

ARTICLES

Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods

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Table of Contents

Introduction	601
I. Equality Principles, Negative Rights	605
A. Negative Rights, Entitlements, and State Action	606
1. Negative Rights	607
2. Entitlements.....	613
3. State Action.....	615
B. Equality of Educational Opportunity	620
1. School Finance Cases	620
2. Desegregation Cases	623
C. The Paradigm as Problem	628
II. Affirmative Action and Disadvantaged Neighborhoods: Paradigms of Paralysis	629
A. Affirmative Action: Definition of a Remedy	630
B. Affirmative Action's Search for Justification	635
1. Scholarly Views	635
2. Constitutional Standards	642
C. Impact on the Underclass	644
1. Misplaced Focus	645
2. Politics of Race and Politics of Poverty	647
3. Politics of Stalemate	649
4. Impact on Education	651
III. Remedying Myopic Visions of Equality: The Caste- Abolition Principle.....	659

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A.	Positive Rights to Minimal Subsistence	660
B.	Constitutional Basis for a Right to Equality of Educational Opportunity for the Underclass: The Caste- Abolition Principle	665
1.	The Caste-Abolition Principle	665
a.	The Principle's Roots	666
b.	The Principle's Reach	669
c.	The Principle's Interpretive Coherence	672
2.	Incidents of a Caste System	677
IV.	Application of the Caste-Abolition Principle to Disadvantaged Neighborhoods and Equality of Educational Opportunity	682
A.	The Underclass	682
B.	Relation Between Equality of Educational Opportunity and the Caste-Abolition Principle	689
1.	Dual School Systems as Determinants of Class	689
2.	Underclass Schools	690
a.	The Experts' Views	691
b.	Narratives	694
c.	School Finance	699
C.	Violation of the Caste-Abolition Principle	700
1.	Children of the Caste	700
2.	Manageability of the Principle	702
D.	Remedies	703
Conclusion	713

"It all seemed . . . like a brilliant dream."

Charlotte Forten, a free young black woman teaching former slaves at the Union enclave of Beaufort, South Carolina, upon learning that President Lincoln had signed the Emancipation Proclamation January 1, 1863¹

"What happens to a dream deferred?

Does it dry up
like a raisin in the sun?
Or fester like a sore—
And then run?"

Langston Hughes, 1951²

1. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 1-2 (1988).

2. LANGSTON HUGHES, *Montage of a Dream Deferred*, in THE LANGSTON HUGHES READER 123 (1958).

"Don't tell students in this school about 'the dream.' Go and look into a toilet here if you would like to know what life is like for students in this city."

Christopher, a student in Clark Junior High School, East St. Louis, c. 1990³

Introduction

Our constitutional heritage is one of perplexing and sometimes agonizing contradictions, many of which appear vividly—and disturbingly—in our visions of equality. From America's first breath, its conception of equality has been at odds with itself. Americans then expressed the "self-evident" truth that "all men are created equal" with an inalienable right to liberty, and concluded that those premises provided moral and political legitimacy to the assertion of national autonomy.⁴ Yet the subscribers to that creed were willing to participate in an enormous political, legal, social, and economic institution premised on a grotesque inversion of that noble proposition: that many persons (conveniently identified by skin color) are created inferior and therefore subject to the most extreme deprivations of liberty.⁵ These normative contradictions of caste and equality persisted in the Constitution's thinly euphemistic recognition and protection of slavery,⁶ calling into question just who counts as "We the People of the United States."⁷

Since its cornerstone was laid, our house has thus been divided against itself—not just in terms of dramatic sectional disputes, but also in terms of the principles that animate our ideological premises and aspirations. Deep discord over such fundamental issues was bound to erupt into open conflict: Explicit constitutional recognition of a principle of equality was born out of America's bloodiest war, the origins of which can be traced largely to those contradictions.

The constitutional conception of equality in the United States today continues to exclude an identifiable class from "mainstream" American society. I submit, however, that the excluded class and the means of

3. JONATHAN KOZOL, *SAVAGE INEQUALITIES* 2, 36 (1991). See also *infra* note 248.

4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. And more than half of the population (again conveniently identified, in this context, by gender) were so far outside any principle of equality as not even to bear semantic recognition.

6. See U.S. CONST. art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3; art. V. Contradictions also persisted in that document's consistent refusal to acknowledge women's existence even by pronoun.

