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D. Marvin Jones
University of Miami School of Law, djones@law.miami.edu

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Articles

Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams

By D. Marvin Jones*

Full many a gem of purest ray serene
The dark unfathom'd caves of Ocean bear:
Full many a flower is born to blush unseen,
And waste its sweetness in the desert Air

Introduction

IT WAS IN THE 1960s that the federal government officially set its face against discrimination in employment. This new equal employment policy represented, within the deep symbolism of our civil rights discourse, a national effort at alchemy. It was a legislative policy to trans-

* Associate Professor, University of Miami School of Law. B.S., 1973, Union College; J.D., 1976, New York University. I wish to thank the many friends who have helped with encouragement and criticism, hard questions and helpful suggestions. Many thanks, therefore, to Steven Winter, Linda Greene, Pat Gudridge, Richard Hyland, Michael Fischl, Mary Coombs, and Lesley Blank. I am also grateful to Brian Scher, Lisa Butler, and Joseph Alt- schul for valuable research assistance.


3. The law generally, and civil rights law in particular, not only imports rules of conduct, it signifies for individuals structures of value and meaning. See W. Hamrick, AN EXISTENTIAL PHENOMENOLOGY OF LAW: MAURICE MERLEAU PONTY 129-40 (1987). The central “meaning” of 1960’s equal employment laws in these terms is the sheer fact that dis-
mute the crude laissez-faire terms of employment law into the terms of equality, a kind of golden rule.

Under the new policy, moral precepts of biblical antiquity were to infuse the federal statutory framework with resplendent new legislative prohibitions and commands. A reawakened national conscience was to become the forensic equivalent of the philosopher’s stone: something to transform the formal structure of employment law from its base, ethically unrefined common law elements into a structure that reflected the bright, shining egalitarian ideal.

The civil rights decisions of the Term ending in 1989 (hereinafter “1989 Term”) represent quite simply a reverse alchemy. The decisions, to be sure, stopped short of expressly overruling key precedent. Yet, through an ingenious verbal sleight of hand, the Court has altered antidiscrimination law in fundamental ways. Doctrinally, prior to the 1989 Term, there were two theories of discrimination. One theory prohibited discrimination in the form of intentional acts. A sister theory presumptively prohibited employment decisions which had disproportionate impact upon blacks, regardless of intent. This doctrinal framework, in the
teeth of *stare decisis*, has been cast aside: the two theories are collapsed into a single intentionalist model.

The deeper change, however, is at the level of what Rorty calls our "final vocabulary."7 Doctrine almost always paints over and attempts to reconcile competing conceptions of the social world. In antidiscrimination law, we are engaged simultaneously in a contest between competing ideas about what equality is, and competing ideas about what the role of law is: indeed what law is. The two theories of discrimination reflected an open ended "final vocabulary" that included both positive and moral categories, a notion of law both as a process of adjudication and as a social institution. Between the two poles of the theories, there was room for discrimination law to refer both to allocation of rights between individual employers and employees, and to a striving after national ideals.

The Court has in effect made this open-ended vocabulary disappear. It has done so, not by eliminating the words equality or discrimination, but by fixing narrow meanings to them. We are required to discuss and think about the discrimination phenomenon in only one way. The Court not only limits the options of civil rights plaintiffs, but through the sorcery of a rhetorical strategy, deprives us of the vocabulary we need to conceptualize our rights.

Of course, as I write, there are still faint rumblings of curative legislation in Congress.8 The problem is that, even if the current political inertia could be reversed, the depth of the Court's conceptual shift militates against a quick legislative fix.9

What mediates between the Rehnquist Court's perception of itself as conservative, and the implicit activism of the Court's reinterpretation of the discrimination idea, is a set of blinding assumptions I call the "neutrality mask." There are three pieces to the mask.10 One piece is that the

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7. R. RORTY, CONTINGENCY, IRONY, SOLIDARITY 73 (1989). "All human beings carry about a set of words which they employ to justify their actions, their beliefs . . . I shall call these words a person's 'final vocabulary.' . . . It is final in the sense that . . . these words are as far as he can go with language." *Id.*


9. Because the issue goes to the heart of how we conceptualize discrimination, legislation is only a partial answer. This is true because whatever legislation is passed will be filtered through the interpretive lens that the Court has donned.

10. H. GATES, FIGURES IN BLACK 168 (1987). The Court's use of a figurative conceptual mask parallels the use of the "doll-wood" mask in the African tradition. That is, "the mask is a vehicle for the primary evocation of a complete hermetic universe . . . an autonomous world, marked both by a demonstrably interior cohesion and by a complete . . . [indifference] to exterior mores or norms." *Id.*
Court is enunciating procedure and not substance. Procedure, the Court implies, is the opposite of policy or value choice, and the two categories do not overlap. Another piece of the mask is that exclusively positive approaches to law are somehow objective. And the final piece of the mask is that formal equality marks the proper boundary of the equality ideal. The mask is not constructed out of wood but rather out of rhetorical constraints, by the fixed meanings the Court gives to words, by the rigid categories the Court assumes everyone should use, and by the way it assumes and suggests that these meanings and categories are natural or at least inevitable.

My goal in this article is first to reveal within the civil rights cases that the mask is there: that the Court has radically changed civil rights law to fit its own assumptions, and that the Court covers up the fact that it is indulging in its own assumptions through a rhetorical strategy. (In describing the Court's constraints as a mask, I do not suggest that the Court is intentionally obscuring anything. The "mask" is simply what I see from an external standpoint. From the internal standpoint of the Court, nothing is being obscured, no constraints are being imposed, rather the Court is "recognizing" something that is "objectively" there.)

The discussion is organized as follows. In Part I, I attempt to suggest from where, as a point of origin, the Supreme Court's approach is derived. I locate the wellsprings of the Supreme Court's current jurisprudence within a set of classical legal dichotomies such as the dichotomy between morality and positive law. I point out that these same classical legal dichotomies mirrored, and were nearly coextensive with, moral rationalizations for slavery and Jim Crow. As such, this classical legal framework was in deep conflict with national ideals and with a national aspiration for the legitimacy of its political/legal order. (Here one must read Myrdal\textsuperscript{11} and Habermas\textsuperscript{12} together).

I also examine the philosophical sources of this classical legal framework: a nineteenth century judicial philosophy referred to as judicial neutrality or judicial restraint. I try to point out that this notion of judicial neutrality proceeds from circular assumptions about the nature of legal interpretation and has only the most tenuous claim to logical coherence. Thus, I begin by identifying the Court's current rhetoric of neutrality as both historically suspect and conceptually flawed.

\footnotesize{\textsuperscript{11} See G. MYRDAL, AN AMERICAN DILEMMA; THE NEGRO PROBLEM AND MODERN DEMOCRACY (1962).}
\footnotesize{\textsuperscript{12} See J. HABERMAS, LEGITIMATION CRISIS (1975).}
In Part II, I discuss how in the context of the 1989 Term's civil rights cases, the old model of judicial neutrality is twisted by the Rehnquist Court: notions of neutrality and restraint are used as a guise for an activist attack on liberal civil rights precedents. I suggest how the Court reinvents and reconfigures classical assumptions about judicial decision-making and imposes them as rhetorical constraints on notions of equality and law. In Part III, I take a look at historical parallels which I find uncanny. In Part IV, I suggest why the Court's current approach, apart from its internal contradictions, fails to provide society with what it needs to transform itself and change.

I. Stories of Origin

For this mode, which we must call the spirit, breathes through the universe and does not touch it; touches only the dark things, held prisoner, incommunicado, touches, judges, sentences and passes on.  

A. Myth, Irony, and Divided Souls

America has dreamed a dream. That dream was America's concept of itself: A nation distinguished at the level of ideals by a special Lockean commitment to equal rights.

14. Genesis 40:8. "And they said unto him, We have dreamed a dream, and there is no interpreter of it." Id.
15. See J. Locke, The Second Treatise of Government 15 (T. Peardon ed. 1952) (1st ed. 1690). Locke was a great proponent of natural law, particularly the contractarian premise that just governments had power coterminous with the consent of the "the commonwealth." Both the Declaration of Independence and the Constitution resonate with Locke's ideas.

There is also, lurking as a presupposition within Locke's moral theory and hence our own constitutionalism, an ideal of reason which would be later delineated by Immanuel Kant. See I. Kant, Fundamental Principles of the Metaphysics of Morals (T. Abbott trans. 1949) (1st ed. 1785). From a Kantian point of view, moral principles were discoverable by pure reason and were absolute (imperatives) rather than relative or subjectivist; as such, they were universal in application. Kant seems to echo throughout the American ethic. See, e.g., The Declaration of Independence para. 2 (U.S. 1776) (Jefferson's phrase about man's "inalienable rights").
Americans, historically, saw themselves united by an egalitarian spirit that invested their political institutions with life and meaning. Thus imbued they, like the mythological Prometheus, presumed to bring light unto other nations. Ironically, this grand egalitarian spirit — so Promethean in character — was consigned by traditional choices of the white majority to a Promethean fate.

16. The centrality of the shared equality ideal to notions of national unity is attested to historically by Jefferson’s, Lincoln’s, and later Lyndon Johnson’s appeal to this value when national unity was threatened. They each found, in a shared reverence for equality, a common normative heritage which bound Americans together and took precedence over regional, ethnic, or racial loyalties. See The Declaration of Independence para. 2 (U.S. 1776) (“We hold these truths to be self-evident that all men are created equal and endowed by their creator with certain inalienable rights.”) (emphasis added); The Gettysburg Address of President Abraham Lincoln (1863) (“Four score and seven years ago our forefathers brought forth upon this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal.”) (emphasis added); Address on Voting Rights by President Lyndon Johnson (March 15, 1965) (“This was the first nation in the history of the world to be founded with a purpose, the great phrase of that purpose still sounds in every American heart, North and South: ‘All men are created equal.’”) (emphasis added).

All sought to use an appeal to a shared reverence for equality as a means of not merely evoking, but defining, a common national purpose. See also Ball, Stories of Origin and Constitutional Possibilities, 87 Mich. L. Rev. 2280, 2280-85 (1989) (add parenthetical explanation).

17. Spirit is to ideal, here, as Plato’s objects were to shadow. See PLATO, THE REPUBLIC (B. Jowett trans. 3d ed. 1892). The notion is that, despite the abstract ambiguity of the equality ideal, there is a reality behind it, a moral reality that casts its shadow as an ideal. I locate this “spirit,” a collectivizing, animating force, at the center of America’s national consciousness. The spirit breathes through American history in the professed beliefs of Americans like Jefferson, in canons like the Declaration of Independence, without touching American institutions, yet touching American thought in the most interior way, creating a kind of moral center, the point where all political and legal discourse begins.

18. Prometheus in the Greek myth was a Titan who stole the secret of fire from heaven and shared it with Man. For his crime, Zeus punished him by shackling him to a mountain where an eagle tore constantly at his flesh. Fire, of course, represents wisdom or enlightenment, which is the sine qua non of civilization or, in Locke’s terms, a sine qua non of a legitimate political order. See P. SHELLEY, Prometheus Unbound, in SHELLEY’S PROMETHEUS UNBOUND 115-301 (L. Zillman ed. 1959). It seems there is a parallel duality within the American dilemma. Prometheus is constrained because the “enlightenment” that he dares to provide Man is a threat to Power. Similarly, the egalitarian ideal is constrained as a threat to the power structure of the white majority which historically was linked to institutions, like slavery and Jim Crow, which were imperiled by equality norms.

Finally, the fate of Prometheus is not merely irrational but represents the dialectic between rationality or wisdom and brute force. If, as Kant could be extrapolated to suggest, any reasoned inquiry will show that moral fairness to blacks is a moral imperative, the treatment of blacks was against reason and mirrors the mythical dialectic between rationality and the brute force of majority political will. See Aeschylus, Prometheus Bound, in SEVEN FAMOUS GREEK PLAYS 5-42 (W. Oates & E. O’Neill ed. 1938) [hereinafter Aeschylus].
As in the ancient story, the spirit remained immortal — in the realm of America's legitimating myths. Yet, again paralleling the old story, the spirit was historically constrained. It is historically constrained by traditional racial policies within the high, ethereal realm of moral aspiration, removed from the realm of moral choice.

The American imagination, in its dialectical machinations, had created two worlds, and Americans lived in both at once. There was one world in which Americans made practical decisions, conducted business, and created institutions. This was the world of deeds. Here the majority's desire for its own self-interest was enthroned, and higher truths remained on a scaffold constructed by highly rationalized injustice.

20. I use “myth” here in two senses: one is as a story or narrative that helps explain the world; the other is as a fairy tale or fantasy that covers up the world's profane aspects, e.g., the story of the stork bringing babies. In the first sense, I refer to the narrative about equality that occurs as a theme in the story of how this nation was founded and how American society came to have it's formal emphasis on “equal justice under law.” (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”) See Cover, Foreward: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983). This narrative is a “legitimating myth” in that it makes it possible for Americans to think of themselves both as democratic and morally whole. As narratives, these stories indeed, as Cover suggests, connect American institutions to the normative world or nomos. Id.

These stories about egalitarian traditions are myths in the fairy tale sense to the extent that they are deeply contradicted by institutions like chattel slavery and segregation. In this sense, the equality story operates as a kind of psychic detour on the bridge between nomos and historical American institutions to connect Americans to a wishful, fictive reality. The equality narratives are signs by which Americans created a false national identity — a fictive self — to mediate between themselves and the normative world they created. Id. at 5-11.

21. An ongoing constitutional debate follows the fault line between the “two realms”: moral choice and positive institutional commands. On the surface, the debate has been the extent to which the law is positive versus the extent to which “moral” claims should find expression. Cf. R. Bork, The Tempting of America 252 (1990) (For Bork, the Constitution is essentially positive, the textual equivalent of Austin's “command of the sovereign.” “The [positive] principles of the actual Constitution make the judge's major moral choices for him. When he goes beyond such principles, he is at once adrift ...”). But see R. Dworkin, Taking Rights Seriously 147-49 (1977) (“Our constitutional system rests on a particular moral theory, that men [sic] have moral rights against the state ... that argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place.”). Id.

22. This comfortable moral cosmology can be explained in Freudian terms. Lawrence, The Id, The Ego, and Equal Protection, 39 Stan. L. Rev. 317, 326 (1987). Lawrence suggests that this framework for reconciling normative conflict begins in the unconscious as a defense mechanism against anxiety. This “strain theory” would explain the conception of the two worlds as a “symbolic outlet” for “emotional disturbances generated by social disequilibrium.” A shared “ideology” (moral cosmology translated into the political terms) flows from this “because the disturbances ... are common to all ... so ideological reactions will tend to be similar, a similarity only reinforced by the presumed commonalities in 'basic personality structure' among members of a particular culture.” Id.

23. See W.E.B. DuBois, The Souls of Black Folk 23 (1973). The image is from the sorrow song which begins the second chapter:

Careless seems the great Avenger
But there was another higher world or plane in which Americans interpreted their history, professed their beliefs, and justified themselves. This is the world of the Word.24 On this elevated plane, the spirit was perennially renewed. Here, the concerns of one's own heart, one's private ideals, could be expressed. This division of the moral universe into separate planes mirrored an inner dividedness, a fundamental ambivalence about moral identity. It reflected a divided soul.25

The moral fault line that divided the social world into separate realms for the public and the private reflected a reciprocal and reinforcing dichotomy between the public and the private self. Resting in the interstices of this interface was a division between the self that considered its own interest and the self that considered the rights of others.26

Id. One is immediately struck by the symmetry between the moral paradigm of Aeschylus and that which DuBois depicts. See Aeschylus, supra note 19.

24. See Cover, Violence and the Word, 95 YALE L.J. 1601 (1986). Cover identifies a tension between judicial interpretation, the word, and the effect of interpretation to cause violence in the real world. In Cover's dichotomy, the law represents the sacred and its effects the profane. In fact, the law is the means by which society rationalizes the profane violence decreed by courts. Id.

I identify a similar dichotomy between sacred and profane worlds, but I see the law traditionally as the handmaiden of racism. The law, historically, is itself profane. In these terms, society needed to rationalize not merely the effects of the law but the law itself. I focus on this prior, fundamental tension between law and democratic (i.e., egalitarian) values.

25. Perhaps the classic instance of this conflict is Jefferson, the founder. "I tremble for my country when I reflect that God is just; that His justice cannot sleep forever . . . ." H. ARENDT, Civil Disobedience, in CRISES OF THE REPUBLIC 60-61 (1964) (quoting T. JEFFER-SON, NOTES ON THE STATE OF VIRGINIA, Query XVIII (1781-1785) (emphasis added)). No less internally divided were judges who returned slaves, against their moral beliefs, premised on a notion of the superiority of law over moral norms. Similarly, the Garrisonians were abolitionists, but they were so tied to formalistic distinctions between law and morals that they agreed to a textualist construction of the Constitution as pro-slavery and accepted the institution as formally legitimate. See R. COVER, JUSTICE ACCUSED 1-15, 150-54 (1975).

26. The self/other dichotomy is the axis around which traditional political theory organizes its understanding of rights and power. Everything proceeds from the assumption that the individual is the proper unit of legal or moral inquiry. The self/other dichotomy is of course a construct.

