the Thirteenth Amendment and its purpose).

12. *See* Irving Dillard, *The Emancipation Proclamation in the Perspective of Time*, 23 LAW IN TRANSITION 95, 95-100 (1963) (examining the pre-emancipation proclamation mind set of President Lincoln, as well as his many attempts and strategies to bring the nation

The 1864 and 1865 Freedmen's Bureau Bills

The Thirteenth Amendment, while liberating former slaves, did not solve the problem of racism directed toward newly-freed slaves by their fellow citizens, nor did it address the problem of assimilating the newly-freed slaves into white society. As a result, Congress proposed the 1864 Freedmen's Bureau Bill with the specific intent to provide special assistance to the newly freed slaves.[13] This legislation specifically designated African-Americans as the beneficiaries of programs meant to assist in the transition from slavery.[14] Proponents of the bill argued that it was necessary in order to atone for the past discrimination visited against the former slaves.[15] They also argued that the provision of race specific benefits would allow the former slaves to become self-sufficient, and would prevent them from becoming wards of the nation.[16] Thus, as is the case today, proponents of race conscious measures advanced the ideology that providing measures to assist those who have been and are presently discriminated against benefits the nation as a whole, because these members of society will be able to contribute to the community, and will not exist as liabilities to the nation.

Opponents of the Freedmen's Bureau Bill employed arguments very similar to those who oppose affirmative action today. Their main argument questioned the logic of promulgating legislation that was specifically intended to benefit only African-Americans.[17] The opponents considered it unfair that

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together without actually freeing the slaves). Dillard provides that the Emancipation Proclamation liberated slaves only in Confederacy controlled areas. *Id.* *See also* Jones, *supra* note 7, at 388.

13. The Freedmen's Bureau Bill of 1864 was introduced by Representative Eliot on January 19, 1863. It did not become law until March 3, 1865. Act of March 3, 1865, ch. 90, 13 Stat. 507, 508. *See* PAUL PIERCE, THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION (1904). *See also* W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION (1935) (providing the most extensive review of the Reconstruction Era); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877 122-128 (1966).

14. IRA BERLIN ET. AL., FREEDOM, A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867 (1985).

15. CONG. GLOBE, 38th Cong., 1st Sess. 2800 (1864). *See also* LOUIS HENRY BRONSON, FREEDMEN'S BUREAU A PUBLIC POLICY ANALYSIS (1971) (providing an excellent review of the Freedmen's Bureau debates with a disclosure of the underlying rationales of the proponents and opponents). For the contemporary argument, see Herbert O. Reid, Sr., *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 HOW. L.J. 381, 427 (explaining that race conscious programs are necessary in order to eliminate discrimination and its effects).

16. H.R. REP. NO. 2, 38th Cong., 1st Sess. 572-573 (1864). Rep. Eliot stated "[This bill] will enable the Government to help into active, educated, and useful life a nation of freedmen who otherwise would grope their way to usefulness through neglect and suffering to themselves, and with heavy and needless loss to us." *Id.* *See also* VICTORIA MARCUS OLDS, THE FREEDMEN'S BUREAU AS A SOCIAL AGENCY (1967); BRONSON, *supra* note 15, at 87.

17. H.R. REP. NO. 2, 38th Cong., 1st Sess. 2-4 (1864) ("Why the freedmen of African

impoverished white citizens would not benefit from this bill. Here lies the origin of the notion that legislation should apply to all citizens equally, and that ours should be a "colorblind society."[18] This argument glosses over past and present inequities in favor of a system that allows the continuation of those inequities.[19]

The final version of the bill did not pass until 1865, when it was amended in order to include white refugees as beneficiaries.[20] In practice, though, the majority of the benefits went to freedmen.[21] Therefore, by the end of the Civil War, the nation had taken its first, halting steps to provide special assistance to remedy past discrimination. The constitutionality of providing such programs to one racial group exclusively was still an open question, but the Freedmen's Bureau Bills nevertheless acknowledged the race of the individuals entitled to receipt of the benefits of the programs.