7. U.S. CONST. pmb. As Akhil Amar observes, "no phrase appears in more of the first ten amendments than 'the people.'" Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991).

exclusion are not confined to those commonly appreciated in constitutional discourse. This Article contends that the most severely excluded class is not defined exclusively by race or gender, but instead by membership in that poverty-stricken, marginalized group sometimes referred to as the “underclass,” whose members are disproportionately minorities.⁸ The underclass remains trapped in a web of subordination, the strands of which are spun in part from prevailing constitutional models—especially models of equality.

One would think that the existence of an identifiable class subjected to a distinct pattern of entrenched, severe, social and economic disadvantage and exclusion would raise serious concerns articulated in terms of “equality.” And, in a society whose organic norms include an express commitment to equality, one would expect to see a determined quest both to understand that pattern of disadvantage and to remedy or at least to mitigate it. One might even suppose such efforts are constitutionally required if the disadvantages are severe enough and the equality norm is sufficiently robust. One bringing those modest expectations to an examination of American constitutional law today would be rudely disappointed. Our legal institutions (judicial, political, and academic) have largely failed to meet this challenge and instead have developed a web of equality conceptions that contribute both directly and indirectly to the problem’s perpetuation.

The first strand of this web consists of the interpretive paradigms that the Supreme Court has applied in its entitlement, state action, school finance, and school desegregation cases. Those paradigms share the common thread of envisioning a limited menu of negative rights in the liberal legalistic constitutional state. This perspective is largely blind to the social realities confronting members of the underclass and the myriad ways in which government action and inaction powerfully affect their lives. The Court’s approach thus denies the constitutional significance of severe poverty as a social condition in many circumstances and has contributed to and legitimized the economic, political, and social isolation of the underclass from mainstream American life—a condition disturbingly similar to important characteristics of the caste system of slavery.

Another strand derives from the affirmative action debate. That controversy has entangled society in an ultimately empty paradigm polarized along dimensions of individual versus group rights and equality of opportunity versus equality of result, forcing a choice between unaccept-

8. For discussion of the “underclass” phenomenon, including the debate over the label itself, see *infra* notes 345-70 and accompanying text.

able alternatives. Affirmative action's proponents demand a form of racial and gender discrimination and would dilute the significance of at least some criteria—including educational achievement—traditionally regarded as indicative of individual merit and ability. They take this position in the name of collective values, invoked to justify the adverse effects of racial or gender discrimination imposed on affirmative action's individual victims. Advocacy of that troubled agenda has tended to distract attention from the more daunting task of offering equal opportunity to the underclass. Many of affirmative action's opponents, by contrast, adhere to a selective conception of individual rights and advocate a brand of meritocracy that ignores inequalities in initial allocation of opportunity. They often oppose redistributive investment of sufficient societal resources to provide meaningful equality of opportunity, including educational opportunity. This Article questions whether both sides in this conflict might really be contending for political and economic privilege in the name of equality, and whether that contest has contributed to the growing estrangement of the most disadvantaged class in the United States, which neither has a real voice in nor benefits much from affirmative action policies.⁹

This Article offers an interpretation of the Civil War Amendments as collectively embodying a "caste-abolition" principle, which would provide a remedy for conditions or actions that tend to recreate a caste society in which one group is systematically and grossly disadvantaged, dehumanized, and ostracized.¹⁰ That principle would derive from the special historical roots of those amendments: the American revolution's fight to abolish the existence of a caste society. I argue that the caste-abolition principle forms a coherent interpretive conjunction of the con-

9. This Article is an extension of ideas I first proposed in Donald P. Judges, *Light Beams and Particle Dreams: Rethinking the Individual vs. Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1007 (1991) [hereafter *Light Beams*]. Portions of the description of affirmative action originally appeared there. *Light Beams* was in part a response to Rod Smolla, *Affirmative Action in the Marketplace of Ideas*, 44 ARK. L. REV. 935 (1991), which sets forth an illuminating analysis of *Metro Broadcasting, Inc. v. FCC*, 493 U.S. 1017 (1990).