The individual is not to be conceived of as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime
Along this moral dividing line an array of other normative conflicts could be reconciled. Personal moral values were considered separate from demands of positive law; claims of equality were separate from the mandate of majority will; the aspirational idea that America was democratic was separate from the historical fact of slavery, Jim Crow, and racial caste.

There was the hiatus of radical reconstruction. This aside, however, the spirit historically remained confined within the lofty, abstract plane of principles professed, bound there by tethers of majoritarian will that moral aspiration alone could not remove.

But there was a hopeful, pregnant period, perhaps the second Reconstruction, between the end of World War II and the advent of the Rehnquist Era. Here again there was a break with history. In that erstwhile era, so recent yet so distant in its moral tone, traditional, collec-

27. Eric Foner dates this "radical reconstruction" period from 1867 (when "radical republicans" in Congress "swept away Southern governments and fastened black suffrage upon the defeated south") to 1877 (the date of the Hayes Tilden Compromise when, in exchange for favorable resolution of a dispute over the Presidency, the Republicans agreed to remove the Northern troops which had enforced civil rights laws). During Reconstruction, a panoply of civil rights laws were passed, blacks were elected to office, and began numerous businesses. These black gains were largely swept away after 1877. See E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, at xix (1988).

28. I locate the problem at two levels: the level of individual moral choices, and the level of the majority's political decisions about how it ordered its institutions. Cf. G. MYRDAL, supra note 11 (discussing the problem in a sociological context). See also R. COVER, supra note 25, at 147-48 (discussing the inner conflict within antislavery judges).

29. See D. BELL, AND WE ARE NOT SAVED 6 (1987) (suggesting parallels between the period following the Civil War and the present era in terms of civil rights laws being passed as "symbols of redemption," then abandoned when the laws do not by themselves bring redemption).

30. William Rehnquist was appointed Chief Justice by President Reagan on September 25, 1986. Until Justice Powell's departure in 1987, however, the Court was still tenuously moderate to liberal with Powell often acting as the swing vote. Powell was replaced by Anthony Kennedy on February 11, 1988, with devastating effect. The Court has pursued a dramatically conservative course since then. By "Rehnquist Court" I refer to the Court's strong conservative bent evident since Kennedy's appointment. See Chemerinsky, The
tive ambivalence yielded to a tentative consensus to redeem the American soul from the sins of the past.

Of course, America remained in conflict about the perennial, polycentric problem of race. But mediating between liberal and conservative, between the defenders of the status quo and the insurgent forces of change, between those under the banner of gradualism and those who wished to move with less deliberation and a little more speed, was a shared assumption that America's thumb rested on the scale of justice in favor of the civil rights of blacks.

The Supreme Court, always the mirror of national consciousness, reflected the political context of which it was a part: there was a slim, fragile, liberal majority on the Court.

In those days, questions about affirmative action and other civil rights issues — essentially political issues which were translated by a uniquely American constitutionalism into legal disputes — were the focus of grand court battles just as they are now. But, on these substantive civil rights issues, the Court followed a path, though sometimes erratic, that roughly tracked the inertia of its liberal consensus. Within the brief moment of this liberalism, the ideal of equality found doctrinal expression in a legion of minority protective landmarks ranging from Brown v. Board of Education to Griggs v. Duke Power Co. For a time, through

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31. "Polycentrism" refers to problems which are "many centered, much like... a spider web, in the sense that resolution of a polycentric dispute would necessarily have broad repercussions." See Fiss, The Supreme Court, 1978 Term — Foreward: The Forms of Justice, 93 Harv. L. Rev. 1, 39-40 (1979).


33. By civil rights I refer to rights embodied in legislation, as opposed to common law, that guarantees equal treatment of blacks. In modern terms, civil rights encompass restraints upon both government and private action. This must be contrasted with "civil liberties" which connotes a panoply of "natural rights" of the individual, expressed in constitutional restraints on governmental power (e.g., freedom of speech, religion). Civil rights can also be distinguished from political rights which refer generally to rights of political participation (e.g., the right to vote). See Black's Law Dictionary 223, 250, 1043 (5th Ed. 1979).

34. 347 U.S. 483 (1954).

35. 401 U.S. 424 (1971). Griggs held that an employment practice or test although
the redemption of a new civil rights approach, America's Promethean spirit was unbound.

In that era, the chief slogan of the conservatives on the Court, carried into constitutional battles like a sword of righteousness against the social claims of the liberals, was the call for judicial self-restraint. Armed with the idea of judicial self-restraint, the conservatives sought to create within the law an empire of reason distinct from politics and impenetrable to sentiment and socio-economic concerns. By keeping the territory of law free of the encroachments of passion and politics, certain fundamental principles could be kept safe: procedural fairness, and even justice as fairness, a notion of value neutrality that foreclosed ideological leaning to one side or another in a constitutional debate. Thus, there was a sense that in defending the judicial citadel against the instrumentalism of social reformers, something very noble was being preserved.

What is most interesting about the jurisprudence of the Rehnquist Court in the area of civil rights is that, much like the mythical Camelot's Arthur, the Court has lost its sword. Ideas like judicial self-restraint and respect for precedent have lost their power. And the Court, in the major civil rights decisions of the 1989 Term, simply broke with those constraints to strike down precedents they did not like. To the extent that the major decisions of the 1989 Term are instructive, judicial self-restraint, which served as an organizing principle of judicial decision-making, has been largely discarded in the area of civil rights. In going about the task of interpreting the Constitution in the civil rights context, principles that required judges to be value neutral have been replaced by

facially neutral was nonetheless facially discriminatory under Title VII if it adversely impacted upon blacks. Id.

36. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964) (holding state legislative districting scheme constitutionally invalid as a denial of equal protection where black votes were, in effect, diluted by preservation of district boundaries that no longer reflected geographic distribution of population). In dissent, Justice Harlan invoked the classic command of original intent: "the Equal Protection clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures." Id. at 590-91 (Harlan, J., dissenting). See also United Steelworkers v. Weber, 443 U.S. 193 (1979) (holding that Title VII does not prohibit voluntary affirmative action programs by private employers). In dissent, Justice Burger accused the Court of ignoring both the constraints of the text and the proper parameters of judicial review. "I cannot join the Court's judgment... because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers." Id. at 216 (Burger, J., dissenting).

37. Through either seduction or enchantment, Arthur is lured aboard a "silken ship," imprisoned, and deprived of his sword, Excalibur, for a time. R. CAVENDISH, KING ARTHUR AND THE GRAIL 50-53 (1978). The sword was given to a rival knight whom Arthur was required to fight in order to regain his freedom. Id. As Excalibur represents Arthur's virtue, he is in a real sense in conflict with himself. Id.
principles that require judges to protect certain substantive and interpretive values.

These principles can be reduced to two guiding assumptions. First, the Rehnquist Court, using a rhetorical strategy, postulates that discrimination can only be defined one way. In my view, discrimination is defined with reference to some notion of equality. As will be seen below, there is a dividing line that separates formal equality and real equality. We will see that it is the same line that separates fault-modeled notions of intentional wrongdoing from broad social patterns of racial exclusion.

For the Rehnquist Court, the boundary of this dividing line defines how far courts may go in addressing discrimination claims. If plaintiffs can show a causal nexus between intentional acts and patterns of exclusion, fine. But where courts are confronted with a statistical picture of racial imbalance, no matter how extreme, unless that pattern can be connected to a wrongful intent, no discrimination can be found. Where the Warren and Burger Courts' precedents fall outside of these fixed boundaries, the Court has simply revised the doctrine. Precedent is tested by a moral or normative standard: Does it fit within the contours of the notion of formal equality? To be sure, the Court's modus operandi has been to make its normative revisions in what is traditionally denominated as a procedural context: What standard of review is appropriate in a minority set-aside program (Croson)? What theory of proof may be used where subjective employment practices are involved (Wards Cove)? What are the limits of subject matter jurisdiction under 42 U.S.C. § 1981 (Patterson)?

The difficulty is that procedural frameworks — e.g., standards of review, theories of proof, etc. — are the vehicles of social policy and normative choice. By raising the standard of review or level of scrutiny, by narrowing the theories of proof which are available, by altering the procedural framework in crucial ways, the capacity of the law to achieve its normative goals can be easily circumscribed. The Rehnquist Court's

38. By "rhetorical strategy" I mean that the Court, while purporting to define concepts, is really engaging in a kind of tactical wordplay. It is not defining terms but merely placing artificial constraints on the "use of legal concepts." See R. DWORKIN, LAW'S EMPIRE 32 (1986). Dworkin argues that law is not a plain fact whose contours can be observed, but something which we arrive at through a process of interpretation. Some legal theories nonetheless speak of law as a plain fact or objective reality. Dworkin points out that, from what we know about different "theories of meaning, plain fact," theories define only a particular way of talking about law, not the law itself. Id.

decisions represent quite simply a sweeping, intensely ideological rejection of the most basic normative assumptions of the liberal approach to civil rights. This sweeping substantive rejection is only thinly veiled by the nominal procedural context in which the rejection occurs.

This brings us to the second guiding assumption: that interpretation in the area of equal rights can only be done one way. Precedent is tested again: Does its underlying interpretive structure fit within the contours of the Rehnquist Court's rigid notion of law?

The traditional interpretive approach assumed a sharp distinction between law and policy, judicial decisions and moral choice, dichotomies which collapsed for the Warren Court in Brown v. Board of Education. Brown inaugurated not merely the beginning of a new era of racial equality, but a progressive interpretive approach in which social needs and moral imperatives — the need to close the gap between myth and reality in civil rights — became the arbiters of what was required in a given case.

The Rehnquist Court, in the first instance, is making an all out assault on Brown and its prodigy. Of course, it is not the surface principles of Brown but the interpretive method of Brown which is under assault. And it goes further. Beyond simply discarding precedents premised on a progressive interpretive approach, it seeks to reintrench, once and for all, the old interpretive dichotomies: positive law vs. moral claim, public vs. private responsibility, the command of original intent vs. the ideal of

42. 349 U.S. 294 (1955).
43. Brown redefines the method of inquiry by situating the Court in the real world as opposed to the formal reality of pure legalism. First, it removed certain adjudicative blinders to what was going on in society. In Brown, sociological data scorned by the formalistic jurisprudence of the past became crucial. The focus of the inquiry shifted from a search of what the fourteenth amendment meant — the Court in Brown simply says that the actual intent of the fourteenth amendment is unclear — to the needs of society, more specifically, inter alia, to protect young "hearts and minds" from the destructive effects of segregation.

Second, it develops a notion that constitutional rights — here equality — have moral as opposed to merely legal content, thus demanding an inquiry into what is right as opposed to what the law requires. Through the window of this morally grounded notion of equality, the Court was able to focus on real world concerns: the notion of equality in Brown encompasses a paramount concern for black children as a group, and the effects and consequences of discrimination on black children. In the Brown Court's model of equality, group rights to equality were morally superior to individual rights of the white citizens to express contrary associations; and the substantive evil of injury to black children — a concern for result — was superior abstract legal questions like whether the intent of the framers allowed them to intervene.

44. These "interpretive dichotomies" are correlative of moral dichotomy and/or moral dilemma. If law is only positive, lacking moral content, how does law legitimate itself? See J. Habermas, supra note 12, at 97-99. If, as a matter of public obligation, one must obey the will of the majority, how does one exercise "freedom of conscience"? Moreover, as noted
equal rights. This it attempts, again, through a rhetorical strategy: through the meaning it gives to the word law, and how it juxtaposes its positive concept of law with its above-mentioned concept of discrimination.

Discrimination is defined first of all as a legal term, relying on a notion of law in a strong sense. In searching for the meaning of statutes and constitutional phrases bearing on this “legal” concept, we are to be positive rather than normative in our approach. Jurisdictional concerns trump social claims, the command of text or original intent (the original command of the sovereign) trump considerations of historical or real world context.

For example, in the past, chronic racial segregation might have been held illegal and unacceptable viewed through the lens of history and social context. It will not meet the current interpretive standards. Similarly, interpretive approaches that relied upon moral inquiry, that relied upon concepts of stigma or the need to eradicate caste, are foreclosed.

Through a rhetorical strategy, by the way it cabins the meaning of words like equality and law, the Court seeks to impose its own conservative views on discrimination as pre-emptive of all other views. The Court imposes ideology by the very constraints it imposes on language itself.45

The irony, of course, is that on the one hand, the Rehnquist Court seeks to redefine the law in the image of its own conservative values. On the other hand, it seeks to do so by throwing out precedent, and by engaging in an activism that is the antithesis of the classic “restrained” conservative approach. It is trapped in an internal contradiction. It has entangled itself at the interface between values and procedure in a dilemma which mirrors the historic conflict between the values Americans professed and the moral choices Americans made. It has entangled itself in an interpretive dilemma: a conflict between an avowed adherence to the norm of neutrality (values professed) and a newfound activism (moral choice).

above, these legal dichotomies, ironically so threadbare of moral legitimacy, historically were instrumental, conceptual devices in rationalizing institutions of slavery and segregation.

45. The Court builds these linguistic constraints in steps. The Court begins by assuming fixed meanings for certain legal terms, like discrimination, which “meanings” express narrow ideological values. The Court then presents these assumed meanings as a system: as principles related to one another in a coherent unity of one “objective” legal order. By using the Court’s artificial language of equality over and over, we cease to be conscious of ourselves as expressing arbitrary constructs. As the workman’s tool becomes part of his arm, so both the language and the ideological artifice within it become part of us. This system of meanings becomes indistinguishable from a system of linguistic rules in which the fixed meanings of words appear as something natural, objective, value free. See W. Hamrick, supra note 3, at 138.
The conflict here is not merely aesthetic — a matter of mere inconsistency — it is ultimately moral. The Court professes to continue to believe that discrimination is wrong, while at the same time rejecting the very precedents which would allow courts to consider situations involving patent, gross inequality in real world terms. The Court sees that discrimination is wrong, but does not see the validity of precedents and theories that would allow us to address that discrimination in the real world. (This is the old dilemma reborn.) The Court achieves this double vision by nominally retaining the surface principles of the old civil rights decisions, while throwing out entirely the moral content of those decisions. In principle, the Court is against discrimination, but discrimination to the Court means something very specific, very narrow, and ultimately empty of value to blacks.

If the Court’s rhetorical constraints on equality create a double vision, the Court’s rhetorical constraints on interpretation mask the dilemma altogether. In the Court’s vocabulary, legal interpretation has nothing to do with morality. Judges ought not to consider moral imperatives when searching for the meaning of terms like equal protection. As such, there can be no dialogue about the conflict between legal institutions and values because the question of such conflict appears incoherent to the Court. This approach to the meaning of legal discourse prevents us from being able to see, much less discuss, the gap between egalitarian ideals and reality. As such it brings the original dilemma back to life.46

What is it that blinds the Court to its own ideological narrowness? And how can it, in substance, refuse to respect precedent and still perceive itself as a conservative Court?

What has happened is nothing less than a paradigm shift in which the notion of restraint — whose operative concept was neutrality — has been redefined. The old model of neutrality looked inward. It asked judges to examine their interpretive processes to make sure that they were “following the rules laid down.” Following precedent was one of those rules. The new model, the model of false neutrality, looks outward. It looks not at the self, but at the liberal others: Are they imposing only a neutral, formal notion of equality? Does the precedent they rely upon have a foundation in the legitimate grounds of law? Or, is it based on liberal moralizing and historical speculation? Precedent is no longer sacred.

46. Clearly, the Court’s present rejection of “constitutional realism” is a rejection of Brown; not the doctrinal holding, but the hierarchy of values that it stood for, the notion that moral imperatives — what is right — were superior to legalistic concerns.
Neutrality remains a posited central value, but it is now defined in terms of common law baselines and positivism. If the doctrine their "liberal" predecessors have established respects common law baselines and rests on good, positive legal interpretation, fine. But if the liberal doctrine has gone outside of those boundaries, the liberals have not been neutral, and the doctrine is *ultra vires* and must be brought back into line. Neutrality no longer means avoiding the imposition of judicial values. It means keeping out the "wrong" values, *i.e.*, values that threaten to alter pre-existing boundaries of the law.

The stakes in this battle over boundaries are both how much power equality should have to define legal discourse, and how much power the concept of legal discourse should have to define equality? It is a struggle simultaneously between competing images of social justice, and competing images about the foundations and nature of legal judgment, as is seen more clearly below.

B. The Empire of Restraint

What is decisive is not to get out of the circle but to come into it the right way. The circle of understanding . . . is not to be reduced to the level of a vicious circle or even of a circle which is merely tolerated. In the circle is hidden a positive possibility of the most primordial kind of knowing.47

That which was reason in the debate of a commonwealth, being brought forth by the result . . . must be law . . . . Again, if the liberty of a man consists in the empire of his reason . . . then the liberty of a commonwealth consists in the empire of her laws . . . ; and these I conceive to be the principles upon which Aristotle and Livy . . . have grounded their assertion that "a commonwealth is an empire of laws and not of men."48

The great burden of legal interpretation is that it must justify its judgments in an authoritative way.49 Unlike poetry or philosophy, its business is in part reason, but more importantly, action. As Professor Cover notes, "A judge articulates her understanding of a text, and as a result somebody loses his freedom, his property, his children, even his life."50 Historically, this need for authority has been understood as a need for certainty in interpretation of legal texts, a need for a way to

50. See Cover, supra note 24, at 1601.
ground the decisions made in something unshakable and unalterable.\textsuperscript{51} According to Heidegger, interpretation is inevitably circular and always surrounds the analyst with his own subjectivity.\textsuperscript{52}

Either because it has disagreed with Heidegger, or simply because of this insistent need to ground its results, the law has created interpretive constructs to govern how courts should look at things and to provide the "certainty" that is needed. These interpretive constructs are what Professor Peller simply calls metaphors for organizing the social world.\textsuperscript{53}

Typically, constitutional scholars look to a variety of ideas in searching for these "metaphors": notions of formalism vs. realism; interpretivism vs. noninterpretivism. In this discussion, judicial restraint is viewed as a distinct issue, something both separate and secondary as a category of concerns. In my view it is much more. \textit{Judicial restraint is a metaphor} in Peller's sense.