The Fourteenth Amendment

The Fourteenth Amendment was enacted primarily to guarantee the constitutionality of the race conscious measures established in the Freedmen's Bureau Acts, which were subsequently affirmed through the Civil Rights Act of 1866,[22] and to address the problems of racism during the post Civil War

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descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fails to comprehend."). *See* BRONSON, *supra* note 15 (expounding on the deep-seated racial animus imbued in such rationales). *See also* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1320 (1986) (making the contemporary argument that race conscious programs are tantamount to a racial spoils system).

18. H.R. REP. NO. 2, 38th Cong., 1st Sess. 566 (1864) (Rep. Schenck argued that indigent whites should be included because they shared many of the problems confronting freedmen.). *See also* William B. Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1000 (1984) (making the contemporary argument that any type of racial classification is improper).

19. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994) (addressing the use of the primary terms employed in the debate over affirmative action). Morrison states that the term "colorblindness" is used as a red herring to impede efforts to deal with race inequity. It is also deemed a symptom of white guilt.

20. Freedmen's Bureau Act of March 3rd, 1865, 38th Cong., 2d Sess., Ch. 90, 13 Stat. 507 (1865).

21. Robert Benham, *Affirmative Action from a State Perspective: Old Myths and New Realities*, 21 GA. L. REV. 1095, 1100 (1987) (explaining that the Freedmen's Bureau extended benefits to non African-Americans only to provide "essential human needs," (food and clothing), for destitute citizens).

22. Civil Rights Act of 1866 § 1 (current version at 42 U.S.C. § 1981 and §1982 (1994)). *See* BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS PART 1 99-101 (1970). The Civil Rights Act of 1866 was intended to prohibit discrimination, by having jurisdiction over both federal and state law. More importantly though, the Act did not

period.[23] In fact, Congress debated the Fourteenth Amendment and the 1866 Freedmen's Bureau Bill[24] simultaneously.[25] This historical fact illustrates that the two provisions are inseparable. The reasoning behind one is also the reasoning behind the other. In the case of both, the protection of the equal rights of African-Americans was of primary focus.[26] The Fourteenth Amendment was meant to validate race conscious policies found in the Civil Rights Act of 1866[27] and the Freedmen's Bureau Act of 1866.[28]

Amending the Constitution became necessary because of President Johnson's decision to veto the original versions of the 1866 Freedmen's Bureau Act and the Civil Rights Act of 1866. In both cases, the President made classic conservative arguments. Johnson claimed that providing special provisions to former slaves while not providing the same provisions for unfortunate whites was unfair.[29] In his veto of the 1866 Civil Rights Act, President Johnson explained that, in his mind, the distinction between race in the bill would benefit African-Americans while unfairly disadvantaging whites.[30]

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attempt to supersede or abolish any of the race conscious programs present in the Freedmen's Bureau. *See also* Schnapper, *supra* note 7, at 788.

23. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329-30 (discussing how the hearings by the Joint Committee on Reconstruction displayed the many abuses which African-Americans suffered from because of their race. The hearings provided support for those Congressmen wishing to provide strong reform through legislation).

24. 39th Cong., 1st Sess., ch. 200, 14 stat. 173 (1866).

25. HARRY J. CARMAN ET AL., A HISTORY OF THE AMERICAN PEOPLE, SINCE 1865 29-31 (1961). The Amendment and bill were being debated simultaneously in different chambers—while the Fourteenth Amendment was being debated in the House, the Freedmen's Bureau Act was being debated in the Senate; every single senator that voted for the Amendment also voted for the Freedmen's Bureau Act.