10. This Article is not the first to propose constitutional consideration of underclass status. See, e.g., Olga Popov, Note, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095 (1991) [hereinafter *Underclass Review*]. The ideas in this Article differ in several important respects from those in *Underclass Review*. First, although *Underclass Review* suggests a significant revision of fundamental rights analysis, it nevertheless operates within the broader paradigm of negative rights and means-ends scrutiny. This Article offers instead an alternative positive-rights paradigm that looks to caste *condition*, not state action. Second, *Underclass Review* focuses primarily on laws disadvantaging women as a class (and secondarily on laws disadvantaging homosexuals). In contrast, this Article concentrates on the caste-creating condition of membership in the socioeconomic underclass - especially the children of that underclass - in relation to equal educational opportunity. *Underclass Review* does, however, provoke thought about application of the caste-abolition principle in other contexts. Third, unlike this

stitutional terms for bringing former slaves out of their caste status and into the rest of American society: abolition of slavery; vesting of citizenship; guarantees of due process, privileges or immunities, and equal protection; and extension of the franchise. Because it looks to caste-creating and perpetuating *conditions*, the caste-abolition principle avoids the relief-defeating strictures of the Supreme Court's negative rights and state action paradigms. The prudential concerns that drive those paradigms—separation of powers, deference to legislative judgment, and federalism—are more appropriately addressed towards the formation of remedies, rather than towards the determination of rights, as is currently the case. The caste-abolition principle challenges us to make real the constitutional promise of *protection*. This alternative also seeks to reconcile the tensions between liberty and responsibility.

These strands converge on the issue of educational opportunity, which even the Court has agreed in the abstract, is central to equality of opportunity for meaningful participation in society. The current grossly unequal distribution of educational resources perpetuates and aggravates the caste-creating disadvantages, especially lack of employment opportunity and political empowerment, suffered by children of the underclass, its most helpless members. This condition would give rise to a claim under the caste-abolition principle. The remedy I propose—equal allocation of educational resources—would take into account the interests that now lead the Court to deny that such conditions are even matters of constitutional concern.

This Article thus attacks *San Antonio Independent School District v. Rodriguez*,¹¹ which has been aptly characterized as “the *Dred Scott* deci-

Article, *Underclass Review* does not situate its theory in the historical context of the Civil War Amendments' relation to the abolition of a caste society.

A much broader work that considers the role of constitutional law in the creation and maintenance of a caste society is KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989). Although Karst discusses many of the issues addressed in this Article, he emphasizes the classifications traditionally regarded as suspect or quasi-suspect—primarily those of race, as well as gender, alienage, and religion—rather than socioeconomic status (although he does briefly consider the special problem of poverty). I differ with him particularly in regard to the role affirmative action has played in the underclass dynamic. Karst recognizes affirmative action's contribution to the concentration of poor blacks in urban ghettos, but he does not identify as an additional cost to the underclass the impact that advocacy of affirmative action programs may have had on defining the political agenda. Compare *id.* at 167-72 with *infra* notes 203-53 and accompanying text. See also LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 1514-21 (2d ed. 1988) (describing Equal Protection Clause as embodying “antisubjugation principle”).

11. 411 U.S. 1 (1973).

sion for the underclass,"¹² and challenges the broader context of constitutional doctrine in which *Rodriguez* is situated. Although several state courts have stepped into the breach left by the federal judiciary's abdication of constitutional responsibility for the underclass problem in the area of school finance,¹³ we must consider the federal constitutional implications of this national crisis. This Article, therefore, will leave exploration of developments at the state level to others.¹⁴

This Article contains four parts. Part I describes the limits of the Court's constitutional vision of negative rights, state action, and equality principles in the entitlement and educational opportunity contexts. Part II considers the affirmative action strand by positing a relationship among the individual versus group rights paradigm, disadvantaged neighborhoods, and educational inequality. Part III describes and defends the caste-abolition principle. Part IV seeks to tie these strands together by applying the caste-abolition principle to the plight of the underclass and the issue of equal educational opportunity.

I. Equality Principles, Negative Rights

Rodriguez's denial of constitutional relief to the underclass derives from the several fibers that intertwine to constitute the negative-rights strand. First, the Supreme Court's narrow conception of when constitutional obligations arise has largely closed the federal courthouse as an

12. My colleague John Watkins made that analogy in his comments on an earlier draft of this paper. As a former teacher in the Texas public school system, John drafted the following recollection of the conditions in one school district, and the community attitudes that tolerated such conditions:

In the early 1970s, I was teaching in a rural school district in central Texas, not far from Austin, the state capital. The district's students were racially mixed: roughly 40% white, 40% black, and 20% Mexican-American. I taught high school English in a modern building less than ten years old. Elementary school students, however, attended classes in a three-story structure built at the turn of the century and condemned as uninhabitable by county authorities. With no air conditioning, students sweltered in the oppressive Texas heat. The plaster walls were crumbling; the roof leaked; and the restrooms, located in the basement, overflowed with sewage during rainy weather. Because there was no cafeteria, students were bused across town to the high school for lunch. Under pressure from the state education agency, the district eventually closed the building and moved the students to dilapidated barracks obtained from the military and placed on the high school grounds. Despite these conditions, voters declined to approve issuance of bonds to build a new elementary school. Large landowners, who opposed the increase in the property tax necessary to retire the bonds, led the fight. One of the opponents, a farmer who attended my church, told me that he felt no obligation to shoulder an increased tax burden, since his children had graduated from the school long ago. "It's somebody else's turn now," he said. "Besides, I don't care anything about educating the niggers."

13. See *infra* notes 481-85 and accompanying text.

14. I do, however, briefly discuss reasons why it would be a mistake to rely completely on state constitutional remedies. See *infra* notes 487-93 and accompanying text.

avenue for mandating affirmative relief of underclass conditions. Second, in a related series of decisions rejecting constitutional claims to a minimum level of subsistence and equal school financing, the Court further denied constitutional redress to claims arising from underclass conditions. Finally, the Court's negative-rights paradigm has yielded school desegregation decisions that lend constitutional approval to the economic and ethnic isolation of urban underclass neighborhoods.

The Court's denial of constitutional obligation in its entitlement, state action, school finance, and desegregation cases is objectionable in at least two respects. First, it rests on an incomplete conception of equality and an inadequate appreciation of the nature of state action. Second, it legitimizes government's role in a status quo of extreme inequality that a more complete conception of equal protection would not tolerate. A richer account of constitutional rights, one informed by the parallels between the plight of underclass children and the social injustices that spawned the Civil War Amendments, would require dedication of sufficient resources to provide some minimal equality of educational opportunity. This Part describes how the Court's vision of equality is blind to the condition of the truly disadvantaged.

A. Negative Rights, Entitlements, and State Action

The Supreme Court's consistent refusal to recognize a constitutional claim to minimum subsistence or to equal educational opportunity is rooted in its paradigmatic vision of rights in the liberal legalistic constitutional state.¹⁵ This paradigm regards individuals as existing in their own spheres separate from the state, and conceives of the Constitution as providing a discrete set of individual rights against certain kinds of tangible governmental intrusion into the individual sphere. The Constitution thus specifies (either explicitly or implicitly) a finite set of negative rights—*prohibitions* against a defined range of government *action*. The baseline assumption is that the Constitution's requirements are limited to observance of those prohibitions.

Several significant consequences flow from this model. First, liberal legalism simply does not conceive of a positive constitutional *obligation* to address social *conditions*. Second, the Court's paradigm demands definition of what counts as government action and establishes that determination as a threshold criterion for access to constitutional remedies. Third, the Court's approach requires it to ask whether a constitutional claim fits within a recognized taxonomy of individual rights. The net

15. For a brief description of liberal legalism, see Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990).

result of this interpretive approach has been effectively to deny the constitutional significance of poverty and powerlessness as a social condition in many circumstances.¹⁶

1. *Negative Rights*

The abortion funding cases exemplify the Court's negative rights approach. In *Harris v. McRae*, the Court concluded that although the Constitution protects the limited negative right to choose an abortion free of certain state restrictions, it does not provide a positive right to state funding to ensure that poor women have an opportunity to make a choice.¹⁷ The Court therefore upheld the Hyde Amendment, which denied federal Medicaid funds to reimburse the cost of all but a tiny number of abortions for women who otherwise would be eligible for such aid. The negative privacy right to an abortion thus "did not translate into a [positive] constitutional obligation . . . to subsidize abortions" ¹⁸ The Court explained that