It organizes the world spatially by suggesting that there is a finite area in which the Court can make decisions, and beyond which the decision is for another branch of government, the legislature for example. It also organizes "the world" temporally by intimating that certain questions are, or occur, before other questions; the question of who should do something comes before what should be done. Judicial restraint is the exact gravitational center of such concepts as formalism and positivism — the notion that the Constitution lacks moral content and interpretivism.

Moreover, these concepts, with restraint as the center, are part of a coherent whole, a cognitive model for conceptualizing what the Constitution is. Let us take a minute to sketch the outlines of this model of "restraint." What makes it a central metaphor is that it is through the concept of restraint and its corollaries that the law resolves its anxieties about the need for certainty and, in effect, escapes out of the "critical circle." Courts traditionally circumvented the search for certainty by postulating or presupposing a certain ambit of authority. Within that ambit questions of validity were quite simply suppressed. The question

\textsuperscript{51} See Note, \textit{supra} note 49.

\textsuperscript{52} M. HEIDEGGER, \textit{BEING AND TIME} 194 (J. Macquarrie & E. Robinson trans. 1962). Any interpretation which is to contribute understanding, must already have understood what is to be interpreted. This is a fact that has always been remarked . . . . But if interpretation must in any case already operate in that which is understood, and if it must draw its nurture from this, how is it to bring any scientific results to maturity without moving in a circle.

\textit{Id}.

was simply: "How do we find and preserve this area of authority in which judicial decisions are so privileged?" I suggest this area of authority is coterminous with the area circumscribed by the "law." It is through the complex concept of judicial neutrality or restraint that courts classically have located and guarded this sacred ground.

Thus, this metaphor about restraint/neutrality is not only about principles of proper legal decision-making, but about first principles; not only about classical conceptions of what is integrity in legal decision-making, but finally about classical conceptions of what is law. It follows that the true source of power for the Rehnquist Court in its use and reliance upon restraint is a reliance upon a kind of foundationalism. It is this foundationalism implicit in restraint/neutrality that inspires and empowers the Rehnquist Court to use restraint/neutrality concepts as the "stuff" for a wall between liberal precedent and its own doctrine, between "legal discourse" and inquiry into social context and moral values.

Premised on Harrington's aphorism that we should be a "government of laws and not of men," the idea of judicial self-restraint is that judges should follow the neutral principles of law in making their august decisions. Thus, judicial self-restraint begins as a claim that court decisions are legitimate when they are, and because they are, far from exer-

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54. By foundationalism I refer to the idea that legal judgment can be validated by grounding legal judgment in certain "objective" criteria. I also refer to foundationalism as an assumption: that interpretation can occur separate from the values and desires of the interpreters. Finally, I refer to it as a kind of strategy for suppressing or rejecting as incoherent grounds for decision other than those grounds authorized in the theory. For a more deeply philosophical discussion of "foundationalism," see Radin, Reconsidering the Rule of Law, 69 B.U.L. Rev. 781, 793 (1989) (foundationalism refers to "a mind-independent reality consisting of first principles either of fact or value").


56. See H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961). "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved . . . [resting] on grounds of adequate neutrality . . . ." (emphasis added). See also R. BORK, supra note 21, at 2 ("The democratic integrity of Law, however, depends entirely upon the degree to which its processes are legitimate. A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result."). Cf. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 785 (1983) (arguing, inter alia, that neutral principles are premised on an unexamined false assumption about legal language: that "we all know . . . what the words and rules used by judges mean.").
cises in the mere naked preferences of the judges themselves;\(^{57}\) they are instead impartial, neutral declarations\(^{58}\) of "the law." Within this claim is a tacit, enormously ambitious notion of law as something with an internal, objective\(^{59}\) content, that is discovered or deduced.\(^{60}\)

\(^{57}\) Cf. Sunstein, \textit{Naked Preferences and the Constitution}, 84 Colum. L. Rev. 1689 (1984) (For Sunstein, "naked preferences" referred to the raw political desires of the majority. The need to place limits on this potentially tyrannizing force is the \textit{raison d'être} of judicial review. The regime of judicial restraint exists as the conceptual counterweight to this rationale and is preoccupied with the judicial counterpart to majority tyranny — the tyranny of the court's own raw political will.).

\(^{58}\) Neutral here means the Court cannot favor A over B, particularly on the basis of political ideology. The normative source of the command of neutrality is a notion of political equality between citizens and hence parties. I trace the requirement to the natural law principles of Locke which perhaps found their most explicit expression in \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386 (1798) (Chase, J.):

\begin{quote}
The purposes for which men enter into society will determine the nature and terms of the social compact. . . . An act . . . contrary to the great first principles of the social compact[,] cannot be [law] . . . [A] law that takes property from A and gives it to B . . . is against all reason and justice.
\end{quote}

\textit{Id.} at 388.

\textit{Cf.} H. Wechsler, \textit{ supra} note 56, at 21. For Weschler, "neutrality" was a constraint on the way decisions were made and lacked normative content. It meant something like "consistency." I see it rather as a notion of the core constitutional value and give it normative content (i.e., it is an antidiscrimination principle at the level of procedure). \textit{See also} Posner, \textit{The Meaning of Judicial Self-Restraint}, 59 Ind. L.J. 1, 8-10 (1983) ("neutrality" means not only consistent but principled, \textit{i.e.}, can the judge state the real reason for decision truthfully without being condemned).

\(^{59}\) Law is not only conceived of as an objective quantity, but a physical, solid thing which has spatial boundaries and material consequences in motion. This notion of law is classically expressed in \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1 (1824).

\begin{quote}
[The Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have . . . come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist . . . the laws of New York must yield . . .
\end{quote}

\textit{Id.} at 209. Similarly, and more recently, Chief Justice Burger in \textit{Tennesse Valley Auth. v. Hill}, 437 U.S. 153 (1978), creates a poetic image of the law as something freestanding, found outside of the Justices themselves, that if preserved shields everyone.

\begin{quote}
The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal . . . I'm not God. The currents and eddies of right and wrong . . . I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . . What would you do? Cut a great road through the law to get after the devil? . . . And when the last law was down, and the Devil turned round on you — where would you hide Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast.
\end{quote}

\textit{Id.} at 195 (quoting R. Bolt, \textit{A Man for All Seasons}, Act I, at 147 (Heinemann ed. 1967).)

\(^{60}\) The notion that the law was deduced is of course associated with the formalistic idea. \textit{See}, e.g., Schauer, \textit{Formalism}, 97 Yale L.J. 509, 523 (1988); \textit{cf.} Posner, \textit{ supra} note 58, at 14 (arguing that formalism is not to be confused with restraint because the \textit{Lochner} Court was the ultimate "formalist" while activist in the extreme). Similarly, the Rehnquist Court could equally be accused of formalism while being extremely activist.

Posner's point only proves the subjectivity and contingency of legal concepts. Formalism
The rule of *stare decisis*, that courts should follow the rules laid down in precedent, is a corollary of the notion that the law is discovered and not made:

The judges in the several courts of justice . . . are the depositories of the laws, the living oracles, who must decide in all cases of doubt . . . . Their knowledge of that law is derived . . . from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence . . . of such a custom as shall form a part of the common law . . . . For it is an established rule to abide by former precedents . . . because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule.61

Moreover, the notion of objective content62 here is brigaded with the natural law notion that the principles involved are in a sense eternal and unchanging — they have not (and do not) become obsolete.63

It follows that, only by adhering to an equally objective method, restraining the emotions in favor of a disciplined, dispassionate inquiry, can this discovery occur.64

This restraint or limitation on method — the way decisions are made — serves to both create and define the judicial power itself. Under our constitutionalism, the law is supreme, the guardian of liberty that keeps each branch of government within the limits of its role.65 The duty and its controlling assumptions of restraint mean different things to different people at different times. The Rehnquist and *Lochner* Courts, which are mirror images of one another, would both claim that what observers may decry as activism really is no more than the Court mechanically deducing and applying the unalterable command of law.


62. Traditionally, the notion of the objectivity of law was quite literal. See supra note 59. Professor Fiss has defended the notion of constitutional law as objective in an “interpretive” sense. Under his theory of “bounded objectivity,” the law is objective so long as it tracks the authoritative standards of the proper “interpretive community.” See Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 745 (1982).

63. See, e.g., Meese, Address Before the D.C. Chapter of the Federalist Society Lawyer’s Division, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 25 (S. Levinson & S. Mailloux ed. 1988), arguing that the Constitution is ageless in its meaning and intent: it “is not that the Constitution may be adapted to the various crises of human affairs, but that legislative powers granted by the Constitution are adaptable to meet these crises.” Id. at 28.

64. See Rehnquist, A Living Constitution, 54 TEX. L. REV. 693, 696-97 (1976); see also Fiss, supra note 62, at 746 (arguing that judges must conform to fixed standards of the interpretive community of legal scholars or “they lose their right to speak with the authority of law.”).

65. Judicial restraint thus relies centrally upon a strong notion of separation of powers. See R. POSNER, supra note 61, at 11-14. According to Professor Berns, this notion of an “independent judiciary” as a check on the legislature derives from Montesquieu’s book, *Spirit
of the Court, much like a night watchman, is merely to observe — to make sure the law is followed. A court without constraints on what it could decide would be anathema. Without such limits, the Court, under the guise of declaring the law, could become a super legislature. The will of the people could be usurped, thwarting the majoritarian process.66

Judicial restraint rationalizes all this by subordinating substance to process, by using methodology to cabin power.67 By placing hard limits on the way a court decides — it must decide neutrally — we, in effect, limit outcomes.

This works because the operative concept — the notion of neutrality — shifts the burden of persuasion onto the party seeking to exercise the Court’s power. Because judicial power is so dangerous to the majoritarian process, the baseline of neutrality is nonaction or nonintervention. Hence, movement in any direction is a deviation that not only must be justified, but justified objectively.68

The intimate interconnection between what the Court decides and how it decides it, using neutrality as a conceptual linchpin, is a clever strategy for maintaining things as they are. The Court remains tethered to a baseline of inaction that favors the status quo. At the same time, because there are no direct substantive limitations, claims or discussion about substantive, much less ideological, limitations are pre-empted.


66. See A. Bickel, The Least Dangerous Branch 16-29 (1962); J. Ely, Democracy and Distrust 45-48 (1980); The Federalist No. 78 (A. Hamilton).

67. This idea of judicial restraint proceeds from a notion of justice as fairness; a deep, contractarian proceduralism in which the postulate that the majority decides public values preempts the question of whether the majority has selected correctly. See J. Rawls, A Theory of Justice 1-22 (1971) (Arguing that such a “justice as fairness ideal” would be chosen by a community beginning from the “original position.” Judicial review is possible but only upon a justification grounded in process norms). See generally J. Ely, supra note 66 (arguing for a process-norm based theory of judicial review).

68. This focus on “objectivity” flows from the tacit use of “objectivism” as the lens through which the restraint proponents look at the world. “Objectivism” refers to, inter alia, the idea that there is a correspondence between the word categories we use and the real world. On this perspective, “the world consists of some fixed totality of mind-independent objects. There is exactly one true and complete description of ‘the way the world is.’ Truth involves some kind of correspondence relation between words or thought signs and external things.” Hilary Putnam, Reason, Truth, and History 49 (1981).

Many scholars believe that this “objectivism” is a fundamental flaw because “[s]igns do not intrinsically correspond to objects independently of how those signs are employed and by whom.” Id. at 52; see also Winter, Transcendental Nonsense, 137 U. Pa. L. Rev. 1105, 1131 (1989) (arguing that language provides no objective description of reality separate from our conceptual schemes.).
Let us take the seminal issue in public litigation as an example. Whether to permit school segregation on the basis of race to continue or to forbid it, if decided purely on the basis of liberal morality, is an easy question: Of course segregation is wrong. The rub here is what Professor Bickel called the counter-majoritarian difficulty. Social policy is for the legislature to shape as representatives of the majority will.

For the Court to intervene to frustrate the workings of the elected branches on the basis of social policy is not merely counter-majoritarian but inherently subjective: Who is to say that the value judgments of the nine Justices are morally superior — on the issue of segregation or anything else — to those majorities of the particular states who considered the same social issues but reached different conclusions? And what check is there in a process of making naked social choices to prevent the Justices from merely exercising naked preference in disguise.

The only justification for such interference is the narrow positive ground that the majority has contravened the Constitution, the supreme law of the land. It follows that the way a court must go about the

69. See J. ELY, supra note 66, at 43-48. See also Bork, Neutral Principles and some First Amendment Problems, 47 IND. L.J. 1, 3 (1974) (“[O]ne essential premise of the Madisonian model is majoritarianism . . . however . . . [t]here are some things a majority should not do to us no matter how democratically it decides to do them.”).

70. The underlying political conception seems to be a kind of market theory of government linked to a premise of political laissez-faire. See Sunstein, supra note 57, at 1694. The ordering of values through the political process is like the market ordering of supply and demand. Within this conception interference seems “mystical, totalitarian.” Id.; see also Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453 (1989) (arguing that moral values are unworkable as legal standards because they are indeterminate).

71. This moral skepticism was perhaps most eloquently advocated by Justice Holmes: Certitude is not the test of certainty. We have been cock-sure of many things that were not so . . . . What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one’s experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.

O.W. HOLMES, Natural Law, in COLLECTED LEGAL PAPERS 310, 311 (1920). Several modern scholars have guarded well Holmes’ moral skepticism flame. See Rehnquist, supra note 64, at 704-05. See also R. BERGER, GOVERNMENT BY JUDICIARY 249-82 (1977); R. BORK, supra note 21, at 252 (“There is no satisfactory explanation of why the judge has authority to impose his morality on us.”).

72. See J. ELY, supra note 66, at 7-9 (arguing that this “value-neutral” model of constitutional “interpretation” has appeal because it supports judicial review while answering the claim that judicial review is counter to democratic principles of majority rule). “[W]hen a court strikes down a popular statute as unconstitutional it may [say to the majority]: we didn’t do it — you did.” Id. at 9. This view relies on the self-evident fiction that “constitutional law” exists apart from our own opinions about it. The argument requires us to reify text, to imagine it as a thing, like a chain or a tie that “binds.” Even if one were to accept this fiction,
critical interpretive business of determining whether constitutional contravention has occurred is to follow neutral principles:73 neutral principles to discipline the interpretive process to insure that the court is exercising only judgment as opposed to personal preference and political will.

At the center of the constellation of concepts comprising these neutral principles and rules is the notion that what the Constitution says is important, not what a particular judge thinks is correct or what he/she thinks a particular situation demands.

Of course, since the Constitution on individual rights is open-textured or opaque, this textualism might seem naive.

The classic answer to this problem was that if the text was not clear, one simply had to determine the “original intent.” Whether or not busing should be ordered to remedy past segregation against blacks as a constitutional question had nothing to do with the urgency of the need, and again nothing to do with what the judges personally thought was right. It was, rather, a search, several generations removed, for what the framers intended the constitutional text to mean with respect to busing (notwithstanding that when the Constitution was written, there was no such thing as a bus).74

This formalism75 of limiting judicial inquiry to the four corners of the text (and its implicit “intent”) was held inviolable even against claims

the problem is that the fiction is incomplete and incoherent as a justification. The text, binding or not, is extremely unclear. Inevitably, there is a need to turn to some substantive value to fix constitutional meaning. See Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1064 (1980).

73. This emphasis on neutrality with regard to public values has been explicitly embraced by the Rehnquist Court. For example, in Stanford v. Kentucky, 109 S. Ct. 2969 (1989), the Court rejected a challenge to the Kentucky Legislature’s choice of the death penalty for 16-year-olds saying they could not follow their “personal preferences” and strike down the law because they would then cease to be “judges of the law” but instead a “committee of philosopher Kings.” Id. at 2980.

74. This old argument carries the contemporary banner of interpretivism. In its modern form, the search is not for intent as an actual mental fact, but intent as it “reasonably” appears from the text and associated historical materials. See R. BORK, supra note 21, at 144. The idea is not only to ground decisions in something exterior to the judges’ own values, but to connect it in some manner to the original “will.” “Non-interpretivists” suggest that courts should try to identify within the Constitution general public values and then interpret them contextually. See, e.g., R. DWORKIN, supra note 38, at 228-32 (arguing judges are like authors of a chain novel, they may write what they like as long as it respects the overall “integrity” of the work).