26. J. G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION (1961). *See also* Benham, *supra* note 21.

27. Joel William Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 34 (1979).

28. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. REG. L. REV. 1, 27-28 (1992); Douglas D. Sherer, *Affirmative Action Doctrine and the Conflicting Messages of Croson*, 38 KAN. L. REV. 281, 285-88 (1990); Schwartz, *supra* note 20, at 219-21 (explaining that for the majority in Congress, section 1 of the Fourteenth Amendment was intended to elevate the provisions of the 1866 civil rights statute to constitutional standing, thereby maintaining the capacity of the Freedmen's Bureau to execute its mandate). Lori Jayne Hoffman, Note, *Fatal in Fact: An Analysis of the Application of the Compelling Governmental Interest Legislation of Strict Scrutiny in* City of Richmond v. J.A. Croson Co., 70 B.U. L. REV. 889, 893-94 (1990).

29. *See* Schnapper, *supra* note 7, at 769 (citing President Johnson's veto speech).

30. Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1945 (1987) ("President Andrew Johnson's Controversial February 1866 veto message concerning the Freedmen's Burreau Bill illustrated a new emphasis on avoiding paternalism at almost all costs, and certainly at the cost of protecting the freedmen." Johnson claimed that the bill

This rhetoric is very similar to the race baiting tactics currently employed by many of those arguing against present day affirmative action programs, where whites are thought of as being pitted against African-Americans.[31]

Both the Freedmen's Bureau and Civil Rights Act of 1866 were meant to provide the newly freed slaves with some opportunity to become viable members of the society. Achieving this goal necessarily required measures that applied directly to the group that had been wronged for the previous three centuries. Yet when Congress attempted to enact such a remedy, those against providing assistance to the downtrodden determined that the one characteristic that caused the former slaves to be enslaved, i.e., the color of their skin, could not now be used to thwart efforts to ameliorate the condition of ex-slaves. In the twisted, conservative logic, assisting African-Americans might unfairly injure white citizens.

In contrast, proponents of the 1866 Acts supported race conscious measures because such action directly assisted those who had been discriminated against. The proponents openly acknowledged race as a factor and felt that because it had been a factor in the enslavement and continued discrimination against the ex-slaves, it could now be taken into account in fashioning a remedy for nearly 300 years of inequality.[32] Therefore, Congress overrode President Johnson's veto of the Civil Rights Act of 1866, and subsequently passed a new Freedmen's Bureau Bill that was even more race specific than the previously vetoed Freedmen's Bureau legislation.[33] Johnson also vetoed the 1866 Freedmen's Bureau Act, but once again his veto was subsequently overridden.[34]

The Fourteenth Amendment was enacted by the Congress during the same debates and discussions concerning the effective provision of remedies for past and present discrimination for former slaves. Therefore, the Amendment must be analyzed in this context, which acknowledges the effects of discrimination on African-Americans, and must be recognized as being designed to guarantee the constitutionality of race conscious measures employed

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would discriminate against millions of the white race, who are honestly toiling from day to day for their subsistence.).

31. Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 35 (1992) (arguing that whites should not be required to atone for their descendants by being disadvantaged by affirmative action).

32. *See* Christopher Mellevoid, Patterson v. McLean Credit Union: *Denying the Equality of Effect in the Right to Contract*, 11 PACE L. REV. 411, 420-21 (1991).

33. Schnapper, *supra* note 7, at 772-774 (discussing four new race-conscious measures included in the second version of the bill).

34. The Senate voted 33 to 12 and the House voted 104 to 33 to override Johnson's veto. CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (1866). *See also* Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 998 (1983).

to improve their situation.[35]

In 1875, the Supreme Court began to retreat from assisting Congressional efforts to assimilate African-Americans into post-civil war society. The Civil Rights Act of 1875[36] was enacted to provide African-Americans with equal access to public accommodations, including inns, public consequences, theaters, and "other places of public amusement."[37] By its terms, the Act applied to private individuals,[38] and made violations criminal misdemeanors.[39] Several white owners of private hotels, theaters, and railroads had policies excluding African-Americans, and were indicted under the Act. They challenged the Act as an invalid exercise of Congress' enforcement powers pursuant to the Thirteenth and Fourteenth Amendments. In a case that came to be known simply as the *Civil Rights Cases,*[40] the Supreme Court consolidated the challenges for resolution of the issues presented.[41]