although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The

16. The foregoing statement must be qualified, however, because indigency has attained a limited measure of constitutional relevance in a narrow class of cases. For example, the Court has interpreted the Constitution to require the state to provide counsel to indigents in serious criminal trials. *Gideon v. Wainwright*, 372 U.S. 335 (1963). And the Court has invalidated state statutes barring access to the criminal appellate process to defendants unable to pay filing and transcript fees. *E.g.*, *Draper v. Washington*, 372 U.S. 487 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). The Court also has required the state to provide counsel to indigent defendants for the first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963). And the Court has required appointment of counsel in adversarial proceedings brought by the state to terminate parental rights. *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). Even these cases can be understood as resting on negative rights (to equal protection or due process) and affirmative state action, because of the state's active role in criminal prosecution, execution of sentences, and termination of parental rights. That the right is not a positive one triggered by indigency alone can be seen by comparing the Court's rejection of procedural due process challenges to fees in proceedings brought by private litigants. *E.g.*, *Little v. Streater*, 452 U.S. 1 (1981); *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973). *Boddie v. Connecticut*, 401 U.S. 371 (1971), however, invalidated a state's refusal to waive a filing fee for an indigent in a divorce action. In *Kras*, the Court distinguished *Boddie* in part as involving a state monopoly over dissolution of the marital relation, a distinction which also implicates associational and privacy interests. 409 U.S. at 443-44. Furthermore, the Court has held that the state is not obligated to provide counsel for discretionary appeals, *Ross v. Moffitt*, 417 U.S. 600 (1974); in post-conviction proceedings, *Pennsylvania v. Finley*, 481 U.S. 551 (1987); or even in post-conviction proceedings in capital cases, *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality). In *Ross*, the Court observed that the state is not constitutionally obligated to "duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction . . ." 417 U.S. at 616.

17. 448 U.S. 297 (1980).

18. *Id.* at 315 (citing *Maher v. Roe*, 432 U.S. 464, 475-76 (1977)).

financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.¹⁹

There are at least two problems with the Court's position. First, the Court's distinction between state inaction and action is dubious. The state has affirmatively decided—indeed enacted a statute—to exclude from a comprehensive program of publicly funded medical care the one medical procedure entitled to constitutional protection. Surely poor women who are in effect bribed to choose childbirth over abortion could reasonably feel that the state has “done something” tangible and substantial to them.²⁰ Second, the Court gives a conclusion, not a reason. The argument that indigency, not government action, is responsible for restrictions on a woman's choice is another way of stating that the government bears no constitutional responsibility for her indigency.²¹ The question remains whether government should bear this responsibility.

There may be something to the view that a legislative judgment that our society will be insensitive to the plight of its least privileged and most vulnerable citizens is entitled to some deference. But the Court's linear, mechanistic view of the relationship between the individual and the state ignores the pervasive and powerful ways in which government affects the lives of individuals—especially the poor and the vulnerable. The Court's ultimate responsibility, after all, is to ensure that the majority is not allowed to negate the rights of citizens unable to command political support, but who are no less worthy of protection.²²

An extreme example is *Rust v. Sullivan*.²³ The regulations upheld in *Rust* prohibit family planning clinics that receive Title X moneys from discussing abortion as an option with their clients, even if the clients request abortion information, and even if the providers believe such infor-

19. 448 U.S. at 316-17.

20. See *TRIBE*, *supra* note 10, at 1346-47.

21. The Court reaffirmed this principle in *Webster v. Reproductive Health Services*, upholding a prohibition on the use of public facilities or employees to perform abortions not necessary to save the mother's life. 490 U.S. 1003 (1989). The Court has also applied this approach under the First Amendment, reasoning that the First Amendment constitutes only a prohibition against certain kinds of governmental restrictions on speech, not an entitlement to the means to exercise one's free speech rights. *E.g.*, *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

22. *E.g.*, *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316 (1819); see JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

23. 111 S. Ct. 1759 (1991). See also Public Health Services Act, §§ 1002, 1008 (codified as amended at 42 U.S.C. §§ 300(2), 300a-6 (1991)); 42 C.F.R. § 59.8 (1990).

mation to be in the clients' best medical interests.²⁴

The Supreme Court rejected both a free speech and an abortion rights challenge to the regulations. In the Court's view, the administration had merely defined the Title X program as limited to family planning and reproductive health exclusive of abortion.²⁵ In disposing of the First Amendment claim, the Court made the remarkable assertion that the regulations "do not significantly impinge upon the doctor-patient relationship," because "[t]he program does not provide post-conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her."²⁶

The Court concluded that the regulations do not infringe a woman's reproductive freedom because: (1) the woman is left "in no different position than she would have been if the government had not enacted Title X"; and (2) "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."²⁷ In short, in the Court's eyes, the government's Title X program under the 1988 regulations is like a canoe quietly slipping across a placid lake, leaving hardly a ripple in its wake.