75. Formalism can be defined by the way it looks at text. It sees text as a vehicle for an author’s intent. Moreover, there is the romantic notion that the writer’s intent is “immortal” to the ravages of time. Shakespeare’s famous Sonnet LXV is the classic statement of the idea:

Since brass, nor stone, nor earth, nor boundless sea,
that history or social analysis required departures from what was literally written down. The search across the misty vale of history for this original intent was a sacred convention, perhaps the constitutional equivalent of the search for the Holy Grail.

The formalistic idea resonates with a kind of canonical demand for order and coherence in court decisions, and implicitly threatens those liberals who depart from it not merely with heresy, but with an immaturity comparable to a car driver who refuses to observe red lights.

These two overarching commandments — (1) follow what is written down, and (2) follow the framers' intent — were the alpha and omega of traditional legal scholars. Together with an implicit concept of law as positive, and the corollary of *stare decisis*, these parameters reflected the stubborn hope of legal conservatives: by narrowing the ambit of what judges would consider, a conceptual territory could be carved out for law far removed from the constantly shifting sands of social debate.

From my vantage point, within this elaborate rationalization and design are patterns of inner conflict going to the root of judges' and lawyers' anxieties about the need for something upon which to ground their judgments. Past an uncritical objectivism about language, the true ground for legal judgment lies not in notions of law as objective and judges as oracles; rather, it resides within the power of the concept of law — the power of the Word — to create and structure power relations between men. I don't mean to suggest an historical conspiracy. There is

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But sad mortality o'ersways their power,
How with this rage shall beauty hold a plea,
Whose action is no stronger than a flower?
Of how shall summer's honey breath hold out
Against the wrackful siege of batt'ring days
When rocks impregnable are not so stout,
Nor gates of steel so strong, but Time decays?
O fearful meditation where, alack,
Shall Time's best jewel from Time's chest lie hid?
Or what strong hand can hold his swift foot back?
O! none, unless this miracle have might,
That in my black ink my love may still shine bright.

W. SHAKESPEARE, SHAKESPEARE'S SONNETS 149 (T. Brooke ed. 1936) (1st ed. 1609).

To this imagery is added the fiction that we can, from our temporal distance, still determine this intent, and must do so to preserve the integrity of the text. *Cf.* M. FOUCAULT, *What is An Author?* in THE FOUCAULT READER 101-20 (1984) (arguing that the writer being absent does not really exist for interpretation — he is just a construct). As it seeks to follow original "authorial" intent, interpretivism is a form of formalism. In law, formalism is generally condemned. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 124-30 (1961) (defining formalism as refusal to acknowledge necessity of choice in penumbral area of rules); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1506-07 (1985) (formalism as the artificial narrowing of the range of choices).
a close connection between the way we are taught to see something, and the way we observe, between perceived meaning and belief. The ultimate power of the metaphor of restraint is that it contains within it enough of a cognitive model for interpreting the meaning of law, and judges' roles, that the metaphor blends with fact; one's belief in its corollaries blends with one's perception of reality. It is this which perhaps explains why there is such religiosity about fictional quantities like "original intent."

It is this classical conception of the proper ambit of legal interpretation which, in reconfigured form, is at the center of the Rehnquist Court approach. Perhaps the best summary, in a sentence, of what I hear the Rehnquist Court saying occurred in a speech by an erstwhile Reagan Era politician. Ridiculing those who wanted to look elsewhere than within the text or the imaginary minds of the framers for the Constitution's meaning, one Attorney General said, "[T]he further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges bring the meaning."

Ironically, from a review of several of the Rehnquist Court's decisions, it seems that the Court is contradicting itself. In an effort to enforce restraint, to maintain the neutrality and objectivity of the law in the face of liberal ideology, they have introduced their own ideology. In short, it looks as though the picnic that Meese described has already begun.

II. The White Knight's Inventions

"Now the cleverest thing of the sort that I ever did," he went on after a pause, "was inventing a new pudding during the meat-course."

"In time to have it cooked for the next course?" said Alice. "Well, that was quick work certainly!"

"Well, not the next course," the Knight said in a slow, thoughtful tone, "no, certainly not the next course."

"Then it would have to be the next day. I suppose you wouldn't have two pudding-courses in one dinner?"

"Well, not the next day," the Knight repeated as before, "not the next day. In fact," he went on, holding his head down, and his voice getting lower and lower, "I don't believe that pudding ever was cooked!"


77. Meese, supra note 63, at 31.
In fact, I don’t believe that pudding ever will be cooked! And yet it was a very clever pudding to invent."

A. Wards Cove: A Clever Pudding

The Supreme Court decision in *Wards Cove Packing Co. v. Atonio* is a good example of the interpretive picnic the conservatives are having. In *Wards Cove*, the Court confronted a discrimination claim in which there were stark patterns of segregation.

There were separate dining facilities for whites and nonwhites. In addition, there was "stratification of jobs along racial and ethnic lines." Nonwhites comprised 10% of the pool of workers who fit the classification of unskilled labor in the general location of the canneries involved. Nonetheless, over the years of the canneries' operation, they comprised from 47-70% of the canneries' unskilled laborers. On the other hand, "virtually all the employees in the major categories of at issue jobs (non-cannery jobs) were white."

The cannery jobs in which nonwhites were concentrated were not only the least prestigious, they were also the lowest paid. In addition, cannery workers received the poorest and (mind you, the canneries in question are located in Alaska) the least insulated housing. The racial character of the job/housing designation is reinforced by the employers' own racial labeling in which terms like "Phillipine Bunkhouse" were used to refer to cannery housing, and "native" to refer to certain cannery jobs.

Although there were no express policies preventing minorities from seeking noncannery jobs, a system of interlocking, discretionary employer practices locked the racial stratification into place.

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78. E. CAHN, CONFRONTING INJUSTICE 70 (1966) (quoting L. CARROLL, THROUGH THE LOOKING GLASS (1896)).
80. In *Wards Cove*, the claim arose under Title VII of The Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, sex, national origin, and religion. *Id.* at 2118.
84. *Id.* at 33,829.
86. *Id.* at 2120.
88. *Id.*
89. *Id.* at 33,835.
Nonwhite cannery employees had problems applying for jobs outside of the cannery. For example, if they applied during the season in which they were working, they were not considered because the employer only accepted applications off season. Moreover, the vast majority of the minority cannery workers had been recruited locally and were from Alaska. On the other hand, the employer hired for noncannery jobs in Seattle, Washington or Astoria, Oregon.

Further, there were no posted job vacancies, and no listed job qualifications. Nonwhites neither knew when jobs were vacant, nor what “qualifications” were needed for the job. This was complicated by the fact that, in many instances, while the employer claimed that certain noncannery jobs were skilled, this was a subjective label. The jobs often required skills, but they were skills that could be provided in brief training. The employer provided no training to cannery employees.

And there was no formal promotion system. Recruitment for noncannery jobs was by word of mouth from incumbent, predominantly white noncannery workers to their friends and relatives who almost always were white also. Under this system, the overwhelmingly white noncannery workforce consistently perpetuated itself.

Despite the striking, chronic disparity, and what one Justice went so far as to call “plantation” style segregation, the Court found no discrimination.

The decision is complex, but a major part of the rationale has to do with how this Court, in contrast to its predecessors, defined discrimination. To understand the turnabout here it is essential to understand the ongoing theoretical conflict which formed the backdrop to the Court’s approach.

Discrimination, like its conceptual opposite, equality, is a riddle or paradox which invites conflicting interpretations. The interpretations differ, interestingly, in their respective conceptions of the underlying
moral principle upon which the norm of equality is based.\textsuperscript{98} For the conservatives, the antidiscrimination laws merely enact a procedural principle commanding that, in employment decisions, like must be treated alike.\textsuperscript{99}

Because the nondiscrimination notion is a procedural concept assuring evenhanded treatment of similarly situated individuals, it is breached when similarly situated individuals are treated differently because of their race. Such differential treatment has an essential ingredient of volition, and a finding of unconstitutional discrimination therefore rests on a finding of intent.\textsuperscript{100}

Thus, the focus on employer decisions is determined by how the discrimination or the antidiscrimination principle is defined: The question of discrimination is always whether employer decisions are evenhanded or not.\textsuperscript{101} Since by definition discrimination involves employer decisions that involve intentional conduct, it would make no sense to talk about discrimination other than as an intentional construct.

This definitional linkage of discrimination with intentional conduct is associated with a concomitant notion of discrimination as a particularized wrong.\textsuperscript{102}

That is, the traditional view posits discrete individual actors and discrete actions which have legal meaning only when associated with an intentional element.\textsuperscript{103} Within the definition of discrimination as an intentional act of particular individuals is a model of discrimination as something akin to an intentional tort. Thus, historical or social inquiry in these terms seems mystical and irrelevant.

A corollary of the definition of discrimination as an intentional construct is that the goal of discrimination law is to identify instances in

\textsuperscript{98} See Fiss, \textit{A Theory of Fair Employment Laws}, 38 U. CHI. L. REV. 235 (1970-1971) (presenting the seminal insight that there are two competing moral norms within the concept of equality).

\textsuperscript{99} Westen, \textit{The Empty Idea of Equality}, 95 HARV. L. REV. 537 (1982). As Westen points out, the rule begs the question: "When are two people sufficiently alike?" The indeterminacy of the rule collapses it into a search for some substantive principle on which to ground results.


\textsuperscript{101} This image of the "evenhanded" employer is perhaps the key cognitive device which allows us to conceptualize the principle of antidiscrimination within the intent or disparate treatment model. The image contains the operative metaphor that equality exists where there is balance. A scale is balanced when its two "hands" are level or "even" with one another. Similarly, employers pursue "equality" when they are "evenhanded."

\textsuperscript{102} There is an implicit metaphor of discrimination being a kind of assault.

which wrongful intent is expressed. As Professor Freeman points out, this presumes that intentional wrongdoing is not the norm.

From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors. It is a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work.104

This presumption of discrimination as deviant creates a class of innocents, the majority of whom are not at fault.105

To protect the innocent as it were, to provide the necessary reliability of the inquiry, this notion of discrimination as an intentional act (i.e., an intentional tort) was brigaded with tort-based notions of causation.106 Thus, under the traditional view, the plaintiff must show a tort-modeled causal nexus between the defendant’s intentional consideration of race and the loss of some employment benefit.

The effect of the imposition of the baselines on the discrimination concept, natural as it may seem, is to narrow the idea to a legalism so cramped and artificial that it excludes whole categories of race-based disparities from legal purview.107

However, a broader view would see the “like should be treated alike” approach as a Procrustean bed in which actual victims are penalized because their circumstances do not fit narrow preconceptions. This broader view would define the antidiscrimination principle as premised on the notion that, where a person has an immutable characteristic, that

104. Id. at 1054.

105. Id. at 1055. “The fault notion as applied to racial discrimination today is . . . related to the assumption of 50’s liberals that such discrimination was largely a Southern problem.” Id.

106. See G. Lakoff & M. Johnson, Metaphors We Live By 61-68 (1980). Most of our ordinary conceptual system is generalized from our physical experience. We conceptualize causation based on our experiences as children in manipulating objects “[w]e pull off [our] blankets, throw our bottles, drop toys.” Id. at 70.

We generalize from these experiences a prototype of what causation is. This generalization “is a mental construct by which the human mind creates meaning, a recurring structure or repeatable pattern that is the chief means for achieving order in our experience so that we can comprehend it and reason about it.” Winter, The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning, 87 Mich. L. Rev. 2225, 2231 (1989). The “prototypical” notion of causation is that a single specific person or agent causes something, there is a plan, it has a specific effect, and the effect is perceptible. See G. Lakoff & M. Johnson, supra, at 69-72 (the operative notion of causation in discrimination law tracks the cognitive “prototype”).

107. See Lawrence, supra note 22, at 321-44 (noting that intent based theories fail to recognize that unequal treatment often results from unconscious processes (e.g., racial stereotyping)); see also Fiss, supra note 98, at 251 (arguing that unequal treatment may result from mistaken “information” about race).
person may not be burdened or penalized unnecessarily because of that characteristic.\textsuperscript{108}

The operative image is a notion of equality as a path. Discrimination is a "barrier" which prevents minorities from advancing along the path.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. \textellipsis 
\textellipsis What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.\textsuperscript{109}

The atomistic, procedural concept of discrimination that focuses discretely upon particular employment decisions (the intent model) is replaced by a broad substantive vision of removing the obstacles that block racial progress.\textsuperscript{110}

Under this concept of discrimination, the good faith or bad faith of the employer is irrelevant. The intractable inquiry about the acceptability of an employer's mental state is supplanted by the question of the acceptability of the social result of an employer's decisions. We move from an inward, subjective inquiry to an outward, objective approach. Moreover, we move forward in time from a nineteenth century tort model of discrimination, linked and intertwined with classical notions of individual fault/responsibility, to a more contemporary sense of group or social responsibility.

This conception of discrimination, which animated the Court in \textit{Griggs}, is called the effects model.\textsuperscript{111} Under this approach, the question is one of acceptability of policies which have disparate effects. By dispa-

\textsuperscript{108} See University of Cal. Regents v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part, dissenting in part). "While a classification is not \textit{per se} invalid because it divides classes on the basis of an immutable characteristic (citation omitted) \textellipsis such divisions are contrary to our deep belief that 'legal burdens should bear some relationship to individual responsibility or wrongdoing.'" \textit{Id.} (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (emphasis in original).


\textsuperscript{110} The two schools of thought, intent vs. effects, use different theories of meaning. The intent school thinks of the word discrimination as referential: it refers to text, to specifically identifiable decisions, specifically identifiable economic injuries, etc. The effects school thinks of word discrimination as the skin of a grand idea. Discrimination encompasses the ideal of a racially just society in truth as well as form. On the contrast between referential and idealistic theories of meaning, see generally L. Wittgenstein, supra note 76.

rate effect we mean, for example, a high school diploma requirement which impacts unequally on blacks and whites. 112

It is true that such a high school diploma requirement is facially neutral. However, because the high school diploma requirement has disparate effects, it nonetheless falls within the ambit of the discrimination concept. This concept of discrimination relies upon an understanding of discrimination as an historical or social problem. 113 If blacks by law, because of the immutable characteristic of race, have been denied equal access to education, then it is unfair to burden them with requirements which penalize them for that de jure segregation.

Thus, through the lens of the Griggs antidiscrimination principle, educational requirements, e.g., high school diploma requirements, which disproportionately exclude blacks are presumptively discriminatory and illegal.

The evidentiary policy of a discrimination case mirrors the conceptual framework. Because the disparate effect is an evil to be eliminated, the burden is placed on the employer to show that these educational requirements, which have disproportionately excluded blacks, are justified by business necessity. 114

The two concepts of discrimination can be separated along the line which divides formal as opposed to real equality. The formal equality approach is a conservative approach adopted, perhaps uncritically, as the

Corrective Ideal, 86 COLUM. L. REV. 728, 729 (1986) (differentiating between “purposeful discrimination” and “disadvantage”).

112. This classic disparity obtained in Griggs. In Griggs, according to the 1960 census data, 34% of white males in North Carolina had completed high school as compared with 12% of black males. 401 U.S. at 430 n.6.

113. Thus, the two schools of thought, intent vs. effects, use different methods of inquiry. The intent school has its roots in formalism and looks essentially at text and legislative history. The effects school has its roots in antiformalism and considers history and social context. Said another way, the intent school grows out of the formal common law tradition while the effects school grows out of the antiformal tradition that begins with Brown.

114. Griggs, 401 U.S. at 431-32. See also Connecticut v. Teal, 457 U.S. 440 (1982) (test which had disparate impact on blacks could not be justified by employer’s good faith effort to cure disproportionate exclusion of blacks through subsequent affirmative action program); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight standards which had disparate impact on women could not be justified by bald, uncorroborated assertion that “a sufficient but unspecified amount of [strength] is essential to effective job performance as correctional counselor.”). But see Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (discussed infra); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (only if the minorities could identify a causal relationship between disproportionate exclusion and the specific component of the selection test that excluded them would the employer have the burden of justifying the disproportionate number of minorities in the lower echelons of the workforce hierarchy).
predominant theme and slogan of the civil rights movement. 115 This formal equality approach seeks a color-blind society, and claims only equality of opportunity. Resonating with biblical simplicity, 116 it can be accommodated within a traditional legal framework because it makes no distributive claim and does not disrupt or threaten existing institutions or economic relationships. The difficulty with this approach is that, to its critics, it falls short both as social policy and as a response to legislative will. Critics argue that it fails to address problems Congress intended to focus on in its enactment of civil rights laws. 117

On the other hand, the real equality approach is, in its most pure and extreme form, redistributive and demands that the law speak to continuing, chronic inequalities. Within its moral claim, there is an echo of the historic demand, enunciated by the Radical Republicans, that the law exorcise from the body politic of this country the “demon of race.” 118 The real equality approach begins doctrinally as an idea embedded in Justice Harlan’s dissent in the Civil Rights Cases, in which Harlan seeks to look beyond the text to the true meaning of equality. 119 It becomes a tacit guiding ideal for the liberal wing of the Court in Brown, which is unmistakably the doctrinal ancestor of Griggs. The real equality approach underlies affirmative action claims as well as those challenging disproportionate effects. 120

Although the underlying moral claim of the real equality approach is compelling, it is problematic as a legal theory in that its distributive aspect conflicts with classical notions of individual rights: one cannot be

115. The great theme of the civil rights movement was to assert the moral sameness of all, arguing the irrelevance of color. See, e.g., M.L. King, Strength to Love 35-37 (1963).