The Court first rejected the government's contention that the Civil Rights Act of 1875 could be promulgated under Congress's enforcement power in Section Five of the Fourteenth Amendment.[42] The court noted that the Fourteenth Amendment only applied to *state* action, and could not be used to regulate private conduct.[43] Thus, the court held that Congress had no power to prevent private theater owners, innkeepers, and railroad operators from discriminating against African-Americans.

Second, the Court rejected the proposition that Section 2 of the Thirteenth Amendment[44] gave Congress the power to enact the Civil Rights Act of 1875.[45] Although the Court acknowledged that the Thirteenth Amendment

35. Schnapper, *supra* note 7, at 785 (explaining that the Fourteenth Amendment was introduced into the House in an attempt to improve the situation of African-Americans); Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 159 (1994); Scherer, *supra* note 28, at 288.

36. Ch. 114, 18 stat. 335 (1875) (codified as amended at 18 U.S.C. § 243 (1994)).

37. Civil Rights Act of 1875 § 1.

38. Civil Rights Act of 1875 § 2.

39. *Id.*

40. The Civil Rights Cases, 109 U.S. 3 (1883).

41. One Civil Rights Case was Robinson and Wife v. Memphis & Charleston R. Co., 109 U.S. 3 (1883), where a train conductor refused to allow plaintiff's wife to sit in the ladies car because she was of African descent. *Id.* at 5.

42. 109 U.S. at 18-19. Section 5 provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

43. *Id.* at 12 (citing Virginia v. Rives, 100 U.S. 313 (1880), *Ex parte* Virginia, 100 U.S. 339 (1880) and United States v. Cruikshank, 92 U.S. 542 (1876), all limiting the reach of the Fourteenth Amendment).

44. U.S. CONST. amend. XIII, § 2 ("Congress shall have the power to enforce this article by appropriate legislation.").

45. *The Civil Rights Cases*, 109 U.S. at 25.

not only abolished slavery,[46] but also prohibited the imposition of any "badges or incidents of slavery,"[47] the Court determined that private policies of discrimination against African-Americans did not amount to imposing a "badge or incident" of slavery on them.[48] In so holding, the Court reiterated the notion that Congress should make no attempt to enact race-conscious laws, and that ours should be a "colorblind" society:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[49]

In his lengthy dissent, Justice Harlan argued that the majority failed to acknowledge the intent of the framers of the Thirteenth Amendment to eliminate all "burdens and disabilities which constitute badges of slavery and servitude."[50] Harlan considered overt, private acts of discrimination to be such "badges of slavery."[51] Harlan also argued that the Fourteenth Amendment was enacted to secure and protect the rights of African-Americans as citizens of this country,[52] and that the Amendment vested in them a right of exemption from race discrimination.[53] Harlan explained that the framers of the Fourteenth Amendment intended to confer upon Congress the power to redress "the great danger to the equal enjoyment by [African-American] citizens of their rights, as citizens, . . . [posed], not altogether [by] unfriendly state legislation, but [also] [by] the hostile actions of corporations and individuals in the states."[54]

Justice Harlan thus examined, and would have implemented, the true intent of the Thirteenth and Fourteenth Amendments to provide special legal protections for African-American citizens. The modern-day Supreme Court could learn from Justice Harlan's example, and should have likewise re-

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46. *Id.* at 20.

47. *Id.*

48. *Id.* at 24-25. ("It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.").

49. *Id.* at 25.

50. The Civil Rights Cases, 109 U.S. 3, 35. (1883) (Harlan, J., dissenting).

51. *Id.* at 42.

52. *Id.* at 47.

53. *Id.* at 49-50.

54. *Id.* at 52.