The Court's analysis provides important insights into its vision of the relationship between government, its programs, and citizens' lives. Only someone insulated from the effects of the regulations could accept the Court's view of government's role in women's health care.²⁸ Title X

24. Instead, the health care providers are required to refer pregnant clients to "appropriate prenatal and/or social services . . ." 42 C.F.R. § 59.8(a)(2) (1991). If a client requests abortion information, the provider may respond that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5) (1991).

For seventeen years, the administration had interpreted Title X of the Public Health Service Act to allow "nondirective" counseling and referrals—intended only to inform, not to persuade or to influence—concerning all possible responses to pregnancy, including prenatal care, delivery, infant care, foster care, adoption, and abortion. In February 1988, however, the Secretary of Health and Human Services issued the regulations upheld in *Rust*.

25. Thus, the Court reasoned, the regulations involve not "a case of Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of its scope." 111 S. Ct. at 1772-73. Providers remain free to speak out on abortion outside the scope of Title X projects, the Court observed.

26. *Id.* at 1776.

27. *Id.* at 1777.

28. For an essay on the role of judicial empathy—the ability or willingness of judges to identify with the plight of claimants of individual right against government intrusion—see Donald P. Judges, *Confirmation as Consciousness-Raising: Lessons for the Supreme Court from the Clarence Thomas Confirmation Hearings*, 7 ST. JOHN'S J. LEGAL COMMENT (1992) (forthcoming).

is not a quiet canoe, it is a monstrous battleship.²⁹ These regulations and the Court's decision will unquestionably have an enormous impact, especially on the health care received by millions of low-income women.³⁰ The contention that women are in the same position they would have occupied had there been no Title X is disingenuous and unconvincing. Once government provides ideologically slanted medical information on which Title X clients rely, it substantially intrudes into and has a major impact on their lives.³¹ Yet by asserting the invidious distinction between indirect encouragement and outright prohibition, a distinction made possible by the negative rights paradigm, and by positing a largely hypothetical alternative to the exercise of the right, the Court manages to deny that the administration is doing something palpable to the lives of

29. Title X is the largest single source of federal funding of family planning services, and reaches an estimated 14.5 million women. *New York v. Sullivan*, 889 F.2d 401, 415 n.1 (2d Cir. 1989), *aff'd sub nom. Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

30. According to the lower courts, approximately one-third of those women are adolescents and 90% of all women served have incomes below 150% of the poverty level. *Id.* For many women, their first visit to the Title X grantee is for pregnancy testing, not for contraception. *Massachusetts v. Secretary, H.H.S.*, 899 F.2d 53, 56 (1st Cir. 1990). Federal funds account for approximately one-half of the money received by Title X clinics. *Id.* at 73 n.11.

31. These women are going to Title X clinics for medical assistance concerning reproductive matters. They depend upon their health care providers to give them candid and complete advice in the provider's best judgment, including referral for appropriate treatment. Doctors are ethically and legally obligated to do no less. See, e.g., American Medical Ass'n., *Principles of Medical Ethics and Current Opinions of the Council on Ethical and Judicial Affairs—1989*, in *CODES OF PROFESSIONAL RESPONSIBILITY* 191 (Rena A. Gorlin ed., 2d ed. 1990) (preamble) ("A physician shall . . . make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated."). When the physician remains silent concerning abortion or, what is worse, recites the administration's dogma, any reasonable person would be grossly misled "into thinking that the doctor does not consider abortion an appropriate option for her." As Justice Blackmun observed in dissent:

The undeniable message conveyed by this forced speech . . . is that abortion is nearly always an improper medical option. Although her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the Regulations' mandatory prenatal referral, will be prevented from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

111 S. Ct. at 1785. It therefore is perverse to suggest that government has not interfered with the doctor-patient relationship when it censors doctors in the treatment room, and prescribes an orthodox litany to be recited when patients request medically pertinent information. Neither expressive nor reproductive freedom are protected when health care providers are allowed to speak everywhere and to everyone except where and to whom it matters most. For a thorough analysis of the constitutional implications of government's use of allocative sanctions to control conduct, see Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

these women and their health professionals' ability to provide care.³²

An especially tragic application of the Court's model to the condition of the vulnerable is *DeShaney v. Winnebago County Department of Social Services*.³³ While little Joshua DeShaney remained in his abusive father's lawful custody, the county maintained an administrative network that funnelled all child-abuse information into itself, purported to exercise exclusive jurisdiction over such matters, and actively monitored and dutifully recorded numerous indications that Joshua was being badly abused. In fact, on one occasion the county actually obtained temporary custody when Joshua was admitted to the hospital with multiple bruises and abrasions; but the county shortly thereafter persuaded the juvenile court to dismiss the child protection case and return Joshua to his tormentor.