116. See Leviticus, supra note 4.


118. This imagery is fashioned after the language of reconstruction which depicted the institution of slavery as a “monster.” See, e.g., Cong. Globe, 38th Cong., 2d Sess. 142 (1865).

119. See The Civil Rights Cases, 109 U.S. 3 (1883) (Harlan, J., dissenting). “[T]he Thirteenth Amendment . . . did something more than to prohibit slavery . . . it established . . . civil freedom throughout the United States.” Id. at 34 (emphasis in original). It is the affirmative character of civil rights, and the notion that these rights expressed ideals (like freedom) which are the core elements of the real equality notion. This is clearly Harlan’s model.

120. This approach contrasts with the doctrine expressed in a number of cases prior to Wards Cove. See, e.g., New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978). In both cases, the conservative point was that minorities were seeking something more from the law than identifying and remedying intentional violations of law.
held liable outside of traditional, tort-based notions of fault.\textsuperscript{121} The balance between these two competing ideas of equality was set by rules which limited the intent model to cases in which individual employment decisions were involved.\textsuperscript{122}

However, where facially neutral employment standards or requirements were being challenged as unnecessary barriers, there was a general consensus that the effects model applied. Typically, these standards or requirements or tests were in writing and represented formal policy. They were typically, also, objective standards or requirements in the sense that they applied mechanically, across the board. For example, the high school diploma requirement was an objective qualification in the sense that everyone was subject to the same requirement, and it was readily determinable whether one had the credential or not.

In \textit{Wards Cove}, however, the Court confronted a fact situation which was located on or near the dividing line between the two conceptions of equality. The minorities were purporting to challenge subjective requirements and standards. Because there was an ostensible challenge to facially neutral standards, the effects model was applicable on its face. However, because there was an element of subjectivity, there was the argument that the claim was really one that fit the model of intentional decision-making.\textsuperscript{123} The civil rights community awaited with a hush for the answer to the question before the Court: Which model would apply?

The Court decided that the effects model was applicable agreeing, one would think, to the approach implicit in the theory. However, while they kept the title, they changed the song: The Court grafted onto a nominal effects approach a concept of discrimination and a method of analysis directly contrary to the goals and values of that theory.\textsuperscript{124} In a word, "disparate impact" is redefined.

Under the Court's disparate impact approach, showing a causal nexus between misconduct and racial exclusion, and ultimately identifying intentional employer misconduct, becomes all-important. Conversely, the sheer "effect" of a subjective selection system to perpetuate \textit{de facto} racial stratification becomes irrelevant.

The Court integrated this intentionalist model of discrimination into its "impact" formula by conflating the requirement of a showing of adverse impact with a showing of intent. The trick here was to lift the

\begin{itemize}
  \item \textsuperscript{121} See, e.g., Freeman, \textit{supra} note 103, at 1054-55.
  \item \textsuperscript{122} See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
  \item \textsuperscript{123} See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2120 n.4. (1989).
  \item \textsuperscript{124} \textit{Id.} at 2127-36 (Stevens, J., dissenting).
\end{itemize}
phrase “otherwise-qualified” from the Griggs model, where it had one meaning, and transpose it into the Court’s new vocabulary, where it took on a very different meaning.

In both cases, “otherwise-qualified” refers to where, or upon whom, the axe of judicial presumption falls. In Griggs, “otherwise-qualified” was associated with two assumptions. First, that races were equal in ability. Second, that if blacks were being excluded due to qualifications, the qualifications were presumptively unnecessary and bad. Of course, in Griggs, the jobs were unskilled.125

In Wards Cove, the Court stated that the mere fact of a statistical disparity between a minority percentage of the employer workforce and their presence in skilled jobs did not make out a prima facie showing of adverse impact. It was not probative because it was not clear that minorities as a group were “otherwise-qualified.”126 Assumptions about racial parity are replaced with a deep skepticism about skill parity between whites and nonwhites as groups. The term “otherwise-qualified” now carries with it this baggage of “racial skepticism.”

It follows that in Wards Cove, the Court assumed that employer skill requirements are necessary and good, completely inverting the assumptions of Griggs. The Court went on to shift the burden to the plaintiffs to show that, despite their qualifications, they are being disproportionately denied the employment benefits they seek. This familiar strategy of comparing the qualified minority applicant pool with those hired is the classic Hazelwood/Teamsters127 formula for proving sys-

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125. Griggs is to Wards Cove what Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), is to Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). In employment segregation, as in school segregation, the Court draws a line between two contexts: the primitive Southern context in which blacks have been expressly excluded, and the more subtle Northern context in which there has been no express exclusion. In both Griggs and Swann, the Court read the pattern of segregation against its sense of southerners being primitive, deviationist, and bad on issues of race. But in both Wards Cove and Keyes, the Court assumes they are dealing with modern, normal, and good institutions. In the employment cases, however, the good/bad dichotomy turns less on geography (North vs. South) than it does on a notion of taint associated with certain kinds of tests.

In Griggs, the employer imposes, inter alia, a requirement that blacks prove they could pass a pencil and paper test before they could have certain jobs. Such a requirement is tainted by resemblance to classic Southern exclusionary devices, such as requiring blacks to prove they can read before they can vote. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). An effects approach was justified in Griggs to bring deviationist southerners or Southern style means of racial exclusion to heel. However, once we move away from unskilled jobs, and from the classic Southern exclusionary device of pencil and paper tests, we move away from the taint of the Southern paradigm and the need for the effects model.


127. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of
temic, intentional discrimination. In effect, to establish that they are "otherwise-qualified," minorities must go through the same evidentiary sequence required to prove intent.

The point is that patterns of de facto segregation now lack legal meaning in themselves, and are relevant only insofar as they are circumstantial evidence of a discriminatory state of mind.

The notion of causation is given its strict, particularizing spin. The selection process had a number of components — informal recruitment practices; subjective job qualifications; and informal, standardless promotion practices. The Supreme Court required that the minorities identify a causal nexus between the specific employment practice involved, and the disparity of advancement or employment of which they complained. The sheer informality of the process virtually assured that no such tracking was possible.

Discrimination for this Court — even under the effects model — meant something specific, intentional, and discrete. Like a common law tort, it involved a specific identifiable cause, and identifiable actors. Because, among other problems, the Aleuts and Filipinos could not come up with facts tracking these common law tort baselines, they lost.

Through its linking of the effects theory of discrimination with an antithetical intentionalist model of causation, the Court has erased the boundaries between the two competing concepts of equality, and collapsed the two concepts into one.

The label of disparate impact, and Griggs as a disparate impact case, remain, but the content of each is redefined according to an intentionalist view of what discrimination is. The Wards Cove opinion is, in fact, an unfolding of the Court's concept of the goal of discrimination law to identify and remedy intentional violations only. Said another way, racial exclusion, no matter how disproportionate or chronic, in the absence of a showing of intent, becomes inconceivable as an actionable wrong. The

Teamsters v. United States, 431 U.S. 324 (1977). Between them, these cases set forth the formula for making statistical comparisons in a systemic disparate treatment case.

128. This fault model conception of discrimination is buttressed by the Court's presupposition that discrimination refers exclusively to legal as opposed to moral discourse. It follows that the very grammar or inherent rules of legal discourse work to exclude untraditional conceptions of equality:

The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate . . . . It is, in short, the vocation of legal thought to render radical, nonliberal visions of freedom literally inconceivable.

Court feels neither the need, nor the freedom, to address broad social or moral issues, to try to eradicate caste, or to try to actually eradicate discrimination.

There is, I think, a single concept that unites the Court’s relentless insistence on intent as a boundary for the discrimination concept and positive analysis, as opposed to moral inquiry, as a boundary for interpretation: The Court is tracking a notion of neutrality.

This detached approach prompted one Justice to ask “whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites — is a problem in our society, or even remembers that it ever was.”

From an internal standpoint, the Court is still being neutral. But this is so only through an ideological lens in which there is only one way to define discrimination and its goals. The Court has adopted an implicit God’s eye view of equality. And in so doing, it has imposed its own values and beliefs about the social world.

B. Croson: “They Shall Not Pass!”

Similarly, in City of Richmond v. J.A. Croson Co., the Court invalidated an affirmative action plan through the partisan constraints it placed on the concept of discrimination and the interpretive methodology that may be used.

In Croson, the city of Richmond, ironically the capital of the old Confederacy, had enacted into law a minority set-aside program. Croson, a white subcontractor, challenged this plan as discriminatory on the basis of race. Under the set-aside plan, prime contractors to whom the city awarded construction contracts had to subcontract at least 30% of the dollar amount of the contract to one or more minority business enterprises ("MBEs").

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129. Wards Cove, 109 S. Ct. at 2136 (Blackmun, J., dissenting).
130. “Nothing but ideology keeps alternative political theories and values, and the people they represent, out of the discourse defining the legal rules by which persons and institutions resolve conflicts and determine social winners and losers.” Casebeer, Running on Empty: Justice Brennan’s Plea, the Empty State, the City of Richmond, and the Profession, 43 U. MIAMI L. REV. 989, 993 (1989).
131. This represents, of course, an objectivism about what discrimination is. See supra note 68 and accompanying text.
132. See G. LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS 301-02 (1987) (“The belief that there is a God’s eye point of view that one has access to . . . virtually precludes objectivity . . . to be objective requires one to be a relativist of an appropriate sort.”).
134. Id. at 716.
135. Id. at 712.
At the time the plan was enacted, minorities comprised 50% of the general population of Richmond, but only .67% of the city’s prime construction contracts.\(^{136}\) Moreover, at the time, the controlling case was *Fullilove v. Klutznick*,\(^ {137}\) in which the Supreme Court upheld the constitutionality of a federal law requiring that at least 10% of federal funds granted for local public works projects must be used to procure services from MBEs.\(^ {138}\)

Notably, the Burger Court in *Fullilove* approved a similar federal set-aside program, in the absence of any specific factual findings of past discrimination.\(^ {139}\) (Congress had before it no study which was probative of the issue of whether qualified minorities were excluded from contracting because of their status as minorities.)

On the contrary, instead of focusing on whether there were specific facts showing discrimination against minority contractors as a discrete group, a necessary predicate for relief under the classical intent model, the Court explicitly embraced the notion that Congress could deem a certain status quo as per se unacceptable. If found unacceptable, the reasoning went, Congress had the right and power to try to correct it: “Although the Act recites no preambulary ‘findings’ on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.”\(^ {140}\) Like its doctrinal ancestor, *Brown v. Board of Education*, the Court engaged in no noticeable means/ends analysis.\(^ {141}\)

This makes perfect sense if we understand the implicit framework the Court adopted: because the Burger Court had consciously chosen the effects model as its analytical starting point, the focus was on the results and not on fault or causation. Thus, it was sufficient that black exclusion from contracting was a vicious cycle, and irrelevant that Congress had not shown, as the intent model would require, a factual nexus between this continuing exclusion and some prohibited, intentional conduct.

Having already weighed affirmative action in the definitional balance, and having found it acceptable, the Burger Court translated that decision into a standard of review. The Court held that an affirmative

\(^{136}\) *Id.* at 714.

\(^{137}\) 448 U.S. 448 (1980).

\(^{138}\) *Id.*

\(^{139}\) *Id.* at 485-86.

\(^{140}\) *Id.* at 478 (emphasis added).

\(^{141}\) *Id.*
action program of the kind at issue should be judged by the open-ended test: "whether the objectives of the legislation are within the power of Congress . . . [and] whether the limited use of [race] is a constitutionally permissible means for achieving the . . . objectives."142 The set asides were, of course, upheld.

In *Croson*, however, the Court begins by expressly rejecting societal discrimination as a justification for affirmative action.143 The *Fullilove* Court felt that *de facto* segregation, measured through the grand lens of history, was sufficient. But the Court in *Croson* felt that an identifiable pattern of intentional discrimination144 was required as the initial hurdle to be overcome.145

In doctrinal terms, this requirement of a showing of particularized prior discrimination flows from the Court's assessment that the Richmond set-aside program was guilty of race discrimination. As such, it triggered a strict scrutiny analysis.146 Strict scrutiny was originally rationalized under the theory that "discrete, insular minorities" needed special protection.147 Interestingly, Justice O'Connor held whites to be discrete and insular in Richmond, even though they were 50% of the population.148

But if we peel away the surface, doctrinal explanation, the reason "societal discrimination" is ignored has to do with the interpretive boundaries set by the Rehnquist Court. In place of historical background, the Court substitutes the dry, abstract, and, indeed, white background of pure legalism. The background for the Court is the fault model and its parameters of intent and causation.

Discrimination that does not fit these parameters either doesn't exist or the law, majestically, cannot properly take notice of it.149

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142. *Id.* at 473 (emphasis in original).
143. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 708 (1989). Societal discrimination was the tightly packed notion that connotes a linkage between the present exclusion of blacks and their history and experience: A unique experience that includes slavery, disenfranchisement, and Jim Crow.
144. The Court seems to require a statistical showing of racial exclusion by either the city or contractors within the industry in the relevant labor market area. *Id.* at 729.
145. *Id.* at 720.
146. *Id.*
148. *See Chemerinsky, supra* note 30, at 54 (criticizing the opinion on this point).
149. There is a tacit suggestion that historical inequalities are matters of fate. *See Brest, Antidiscrimination Law*, 62 MINN. L. REV. 1049, 1054 (1978):

I believe that an individual's moral claim to compensation loses force as the nature, extent, and consequences of the wrongs inflicted become harder to identify and as the wrongs recede into the past . . . Indeed, as claims to compensation based on past
This cramped definition of discrimination redefines equality to be formal only, excluding any notion of real equality. The idea or promise of real equality, the source of legislative strategy in *Fullilove*, was to go beyond the fault model and merely “identifying” intentional discrimination. It was to provide a remedy which, to some extent, redistributes opportunities. Otherwise, how can society close the yawning gap between black and white opportunities in the real world?

Under the *Croson* model this is turned upside down.

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the City of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion.\(^{150}\)

and

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.\(^{151}\)

Students of Title VII litigation will immediately recognize this again as the *Hazelwood/Teamsters* formula for proving the *prima facie* existence of a pattern and practice of intentional discrimination. The difficulty with this as a practical or meaningful approach is that, by definition, if minorities can establish this statistical case of discrimination, they can go into court and get the relief they want. In defining discrimination in its ahistorical, particularized way, the Court has thus so narrowed the notion of discrimination that the predicate for “affirmative action” is an absurdly redundant mirror image of the predicate for establishing liability in a lawsuit under Title VII.

From the interpretive vantage point of the Court, formal equality marks the boundary of its normative world. Under the Court’s regime of formal equality, there is no constitutional problem if blacks in overwhelming disproportion do not participate in the market. This is true even if their disproportionate absence is, in a general historical sense, traceable to societal discrimination. It becomes, in the distorting half- injustices of human institutions become attenuated, they begin to compete with claims based on the vagaries of fate, and thus become indistinguishable from demands for greater distributive justice among all individuals . . . .

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\(^{150}\) *Croson*, 109 S. Ct. at 729.

\(^{151}\) *Id.*
light of the Court's common law baselines, a speculative wrong: How do we know intentional discrimination is the cause of the exclusion?152

Moreover, even if we were convinced that there is an historical linkage to racial discrimination generally, unless we can trace it to at least a specific institutional wrongdoer — the construction industry in Richmond, for example — it now becomes not a speculative wrong but simply an unrightable one.

Similarly, having cabined the definition of equality to a formalism, reciprocal redefinitions occur with respect to the elements of the discrimination idea. The operative concept of causation under the Fullilove framework was social, forward looking: Was the present state of affairs likely to perpetuate itself? On the other hand, Croson gave causation a meaning which was legalistic and backward looking, i.e., was there identified past discrimination? Also, in Fullilove, notions of right referred to group rights — there is a need to try to make good on the “century-old promise of equality.”153 In Croson, the word right now refers to narrow, classical conceptions of individual rights — one cannot impose burdens on individuals without, in the sense of the common law of torts, showing fault on the part of identifiable wrongdoers.154

Operating at the linguistic level, Croson reverses the analytical starting point from an effects model to an intent model (from “real equality” to formal equality), and reverses the normative framework from a group model to an individual rights model.

The Court tacitly recognizes the tension between Fullilove and its instant holding. The Court rationalizes this tension via a preposterous distinction based on the governmental level involved.155 In Fullilove, it was Congress who was acting; in Croson, it was a city council. Congress

152. Professor Casebeer attributes the City of Richmond’s relentless insistence on intent to a tacit theory of the state. He argues the Court proceeds from a simplistic image of government as an entity empty of all but the intentions of its officials. See Casebeer, supra note 130, at 1003.

153. Specifically, the Court spoke of “remedial efforts directed toward the deliverance of the century-old promise of equality of economic opportunity.” Fullilove, 448 U.S. at 463.

154. There is an implicit rhetoric of not punishing the innocent: the Court took pains to depict Croson as a businessman who did his best, in vain, to find qualified black subs but found himself enmeshed in the irrebuttable racial presumptions of a minority set-aside program. See Croson, 109 S. Ct. at 712-16.

155. Croson, 109 S. Ct. at 718.
had broad power under section five of the fourteenth amendment (hereinafter "Section Five") to enforce the equal protection clause, while the city council did not.\footnote{156}

What the appellant in \textit{Croson} ignores is that Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment . . . that Congress may . . . redress the effects of society-wide discrimination does not mean that . . . the states . . . are free [to do so].\footnote{157}

The claimed fear was that to allow states to engage in the fashioning of remedies would somehow frustrate the framer's intent of putting "clear limits on the States' use of race."\footnote{158}

The Court legitimatizes the "race neutral" constraints it places on the concept of equality by equating this "race neutral" notion with original intent.\footnote{159}

But the coherence of the Court's claim to originalism is belied by the grotesque shape in which it twists history and the fourteenth amendment. The fourteenth amendment was passed specifically to address the problems of freed blacks. As Justice Marshall has noted, it seems more than a little ironic that, through an intentionalist rationale, an amendment so pregnant with congressional intention to help blacks would be interpreted to foreclose that help.\footnote{160} It is simply a revision of history to contend that Congress meant to do that.

Moreover, implicit in the Court's arguments about Section Five as a bar to states trying to help blacks is a peculiar interpretive constraint:

\begin{quote}
\textbf{156.} Justice O'Connor viewed section one of the fourteenth amendment as "an explicit \textit{constraint} on state power." \textit{Id.} at 719 (emphasis in original). The fourteenth amendment reads in pertinent part:

\textbf{Section 1.} All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

\textbf{. . . .}

\textbf{Section 5.} The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

\textit{U.S. Const. amend. XIV, §§ 1, 5.}
\end{quote}

\begin{quote}
\textbf{158.} \textit{Id.}
\end{quote}

\begin{quote}
\textbf{159.} In the Court's view, the ultimate goal of equal protection is to "eliminate[e] entirely from governmental decisionmaking such irrelevant factors as a human being's race." \textit{Id.} at 722.
\end{quote}

\begin{quote}
\end{quote}
the Court privileges a positive dialogue about power over a normative dialogue about rights.

The Court's tack here is again rhetorical: it conceives of discrimination as a "remedial model" sending us to an inquiry about the parameters of the remedial concept. One parameter is "who" has the power to grant the relief sought. Thus, for the Court, the prior question is the positive question of who has the authority to provide a remedy, not whether a wrong exists. Similarly, if one has the power to grant some remedy, one must still inquire what is the proper "scope" of that remedy.

The normative claims about racial exclusion are entirely circumscribed by positive jurisdictional constraints. These remedial-only "positive law" constraints on equality feed back into the Court's baselines in the fault model. There is an intricate interdependence between the discourse of discrimination as a conception of "law" and "legal remedies," and the discourse of discrimination as a conception of particularizing notions of fault. Although the states retain some power to ameliorate racial disparities, they are limited to "remedying" particularized past discrimination. Its proper scope, according to the Court, is to make whole identified victims of discrimination.

Under the remedial concept of discrimination, the requirement of particularization impinges from both the top and the bottom tiers of equal protection analysis. To satisfy the compelling state interest, one needs to identify a discrete class of victims of intentional discrimination. Then, having particularized the class of victims, the least restrictive alternative thus becomes granting relief to members of that particular class.

Such programs [limited to actual victims] are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole

161. Stretched out on a syllogistic frame the argument seems to be:
1. Remedies are coterminous with common law baselines.
2. Rights are coterminous with remedies.
3. "Discrimination" is a "right."
4. Therefore discrimination is coterminous with common law baselines.

The power of this argument is that it is mechanically deductive and flows easily from the major premise about the limits of remedies. Its deductive character gives it a thin patina of "objectivity." It is, of course, based on the arbitrary and perhaps blinding assumption that the starting point is an inquiry about the positive bounds of "remedies" rather than an inquiry about the moral expansiveness of rights. In my view, because the Court uses this blinding assumption as a starting point, it cannot "see" what discrimination is.

An underlying problem is the Court's blinding assumptions about the nature of law. The Court thinks of law as a "jurisprudence of concepts." "A jurisprudence of concepts is one which attempts to treat the law as a closed system of definitions, rules of operation, and substantive major premises such that any specific legal problem can be solved by deductive reasoning . . . ." See W. Hamrick, supra note 3, at 129.
relevant consideration . . . given the existence of an individualized procedure the city's only interest in maintaining a quota system . . . is administrative convenience.162

It goes without saying that administrative convenience is not enough. Hence, a quota will never be either necessary or the least restrictive alternative.

Affirmative action comes to mean its opposite: standard judicial remedy or mere negative prohibition. The difficulty is that, after approximately twenty-five years of testing, mere negative remedies have not worked to close the gap in black participation.163

In the real world, to a real society, to both blacks and whites, this gap is destructive. It breeds notions of caste with all the attendant stigma; it provides an economic foothold for political inequality; and, to the extent it does this, it threatens the legitimacy of any claim to true democracy. In the real world, and in a constitutional as well as a philosophical sense, we are wrapped in the same garment of destiny. But the Court's sources of perception are limited to the world of legal forms. As such, neither real equality nor the real world problems of caste, stigma, and institutional erosion can be coherently conceptualized.

The systematicity of the Court's rhetorical assault could only come from an intense determination to protect moral values the Court feels is essential. It clearly sees within the legal text a moral one. Yet, from the Court's internal point of view, it is not imposing its own preferences: by protecting these values, it is merely maintaining an objective, neutral legal framework.

In the struggle of the Rehnquist Court to "protect" its perceived "neutral" values, the meaning of equality becomes a contested battlefield. Interpretation becomes war. The liberals who would impose a racial quota become an ideological insurgency who threaten not merely the innocent, but the very premises of the legal order. They must be stopped, alas. The cry resounds, "They shall not pass!"

163. As recently as 1985, Derrick Bell noted that 4 million of 8.8 million black men between the ages of 16 and 64 are either unemployed, out of the labor force, in prison, or of undetermined status in the labor force. See Bell, Foreword: The Civil Rights Chronicles, 99 HARV. L. REV. 4, 11 (1985). See also Luban, The Court and Dr. King, 87 MICH. L. REV. 2152, 2160 (1989) (the percentage of black families below the poverty line is 32.4%, for whites it is 9.7%); Clark, supra note 6, at 808 (since 1969, the percentage of black men who earn less than $5,000.00 a year rose from 8% to 20%); R. FARLEY & W. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA 304 (1987) ("Racial differences in relative incomes hardly vary by how long men attend school . . . The more years a black man spends in school, the further his purchasing power falls behind his white peers.").
C. Patterson: The Invisible Ideal

Blacks: The time has arrived when we, like huntsmen, should surround the cover, and look sharp that equality does not steal away, and pass out of sight and escape us. For beyond a doubt she is somewhere in this country: Watch therefore and strive to catch sight of her, and if you see her first let me know.

The Court: Would that I could! But you should regard me rather as a hunter who has just eyes enough to see what you show him — that is about as much as I am good for.164

Perhaps the best example of the Court’s current approach in civil rights cases is Patterson v. McLean Credit Union.165 In Patterson, a black woman employed as a teller and a file coordinator complained that she had been passed over for promotion, made to sweep floors and other menial tasks, and subjected to remarks about black workers being slower than white workers, all because of her race.166 The question actually raised by the case was whether the statute she used to get into court, 42 U.S.C. § 1981,167 applied to matters after the initial making of the contract. While the issue had not been raised by either litigant, the Court requested that both sides brief the question of whether or not the Warren Court’s decision in Runyon v. McCrary168 was still good law. This was something of an irregular request; without being asked, the Court decided to question the validity of its own precedent.

After some controversy over this boldness, the Court let its own precedent stand and addressed the question raised. The Court noted that the words of the statute did in fact say that blacks shall have the same

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164. See PLATO, supra note 17, at 146. This is a paraphrase of the dialogue between Socrates and Glaucon.
166. Id. at 2369, 2373.
167. The statute reads:
All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactations of every kind, and to no other.
rights to make and enforce contracts, but said nothing about "postformation" conduct. Thus, a strict, literal reading would arguably have foreclosed Ms. Patterson's rights. This literal reading, in tandem with an argument that Title VII was a more appropriate vehicle for the black woman's claims, led the Court to rule that Ms. Patterson had no right to be heard under the statute she had used. This was true despite the fact that she had claimed, without contradiction, that she was made to sweep floors, and was demeaned on the basis of race.

In adopting its literal approach, the Court ignored the historical context: Section 1981 was enacted by Congress because it was intimately concerned with addressing discriminatory practices as they existed in the Reconstruction Era.

As Justice Brennan notes, in addition to dismantling the black codes, section 1981 was supposed to outlaw brutality against blacks. Section 1981's phrase, that blacks shall have the same rights to make and enforce contracts, was meant to do away with the then popular assumption: "[Y]ou cannot make the negro work without [whipping]." It was a way of saying that certain minimum standards of respect were required by law, beyond the reach of contractual negotiation. Or, said another way, certain rights of blacks could not, under section 1981, be bargained away. Section 1981 subordinated even the lofty ideal of freedom of contract to the ideal of equality.

Thus, by reading the text so literally, the Court has actually changed the current meaning of the text to the opposite of what it was supposed to mean. Moreover, the scheme of priorities is reversed from equality over contract to the other way around.

Of course, the key operative term whose meaning is being circumscribed is not the word "contract." It is the term "civil right." The key to Patterson is to understand that the Court feels that freedom from discrimination, as a civil right, is in derogation of the common law and

169. Patterson, 109 S. Ct. at 2372.
170. Id. at 2373.
171. Id. at 2372-73.
172. Id.
173. Fuller argues literal interpretation is at odds with the inherent contingency or rules: one can never determine if a case fits within the "core" or "periphery" of a rule without considering the rule's intent. Fuller, Positivism and Fidelity to Law, 71 HARV. L. REV. 630 (1958).
174. Patterson, 109 S. Ct. at 2388 (Brennan, J., dissenting).
175. Id.
tolerated only so far as positive legislative commands require. Thus, the term "civil right" has legal, but not moral, content.\(^{176}\)

There is a line which separates core and periphery which, for the Court, runs parallel to common law baselines, and parallel to notions of public and private duty. Core notions of injury, defined by analogy to the common law, relate to issues of either contract or tort. Post-contract comments about blacks in general, or assignment to jobs the employee subjectively feels is menial, do not fit unambiguously into any of these core common law categories. Thus, such claims are cast into the private sphere.

Where the core textual authority to impose employer liability exists, that is a public duty. Where we reach an area of ambiguity — the periphery — the Court feels the burden shifts to minorities to resolve their difficulties privately or via some other law which is more clear.

The public/private dichotomy is strengthened by a parallel boundary of positive law. The common law categories are coterminous with a notion of positive wrongs.\(^{177}\) Claims outside of these core categories are essentially normative and finally subjective. Who is to say a black is in any determinate sense injured by remarks about blacks as a group, for example?\(^{178}\)

176. A tacit layer of debate here is an argument about legitimacy. That is, within the debate about what is "legitimate" as a civil rights claim is a debate about what is "legitimate" as law. For liberals, law is mediated by a notion of democratic values: it requires a certain moral order for legitimacy. The concept of civil rights, within the discourse of the law, necessarily embraces moral claims because, absent the capacity to address such claims, legitimacy of law would not exist. The Rehnquist Court, in contrast, can empty the concept of civil rights of moral content because its notion of legitimacy is mediated by a different notion of democracy: a minimalist, procedural construct that requires only "the rule of 'law,'" i.e., positive law. Legitimacy requires no particular moral content.

"The positivization of law means that legitimate legal validity [Rechtsgeltung] can be obtained for any given contents, and that this is accomplished through a decision which confers validity upon the law and which can take the validity from it. Positive law is valid by virtue of decisions." J. Habermas, supra note 12, at 98 (quoting N. Luhmann, Positives Recht und Ideologie in Soziologische Aufklärung 180 (1970)).

177. Implicitly, the vast area the Rehnquist Court cedes to the private sphere would eliminate public duties with respect to noneconomic injuries involving concerns about mere "dignity." This tacitly rejects moral categories, like "dignity," as incongruent with legal discourse. This is the application of the positive concept of law at its most extreme. As we discuss more fully below, this approach parallels the approach of the post-Reconstruction Supreme Court. See, e.g., The Civil Rights Cases, 106 U.S. 3, 629 (1883).

178. There is a faint echo here of Justice Brown's rhetoric in Plessy v. Ferguson, 163 U.S. 537 (1895):

We consider the underlying fallacy . . . to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.
What unites these “core” categories is a deep concern with value “neutrality”; with avoiding imposition of moral constraints about how actors in the marketplace should behave. Categories of common law injury and positive law, notions of the core and the periphery in the realm of rights, become metaphors expressing this value neutrality theme.

This complex metaphor or cognitive model would blur and dissolve if the category of civil rights were not kept to its proper conceptual boundaries.¹⁷⁹

It is finally a problem of seeing. The Court does not, or cannot, see beyond the core of common law categories and literalist interpretation. The Court’s interlocking assumptions about these categories, and about interpretation, form a kind of cognitive lens that blocks the Court’s social vision. This cognitive difficulty blends into the problem of moral blindness. The cognitive lens is finally the lens of ideology which perceives only a narrow notion of what counts as law, and what counts as a right. So long as the Court looks through its peculiar lens, the ideal of equality will remain invisible.

To the extent that the above-mentioned cases reflect the Court’s thinking on civil rights, it is clear that the notion of judicial value neutrality has been abandoned. Ironically, the Court relies on the same “neutral principles” that defined the old model. The same concepts of formalism, original intent, and law as positive command continue to play a central part. But, while all of these elements continue to appear in the center of the Court’s approach, they appear only as caricatured, inverted images. A deep concern for proceduralism has been replaced with a concern for substantive content. A concern with whether precedent is followed has been replaced with a concern about whether the precedent of predecessor courts are pure vis-à-vis the Rehnquist Court’s interpretive standards. Reconfigured, the elements of the old model no longer operate as self-restraint, but as the tools by which the Court writes into law its God’s eye view of what civil rights blacks should have.

¹⁷⁹ Habermas suggests that there may be high psychological stakes to maintaining such a world view: “Classical sociology never doubted that subjects capable of speaking and acting could develop the unity of their person only in connection with identity-securing world views and moral systems.” See J. HABERMAS, supra note 12, at 118. That is, one’s view of the social world represents a “moral reality” in which the individual locates his/her own sense of self. Id. at 117-18. The Court’s view of things is in a real sense not merely a legal framework, it is a framework for organizing the social world (into public and private spheres) and of fixing their own sense of who they are (protectors of order, safeguarding political-legal institutions from contingency and chaos).
The same ideological camp which had worn the pious hat of principle and restraint when they were a minority have put on the helmet of activism and instrumentalism once majority was achieved. But the Court does not see its own nonneutrality. Through the lens of its rhetorical strategy, in which notions of law and equality have fixed meanings, the Court sees equilibrium even when it abandons precedent. In its objectivism, it sees past liberal civil rights frameworks as having upset the delicate balance set by traditional jurisprudence. The Court sees itself as merely restoring the legal order.

The Court, in its opinions, is using legal language and the process of giving meaning to words to form a kind of hermeneutical circle around its own majoritarian values. It is a circle that defines the limits of both interpretation and community.

Man lives with things mainly, even exclusively, since sentiment and action in him depend upon his mental representations as they are conveyed to him by language. Through the same act by which he spins language out of himself, he weaves himself into it, and every language draws a circle around the people to which it belongs, a circle that can only be transcended insofar as one at the same time enters another one.¹⁸⁰

Unfortunately, blacks remain outside of the circle the Supreme Court has drawn. The hermeneutic circle becomes the circle of segregation. It comes to separate constitutional ideals and constitutional possibilities, faithfully tracing the dividing line between the Word and reality in civil rights.

III. The Mirror of History

A. The Second Coming

Turning and turning in the widening gyre
The falcon cannot hear the falconer
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
. . . . The ceremony of innocence is drowned;
Surely . . . some revelation is at hand¹⁸¹

There are perhaps two historical precedents for a judiciary writing its God's eye view of the world into constitutional law. One occurred during the post-Reconstruction Era (1877-1896) and the other during the Lochner Era (1910-1933). Let's talk about Lochner first.

¹⁸⁰ H. GATES, supra note 10, at xxi (quoting Wilhelm von Humboldt).
The *Lochner* Era involved the building of a constitutional "great wall" around the interrelated institutions of private property and laissez-faire capitalism. In the seminal case, *Lochner v. New York*, New York had promulgated a statute limiting the maximum hours a baker could work on any particular day (ten hours), and in any particular week (60 hours). Bakers at the time worked hot, inhumanly long work weeks. Moreover, the predominant perception was that their predicament flowed from gross inequality of bargaining power. New York attempted to intervene legislatively to protect what they perceived to be a particularly vulnerable class of workers from the excesses of twentieth century capitalism.

The Supreme Court held that the statute unconstitutionally "interfered with the right of contract between the employer and employee[s], concerning the number of hours in which the latter may labor in the bakery of the employer." The jumping off point for the Court was an assumption that the employer and employees met as relative equals. The context — individual workers negotiating with large corporate concerns in the age of monopoly capitalism — was simply not taken into account.

Without considering economic realities, the Court reasoned that both parties were grown and intelligent men: "There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations . . . ." By curtailing the "liberty" (viz. freedom of contract) of these parties to make bargains for their mutual benefit, a liberty interest the courts presupposed was protected by the due process clause of the fourteenth amendment of the United States Constitution, the statute interfered with the parties' due process rights. Here was the grand, definitive paradox of the *Lochner* approach: As archetypical formalists, the *Lochner* Court was preoccupied with the idea that judges must be faithful to the law as written down. Yet, they developed a body of doctrine holding freedom of contract as a central constitutional value despite the fact that this was nowhere written down. The due process clause, of course, con-

182. 198 U.S. 45 (1905).
184. The working conditions of this period are poignantly painted by Upton Sinclair. U. Sinclair, *The Jungle* (1906).
185. 1897 N.Y. Laws, ch. 415, art. 8, § 110.
187. Id. at 57.
188. See supra note 156 for text of the due process clause.
tains no reference to freedom of contract and provides no textual justification.

The implicit, definitive naked preference for a whole set of laissez-faire centered values was justified by a guiding, undergirding vision of what a free society was like. The structure and values of that ideal were mirror images of the baselines and values of the common law. They seemed natural and, indeed, inevitable.

Having identified a conflict between the legislation and the due process clause, the Court engaged in a two-step inquiry: Did the legislation have a permissible end and, if it did, was the means used by the statute rationally related to the legislative end involved? While the Court did not expressly reject the state's purpose of providing for public health as illegitimate per se, in the Court's intensely hostile means analysis, the statute was found wanting.

The Court found that the goal of protecting public health was not properly connected to a statutory scheme for achieving it. First, the health of the bakers themselves was dismissed with majestic relativism: It may be true that the trade of a baker does not appear to be as healthy as some other trades, but it is vastly more healthy than still others. Then the Court quickly dispatched with the question of the health of the public at large. "In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman."

The intensity of the Court's means analysis, that is, an objective evaluation of whether the legislative scheme rationally carries out its goal, belies a deeper moral objection. Astute students of constitutional law will immediately recognize that a means analysis, although a doctrinally separate inquiry, feeds in a circular fashion back into the initial all-important question: Do we agree with the legislative end in the first place? A means analysis is sharp or blunt, thoroughgoing or perfunctory, depending on our initial assessment of the legitimacy of legislative purpose. The underlying objection here is to any legislative end or pur-

189. See L. TRIBE, supra note 183, at 578 (arguing that the Court saw itself restoring order, which the legislature had upset).
191. Lochner examined whether there was a "public" and hence, "neutral" justification for the statute. Id.
193. Id. at 62.
194. Note, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123 (1972). The dispute is between competing value choices and that discussions about rationality are purely "diversionary." Id. at 154.
pose to curtail freedom of contract. For the *Lochner* Court, freedom of contract was an organizing principle of the political economy. Allied to this was the idea that, for equilibrium, freedom of contract depended on the maintenance of a legal equality between the parties.

For the legislature to intervene because one party to the bargain has fared badly would render the notion of equality between bargaining entities incoherent. Consequently, the very idea of freedom of contract, upon which the Court's conception of a free market rested, would come undone. "If this statute [is] valid . . . there would seem to be no length to which legislation of this nature might not go." 195 The common law precept, that whatever the parties decide is the contract between them, becomes central to the economic order.

Thus, to protect the contractarian framework, a whole class of legislative ends was placed beyond the power of the legislature: socio-economic legislation which redistributed benefits or rights contrary to the baselines dictated by common law notions of contract was deemed illicit, illegal, and forbidden.

Such narrowing of legislative ends draws a bright line to demarcate where government power stops and individual liberty begins. 196 It also seemed natural to not only read into the due process clause the substantive value of freedom of contract, but to center the constitutionalism of the era upon that principle too.

But if freedom of contract was the center of the constitutional universe, that substantive value had in turn, like a wheel within a wheel, an elaborate internal structure. Freedom of contract was not merely the principle by which relationships between employer and employee, masters and servants, were governed; rather, it was the vehicle which carried forward the fault model and classically liberal notions of individual rights.

For example, in *Adkins v. Children's Hospital*, 198 a 1923 decision invalidating minimum wage legislation, the Court, ostensibly using freedom of contract/substantive due process notions, said:

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196. The lines, though perhaps now long erased since the rise of the regulatory state, appeared quite bright and natural against the baselines of common law.

197. The metaphor is from *Ezekiel*:

> The appearance of the wheels and their construction was a crystal, a single likeness to the four of them, their appearance and construction as if there were a wheel in the middle of a wheel . . . withsoever the spirit was to go they went . . . for the spirit of the living creature was in the wheels.

1 *Ezekiel* 16:20.

198. 261 U.S. 525 (1923).
To the extent that the sum fixed [by the minimum wage statute] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no particular responsibility.199

Ultimately, this argument rests on the claim that, simply, there should be no liability without fault: No taking of money from A to give to B without a showing of responsibility (i.e., fault) on the part of A.

This principle of no liability without fault, the core notion of the traditional fault model, acts in the first instance as a legitimating device. Proponents of this model posit, as a kind of first principle, that distributions which are based on fault are rational, and therefore legitimate. Conversely, measured against the same standard, distributions which do not take fault into account are irrational and illegitimate. It is rational to make someone who has done something wrong pay a price to redeem his acts. It is irrational to do this to someone without fault: such a person is innocent. To say it is irrational is to say we have no justification acceptable to a reasonable person or no objective justification.

If we look still deeper, if we increase the power of our analytical microscope yet another notch, we recognize that within this notion of no liability without fault there is a notion of equality. The reason that, as a matter of constitutional law, there should be no liability without fault is not because it is irrational, but because of the implications of this irrationality. Distinctions between citizens must be justified on neutral or objective grounds as a matter of basic equality. To take from A to give to B in the absence of a rational basis is, by definition, to take from A to give to B on the basis of some nonneutral, nonobjective ground.

It is, in fact, to discriminate against A on the basis of a subjective choice (naked preference again). Thus, while the Constitution does not prohibit something merely unfair vis-à-vis common law norms, this discrimination, this naked preference for A (e.g., bakers) over B (e.g., employers) is what the Constitution does not allow.200 It is thus the principle of equality, albeit a quintessentially procedural, formal version of equality to be sure, which is at the very heart of the fault model in the Lochnerian constitutional tradition.

Ironically, then, legislative schemes premised on Lochner Era workers' claims to real equality were frustrated by a framework ultimately based on a claim of formal equality. One concept of equality was at war with the very idea of the other. Said another way, the formal equality

199. Id. at 557-58 (emphasis added).
concept as applied by the *Lochner* Court rendered the concept of real equality inconceivable as equality; it became, through the Lochnerian lens of formal equality, another form of discrimination. Thus, formal equality operated as a rhetorical strategy, that is, a linguistic limitation on how one could speak of a concept. In the *Lochner* Era, this rhetorical strategy suppressed at the conceptual level any dialogue about redistribution or real equality.

The *Lochner* paradigm ultimately ends in its collision with the powerful forces surrounding the New Deal, including both the political im-etus of Roosevelt, and the increasing power of the realist movement which exploited the gulf between social context and the *Lochner* approach.\footnote{201. *See generally* STONE, SEIDMAN, SUNSTEIN, & TUSHNET, CONSTITUTIONAL LAW, 168, 743-44 (1986) (explaining the demise of the *Lochner* approach as a retreat from formal common law assumptions about the 'naturalness' of private ordering).} Doctrinally, *Lochner* was rejected because the Court ultimately realized, taking social context into account, that the *Lochner* approach really was not neutral after all.\footnote{202. *See* West Coast Hotel v. Parish, 300 U.S. 379, 399 (1923) ("[E]xploitation of a class of workers who are in an unequal position with respect to bargaining power... casts a direct burden of their support upon the community." Once the problem of wages and working conditions was reconceived as a public rather than a private issue, the Court no longer viewed it as "neutral" for the government to stand by and allow inequalities to go on unabated.).}

The parallels between the *Lochner* approach and the Rehnquist Court’s civil rights jurisprudence are so obvious as to tempt one to say perhaps this is *Lochner*’s second coming.

There is the same use of common law baselines as constitutional imperatives: In *Lochner*, the fault model was the canon under which all socio-economic legislation was judged, and in the Rehnquist Court’s jurisprudence, it becomes the canon by which all discrimination claims are judged. This canonical obedience to the fault model blinded the Rehnquist Court, for example, to the systematic, virtually plantation style segregation of the poor Aleuts in *Wards Cove*, and to the discriminatory character of the caste-like, one-race construction contracting industry in *Croson*.

As in *Lochner*, formal equality, the normative commandment at the center of the fault model, is the golden preemptive rule: it becomes the only legitimate conception of the antidiscrimination principle pre-empting all others. Under the iron *Lochner* paradigm, any deviation from mere formal equality, such as affirmative or, more exactly, redistributive efforts to help a disadvantaged social group, is not merely invalid but reprehensible as well. Looked at through the formalist lens, this “affirm-
Affirmative action” is not “race-neutral,” it is just discrimination.203 Affirmative responses to the plight of bakers becomes legislative preference for bakers, affirmative responses to the plight of blacks becomes legislative preference for blacks.

There is a danger that a racial classification [viz. affirmative action quota] is merely the product of unthinking stereotypes or a form of racial politics. If there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate “a piece of the action” for its members.204

Moreover, there is in this imposition of moral values, as in Lochner, a confusion of normative assumptions for facts.

The Court in Croson views the existence of a legislative distribution to blacks, in absence of proof sufficient to meet the fault model, as a plain instance of discrimination. Distributions which do not satisfy the fault model are not merely unjustifiable, relative to common law baselines, as a normative judgment, they are simply unjustified period, as if this were an observation of fact, i.e., “the truth.”205 The Court sees itself not as imposing its personal values, but as imposing a standard as neutral as the sun rising in the East. There is again a strong notion that all this is natural and inevitable.

In Lochner, the idea that common law baselines were natural in this way was justified on the basis of a grand appeal to legal order: unless

203. The Court’s conception of neutrality is captured by William’s paradigm of the sausage machine.

You have this thing called a sausage . . . machine. You put pork and spices in the top and crank it up, and because it is a sausage machine, what comes out the other end is sausage. Over time, everyone knows that anything that comes out . . . is . . . sausage.


This label continues to apply even if “one day we throw in . . . rodents . . . a teddy bear and a chicken.” Id. The Court’s reasoning about neutrality is equally circular. The Court’s concept of the neutral starting point is discrimination as an intentionalist model. This model is the Court’s sausage machine. Everything produced by the model is “neutral.” This neutrality persists even when we throw in chronic, stark patterns of de facto segregation and produce no legal “wrong.” There is within this model a tyranny over words that grinds against one’s sense of logic and justice.


205. This is again a reflection of the Court’s objectivism. They assume a one-to-one correspondence between the words they use and the inferences they make about patterns of social behavior. See supra note 53.
contractarian baselines remained bright, the boundaries between individual rights and state power would be impossible to define.206

This approach echoes throughout Justice O'Connor's opinion. For example, when the Croson Court rejects societal discrimination on the grounds that it did not fit the intent and causation requirements of the fault model, the Court makes its underlying theoretical concern explicit: if we allow societal discrimination, in effect throwing out the fault model's proof parameters, there would be "no logical stopping point," really, no boundary between the sphere of individual rights and judicial power.

[B]ecause the [societal discrimination] theory ha[s] no relation to some basis for believing a constitutional or statutory violation ha[s] occurred, it could be used to "justify" race-based decision-making essentially limitless in scope and duration (citation omitted). In absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.207

Unfortunately, there is no way for the Court to achieve a broader social or historical understanding of responsibility within the two dimensions of its model.

The Courts also share interpretive canons. What makes the Rehnquist Court's theoretical rigidity possible is the similar way in which it, like its doctrinal antecedent, has made a studied effort to situate itself not in a social context, not in the actual experience of minorities as an historically excluded group, but in a transcendental, formalistic false reality. Nowhere is this transcendentalism more intense than in Croson. There the Court suggests that the only interest the city of Richmond had in using a quota instead of relief to identified victims was "administrative convenience."208

Both in terms of the yawning gap between the law and social needs, and in the operation of common law baselines to rationalize this gap as legally irrelevant, the Court did nothing original. They did it the old fashioned way — they Lochnered.

B. Echos of 1883

[T]he substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism

206. Lochner v. New York, 198 U.S. 45 (1905). "If this statute [is] valid . . . there would seem to be no length to which legislation of this nature might not go." Id. at 58.
208. Id. at 729.
Constitutional provisions, adopted in the interest of liberty, have been so construed as to defeat the ends the people desired to accomplish, and which they supposed they had accomplished by changes in their fundamental law.\textsuperscript{209}

Disturbing as the specter of \textit{Lochner} may be, as it whispers through \textit{Wards Cove} and \textit{Croson}, there is yet an even more ominous echo if one listens closely to the Rehnquist Court's declarations on discrimination. In \textit{Patterson} and in \textit{Croson}, both the interpretive approach it uses and the social assumptions which fuel that approach, harken back to the infamous \textit{Civil Rights Cases} of 1883.

The Rehnquist Court is developing two themes. One is that, using the fault model, we must particularize equality claims if individuals are to be held liable. The other theme, using an interpretive approach devoid of moral inquiry, is the tendency to privatize it, to push it out of the realm of constitutional discourse altogether. \textit{Lochner} is the paradigm for the first theme, the \textit{Civil Rights Cases} are the paradigm for the second.

The \textit{Civil Rights Cases} arose out of a challenge to the constitutionality of the Civil Rights Act of 1875 (the "Act").\textsuperscript{210} The Act was passed during the fleeting historical moment when the Radical Republicans\textsuperscript{211} attained political ascendancy. It prohibited, \textit{inter alia}, discrimination on the basis of race in public accommodations, and it provided both criminal and civil liability for persons violating provisions of the Act. The \textit{Civil Rights Cases} consolidated criminal appeals in four cases,\textsuperscript{212} and an appeal of a civil penalty in another. The question, as the Court framed it, was: "[H]as Congress constitutional power to make such a law?"\textsuperscript{213} This becomes the question of whether the Act was authorized by the Reconstruction Amendments.\textsuperscript{214} This leads us to the classic inquiry into the meaning and intent of the amendments involved.

\textsuperscript{209} The \textit{Civil Rights Cases}, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).
\textsuperscript{210} Act of March 1, 1875, ch. 114, 18 Stat. 335.
\textsuperscript{211} The "Radical Republicans" represented the left wing of the post-bellum Republican Party. While the Republicans shared a desire to make emancipation permanent, the "Radical Republicans" wanted a more far reaching social transformation. They were generally associated with constituencies "centered in New England and the belt of New England migration that stretched across the rural North." \textit{See} E. Foner, \textit{supra} note 27, at 228. "At the core of [Radical Republicanism] were men whose careers had been shaped ... by the slavery controversy: Charles Sumner, Ben Wade, and Henry Wilson in the Senate; Thaddeus Stevens, George W. Julian, and James Ashley in the House." \textit{Id}.
\textsuperscript{212} The \textit{Civil Rights Cases}, 109 U.S. at 4 (for denying blacks admission to inns, hotels, and theaters).
\textsuperscript{213} \textit{Id. at 19}.
\textsuperscript{214} U.S. \textit{Const.} amend. XIII, XIV, XV.
In the Court's textualist analysis, it is the fourteenth amendment which becomes the focal point of the inquiry because of its unique equal protection language.\textsuperscript{215}

The first sentence of section one, that “[a]ll persons born . . . in the United States . . . are citizens of the United States and the State wherein they reside” is potentially a rich and powerful proclamation that reverses \textit{Dred Scott}.\textsuperscript{216} Interestingly, the Court passed over this declaration of rights without any effort to discern its meaning. It is obliquely mentioned, but not interpreted. Instead, the Court focused, with a studied literalism, on the remaining passages, all of which enunciate limitations on states. The Court thus reasons that, as the language of the amendment repeatedly says “no State,” it really means no State: It declares that: “[Nor] shall any State deprive any person of life, liberty or property without due process of law . . . .” It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.\textsuperscript{217}

In choosing its literal approach, the Court also implicitly rejected the path of normative inquiry. The express words of the amendment, like points in space, are the beginning and the end of the discussion. There is no search for a deeper underlying set of values to unite the words into a coherent normative scheme.\textsuperscript{218}

The Court did not stop there, however. It grounded the result reached by literalism in an idea of federal civil rights defined by, or imprisoned within, really, a theory of federal/state relations. The central idea is that the federal government may insure that states provide due process, as a grand ideal of procedural fairness for all citizens, but not go further to compel what the federal government feels is a fair result in


\textsuperscript{216} \textit{See} Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). In the infamous decision by Justice Taney, the Court held, \textit{inter alia}, that Dred Scott remained a slave despite his temporary sojourn in the “free state” of Illinois. In Taney’s view, Scott’s claim relied on the notion that he could be a United States citizen capable of suing in United States courts. Taney held that the original intent of the Constitution was that neither slaves nor their descendants were intended to be “citizens” within the meaning of the Constitution. \textit{See also} D. FEHRENBACKER, THE DRED SCOTT CASE (1978) (discussing the historical background of the Dred Scott case).

\textsuperscript{217} The Civil Rights Cases, 109 U.S. at 11.

\textsuperscript{218} \textit{See} Pierson v. Ray, 358 U.S. 547 (1966) (Douglas, J., dissenting). Douglas berates the Court for its "atomistic conception of intention" coupled with "a pointer theory of meaning." "This view conceives of the mind to be directed toward individual things rather than toward general ideas. . . ." \textit{Id.} at 560 (quoting L. FULLER, THE MORALITY OF LAW 84 (1964)). This "pointer" theory of interpretation militates not only against general ideas but also any search for broader values.
specific cases. It may compel the states to refrain from discrimination (procedural fairness again), but not make affirmative laws to promote equality.

It is absurd to affirm that, because the [Amendment seeks to protect against invasion of the] rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection.219

The sphere of federal power ends where state power begins, with the federal interest of preserving due process as the arbiter of where the line is drawn. Thus, the due process or procedural fairness model would reach any instances where the state has deprived someone of something, but would not be triggered in the absence of state action. The boundary between state and federal power is also coterminous with the boundary between a jurisdictionally constrained notion of formal equality and equality of result.

It follows that the contour of a federal civil right, whose dimensions can be no greater than the power which creates it, is delimited by the same boundary drawn by due process and state action. In the world view of the Civil Rights Cases, the same textually grounded jurisdictional logic which defines federal power over states defines the concept of a civil right.

If the notion of a civil right is the notion of a federal limitation on state power, it is also true that only a state can deprive an individual of a civil right.

[C]ivil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws . . . . The . . . individual[s] . . . is [still] a private wrong . . . an invasion of the rights of the injured party, it is true, . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.220

There is here an intricate hierarchy implying two distinct levels of rights, two distinct levels of interference, and two distinct levels of remedy. This two-level theory of civil rights relies on the principle that the remedy is a mirror image of the wrong.221

220. Id. at 17.
221. Cf. W. HOHFFELD, FUNDAMENTAL LEGAL CONCEPTIONS, (1919) (holding rights
This abrogation and denial of rights, for which the states alone were or could be held responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy must be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon that state law.222

Thus, the Court tightly entraps the idea of civil rights in a web of textualism, artificial distinctions, and jurisdictional constraints.223

What underlies all this are a number of assumptions. In the context of the federal government limiting the power of individuals to do as they wish — to discriminate against blacks, for example — procedural concerns about who is acting come before substantive concerns about whether they are doing good, concerns about power come before concerns about rights, and concerns about text come before moral concerns. This hierarchy of concerns reflects an implicit division of the moral universe into public and private spheres. There is a realm for positive, legal concerns — who has the power, what does the text say — and a separate realm for thinking about substantive, moral questions. Indeed, the notion of different spheres of power is, as a metaphor, reciprocal of this moral cosmology.

To paraphrase Justice Harlan, however, even in its own, intensely textualist terms, this model was achieved by interpretive sleight of hand. Assuming the Court’s intensely textualist methodology was appropriate, it glaringly omits critical portions of the text. There was in the first line of the fourteenth amendment a textual basis for locating affirmative rights within the fourteenth amendment. As Justice Harlan noted:

correlative of duties). The Civil Rights Cases complicate the correlative relationship by requiring a prior inquiry as to who has duties under the statute and who has the power to enforce them. The notions of right and duty, foundational at common law, are secondary considerations. Jurisdictional considerations are primary.
222. Id. at 36-38.
223. This intensely legalistic framework reflects the studied relegation of black moral claims to the category of positive law. There is an historical connection, I think. Natural Law still had currency in 1883. Historically, efforts to contain the “natural” rights of blacks depended on civil rights being bound up in a positive mode of inquiry. See, e.g., Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772):

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it is so odious that nothing can be suffered to support it, but positive law. Id. at 510. See also Gudridge, Privileges and Permissions: The Civil Rights Act of 1875, 8 LAW & PHIL. 83, 94 (1989) (arguing that the non-person status of slaves was constructed by the law’s studied refusal to refer directly to the rights of slaves, but rather to the property rights of slave owners or the duties that society might impose on free persons in dealing with chattel slaves).
The first clause of the first section — "All persons born . . . in the United States, . . . are citizens . . . of the State wherein they reside" — is of a distinctly affirmative character . . . [T]hey were brought, by this supreme act of the nation, within the direct operation of that provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." (citation omitted).

The citizenship thus acquired, by that race, in virtue of an affirmative grant from the nation, may be protected . . . [from] congressional legislation of a primary direct character. . . .

A forthright search for the meaning of this amendment might have taken us to a fruitful discussion of what the privileges and immunities of a citizen were. For Harlan, freedom from discrimination "by individuals or corporations exercising public functions" was axiomatic of citizenship, unless the recent amendments were "splendid baubles, thrown out to delude those who deserved fair . . . treatment . . . . Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race . . . ."

Inns and other places were public in the sense that, under common law, "the law gives [them] special privileges and . . . charge[s] [them] with certain duties . . . to the public." Although not entirely articulated, the rationale for finding a civil right of access to public places, as later explained in Harlan's dissent in Plessy, seems to flow from two things. First, the common law tradition was that inns and other places were forbidden from discriminating in general. To discriminate against blacks deprived them of an actual, undisputed common law right. But, more importantly, as he notes in his Plessy dissent, there is a notion of stigma: by being set apart, there is an injury. Moreover, the injury of being set apart from the community is inconsistent with the fourteenth amendment's inclusive design to make blacks part of the community which comprised the sovereignty.

It is the language of affirmative values — citizenship, community and stigma — which underlie and empower Harlan's analysis. These

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225. In the Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873), which involved white plaintiffs attempting to use the fourteenth amendment to challenge a state-sponsored monopoly, the Supreme Court held that the "privileges and immunities clause" protected only a few rights. However, even from a strict doctrinal perspective, this left open the question of what those rights were. Although Slaughter-House prefigured and heralded what was to come, it is not really until the Civil Rights Cases, 109 U.S. 3 (1883), that the Supreme Court entirely forecloses the use of "privileges and immunities" as a textual peg for securing black equality.
227. Id. at 41 (emphasis added).
228. See Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting).
normative concepts of community and stigma, inviting a kind of historical search and appraisal of "freedoms" enjoyed by citizens, set the terms for the ensuing civil rights debate that culminates seven decades later in Brown. Brown's discussion of the stigma to black children was a dialogue whose framework was constructed by Justice Harlan in 1883.

The Court, in rejecting the citizenship inquiry, rejects as well the rich normative framework Harlan offers. It substitutes a purely positive dialogue about negative prohibitions devoid of even the language to articulate the conflict between constitutional values and permitting discrimination in inns and taverns.

The result of all this was to reverse the basic assumptions of Reconstruction. The Republicans had fought a war not merely to abolish slavery, but to secure freedom for the emancipated slaves. The fourteenth amendment existed to fill the gap between the thirteenth amendment and the freedom ideal. The genius of the fourteenth amendment was that it translated the search for the residual meaning of freedom into the idiom of equality, and that it translated the search for a definition of equality into a dialogue about citizenship.

This use of citizenship as a lens to locate equality gives the inquiry a substantive focus. The question becomes what are the substantive rights of citizens. Beyond mere concerns about procedural fairness, this posits a need to include blacks within the concept of community. Blacks are translated from being simply an "other" to becoming "integrated" into the concept of a national "self."

While this conflicted with traditional southern notions about race, having won the war, Radical Republicans sought to institutionalize their own ideals. The clash between the Republican notion of what equality required and what the Old South wanted did not stop with the ratification of the fourteenth amendment, but it continued in, and was chronicled by, the debates about the Civil Rights Bill of 1875. The debates carried forward original southern opposition to racial reform and represented a continuation of the war on a political plane.

The Act of 1875 represented an integral part of a Radical Republican strategy to finally, pre-emptively resolve a debate about the scope of citizenship and hence equality. Southern opposition to the bill, which proposed to remove the burden of race from emancipated slaves in their

229. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2675 (1866) (remarks of Senator Howard). Howard identifies citizenship with the notion of "privileges and immunities." Howard quotes Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) for a list of these immunities which include both Bill of Rights protections and natural law rights, such as the right to own property, and to travel freely through the several states.
contracts with innkeepers and the like, hinged on the theory that this touched on an area the government could not reach.

The traditional southern position was expressed by Joshua Hill in the original debates:

I must confess, sir, that I cannot see the magnitude of this subject. I object to this great Government descending to the business of regulating the hotels and the common taverns of this country, and the street railroads, stage-coaches, and everything of that sort. It looks to me to be a petty business for the Government of the United States....

and

What he may term a right may be the right of any man that pleases to come into my parlor and to be my guest. That is not the right of any colored man upon earth, nor of any white man, unless it is agreeable to me.

There is the idea that government power is relegated to a distinct and different plane than that occupied by choices about personal dealings and associations. It follows that the government cannot rightfully descend from its proper domain to intrude on the plane of personal choice. Similarly, rights and duties are associated with the plane of government power, and they likewise may not intrude upon the plane of personal tastes about association and the like.

Sumner, speaking for the Radical Republicans, epitomized an opposing conception:

The Senator may choose his associates as he pleases.... That taste which the Senator has now declared belongs to him he will have free liberty to exercise always.... but when it comes to rights, there the Senator must obey the law.... Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be open equally to all without distinction of color.

For Sumner, discrimination against blacks by individuals, in the setting of inns and places of public accommodation, was a matter of rights. For Hill, it was a matter of taste.

By enacting the Civil Rights Act of 1875, the verdict of the Reconstruction Congress was that Sumner was right and Hill was wrong.

The Court in the Civil Rights Cases reverses the statutory outcome of the original debate about the civil "rights" of blacks. The court substituted Hill's conception of discrimination as a matter of private choice for Sumner's Radical Republican conception of discrimination as a depriva-

231. Id.
232. Id. (remarks of Senator Sumner).
tion of rights. Not only did the *Civil Rights Cases* adopt the same dichotomy as Hill, it adopted the same rationale.

The parallels between the *Civil Rights Cases* and the current civil rights approach are uncanny. There is the same use, in 1989, of textualism to pre-empt normative inquiry and to frustrate the search for a coherent set of values articulated by the act or amendment in question. Moreover, this textualism is used in tandem with a rigid jurisdictional framework to not only erect barriers at the procedural level in civil rights cases, but at the conceptual level as well, to limit the definition of a civil right. (The approach in *Croson* and in *Patterson* are so similar as to corroborate a common doctrinal ancestry). Beyond creating mere difficulties of proof, this approach places certain kinds of injustices beyond the power of courts or states to address, beyond the power of courts to speak of or conceive of these injustices as legal wrongs.

Recall in *Patterson* there was a Reconstruction statute enacted to protect blacks from humiliations linked to the tradition of slavery prevalent in the master/servant relationship between blacks and whites. Through a transparent use of literalism, the Court obscures the normative scope of the Act and limits it to express prohibitions concerning formation of contracts. The same literalism grounded jurisdictional argument that privatized discrimination in 1883 echoes in *Patterson*.

Mirroring 1883, the Court in *Patterson* uses an intensely literal theory of meaning to distort civil rights legislation into mere text devoid of social goals. The very core of legislative concern — the nexus between slavery and the humiliation experienced by blacks in the master/servant relationship — becomes invisible to the Court. It lies beyond the horizon of the Court’s interpretive approach. Under the Court’s interpretation, blacks, after making an employment contract, may be humiliated and degraded by white employers in ways that mirror the same degradation the Reconstruction Congress sought to eliminate from the marketplace. Yet, again, as in 1883, the Court can see no wrong.

In *Croson*, the echo becomes a roar. The Court enunciates a contemporary version of the two-level theory used in the *Civil Rights Cases*. Recall that the *Croson* Court relies on the textual basis that Section Five gives Congress special powers to enforce the fourteenth amendment. In *Croson*, as in 1883, there are two levels of government, each limited to a distinct plane of activity. Concomitantly, in *Croson*, as in the paradigm of the *Civil Rights Cases*, the standard of legality of government action turns not on normative principles, but upon a theory of federal/state relations defined by these notions of separate planes of power.
The rich, complex normative inquiry about the danger of caste, the problem of stigma, the impact of chronic marketplace inequalities on fourteenth amendment values of citizenship and community is foreclosed by the focus on text and "planes of power." This imagery mirrors the moral cosmology of 1883: that normative inquiry has no place in the public, positive sphere of legal discourse. The approach which animated the Court in the doctrinal tradition beginning with Brown, and recurring in Fullilove, is not pursued and cannot be pursued within the nineteenth century world view that the Court revives in Croson.

The strategy, operating at the level of how we conceptualize notions of rights and remedies, now as in 1883, is to reorganize the discrimination idea around a narrowing premise: that both the legacy of slavery and noneconomic claims of blacks are to have no meaning in the legal world.

The cases seem, in a real sense, to be modern installments in the continuing, historic debate between Sumner and Hill. In the Court's cosmology, the Warren and Burger Courts are located within the same normative arc as Sumner, seeking to expand the concept of discrimination beyond its proper scope as a private wrong. The Rehnquist Court behaves as if this were again the post-Reconstruction Era, and as if it were the post-Reconstruction Court. Mirroring the Court in the Civil Rights Cases, it seeks to achieve the contemporary equivalent of a reversal of the basic Reconstruction assumptions about the scope of the discrimination and the equality ideal.

Conclusion: The Fierce Urgency of Now

I have a dream that one day this nation will rise up and live out the true meaning of its creed, "We hold these truths to be self-evident that all men are created equal." I have a dream that one day . . . sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood. . . .

I have a dream that one day "every valley shall be exalted and every hill and mountain made low . . . and all flesh shall see it together."

This will be the day when all of God's children will be able to sing . . . [f]ree at last. Free at last. Thank God Almighty, we are free at last.233

It is midnight within the American social order.234 The evidence accumulates that the chronic political and economic gulf between blacks

234. See M.L. King, supra note 115, at 51.
and whites worsens. As the gulf widens, there is a terrible resurgence of racist speech and racially motivated attacks on blacks. As Professor Luban has noted, there is the most serious question of whether a nation which has been racist in the past is not in danger of becoming irredeemably so again. It is against this background that the jurisprudence of the Rehnquist Court ought to be considered.

The cases represent not merely an expression of legal rules, they represent in a real sense a conceptualization of national ideals about equality. In defining this word “equality,” the Court, in effect, defines the moral identity of America itself.

This is true because America has, within its own story of origin, chosen equality as the ideal by which it would be legitimated and defined. This story of origin, told originally by Jefferson as a myth about a fictive “democracy” that excluded blacks, resonates and is retold as a redemptive story about a true, inclusive democracy by Dr. King. It is King’s more ethically complete story which now mediates between America’s segregated past and the hope of redemption in the future.

The Rehnquist Court’s decisions, however, exclude King’s narrative — a narrative which began doctrinally in Brown.

The new decisions are the herald of a new constitutionalism — uncritical of its own intense moral anxiety — which presupposes a neutral definition of equality as formal equality only. Concomitantly, the Court presupposes that a neutral discourse about equality must occur within the boundaries of positive law. Within this neutral territory of pure law, there is no room for moral inquiry, or the search for a substantive meaning of equality.

These interpretive boundaries divide, once more, the constitutional universe into public and private spheres, with moral aspiration squarely in the private realm. King’s narrative — which takes place only in the

235. See supra note 163.

236. “A 16 year old black youth [Yusef Hawkins] was shot to death ... in an attack by 10-30 white teen-agers in the Bensonhurst section of Brooklyn ... . The whites, the authorities said, were lying in wait for black or Hispanic youths whom they thought were dating a white neighborhood girl.” N. Y. Times, Aug. 25, 1989, at 1, col. 1. See also Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 MICH. L. REV. 2320, 2320-30 (1989) cataloging a number of documented incidents.

Matsuda’s extensive catalogue includes a black woman who lost four fingers in an apparently race motivated pipe bomb attack, spray painting of hate messages on black churches, and racist harassment, including death threats, against black employees by co-workers. Id. at 2321-70.

237. Luban, supra note 163, at 2159.
realm of our highest moral aspirations — is relegated to a place beyond
the horizon of the law.

Thus, we can only hear King if we cross the tension bridge between
American legal reality and the normative world. That tension bridge is
not merely the bridge between law and value, but equally the bridge that
separates liberal and conservative, black and white. It is the same bridge
which separates an alternative national future from the perpetuation of
the past.

The story the Court tells about the limits of equality and legal inter-
pretation is the sign by which the Court blocks the bridge. It tell us not
to cross over because there is nothing but ideology and chaos outside of
the world of pure law. The sign says "NE PLUS ULTRA": nothing
beyond. This sign marks the limit of our discourse.

The discursive limit becomes the limit of social possibility. It blocks
not only a discussion about competing notions of equality and law, it
blocks redemption.

The Rehnquist Court has situated America across the tension
bridge, within a cramped, barren legal world in which it cannot find the
true meaning of equality. Nor, therefore, can it find a way to make
moral sense of itself. America cannot find the moral truth it needs be-
cause, from its distance across the bridge, within the detached world the
Rehnquist Court has made, it cannot hear the story of Dr. King. It was
a good story, full of dreams.