Despite those indicia of government involvement, the Court invoked its negative rights paradigm to conclude that the county could not be held constitutionally accountable for its failure to intervene before Robert DeShaney savagely but all too predictably beat his four-year-old son into a state of severe, permanent brain damage.³⁴ According to Chief

32. In other contexts, apart from cases directly raising the negative-rights problem, members of the Court have also demonstrated a remarkable capacity to discount substantially or to overlook the real-world impact of government action. Examples can again be found in recent abortion-rights cases. In *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), Justices Kennedy, White, Scalia, and the Chief Justice disregarded uncontested findings of fact concerning the detrimental impact of Minnesota's two-parent notification requirement in voting to sustain the provision. On the whole, the District Court found the evidence overwhelmingly established that the law failed to advance the state's interest in promoting the pregnant minor's welfare or enhancing family integrity, but instead caused considerable harm to the minor and her family. As the lower court found, almost all judicial bypass applications were granted: "The judges who adjudicated 90% of the petitions testified; none of them found any positive effects of the law." *Id.* at 2940. Nevertheless, those four Justices, reciting platitudes about the state's interest in protecting and fostering the parent-child relationship—and ignoring the contemporary realities of divorce, separation, dysfunctional relationships, and abusive parents in many families—were willing to defer to legislative judgment on the wisdom of the measure. Another example is *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), in which Justice Kennedy, writing for the Court, uncritically sustained patently burdensome procedural hurdles for access to judicial bypass of a single-parent notification requirement.

33. 489 U.S. 189 (1989).

34. Another compelling example of government's role in child abuse is Yaakov Riegler's fate at the hands of New York's child welfare system. See Celia W. Dugger, *As Mother Kills Her Son, Protectors Observed her Privacy*, N.Y. TIMES, Feb. 10, 1992, at A1. Yaakov's case illustrates the painful emptiness of the Supreme Court's analysis in *DeShaney*.

Yaakov, a retarded eight-year-old boy who stood a full three feet, eight inches, and weighed all of 48 pounds, was beaten to death in 1990 by his mother, Shulamis Riegler. Shulamis had beaten Yaakov's brother Israel into a coma in 1986, but both boys were returned to their mother after spending several years in foster care. State supervision of the family was terminated on November 27, 1989, notwithstanding that school officials showed Yaakov's bruises that very same day to a city child abuse investigator, who was "shocked." In March

Justice Rehnquist, “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”³⁵ Instead, the Due Process Clause is “phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”³⁶ In the Court’s view, Robert DeShaney, not the county, ruined Joshua’s life. Apparently the government’s role in placing Joshua in harm’s way, faithfully recording his numerous injuries and “suspicions that someone in the DeShaney household was physically abusing Joshua,”³⁷ and monopolizing his one avenue to relief is constitutionally irrelevant to establishing the kind of relationship that would impose a minimal duty of care.³⁸

1990, the city’s Probation Department terminated its supervision of Shulamis, uninformed about additional reports that she might again be abusing her children. Over the next seven months, Yaakov was examined and sometimes treated for numerous cuts, gashes, bruises, and trouble with his elbow that an autopsy later revealed had been fractured. Yaakov’s teachers made repeated, “frantic” appeals for Yaakov’s protection to the child abuse investigator, the investigator’s supervisor, and the state child abuse line. On September 27, 1990, another investigator visited the Riegler home, found burn marks on Yaakov, and was told by the boy that both his father and mother hurt him but that his mother hurt him more. Two days later, Shulamis beat Yaakov into the coma from which he never recovered.

It is difficult to conceive of a coherent system of constitutional accountability that could conclude, as *DeShaney* apparently would, that the city did not participate significantly in the taking of little Yaakov’s life. According to the *New York Times* account,

When Mrs. Riegler pleaded guilty . . . , Judge Francis X. Egiito condemned the city’s child protection system—a system whose goal is, where possible, to reunite children with their natural parents—and the boy’s doctor for not saving Yaakov’s life. “It’s not just Mrs. Riegler who is guilty of the death of Yaakov,” the judge said.

Id. at A16, col. 1.

35. *Id.* at 196.

36. *Id.* at 195.

37. *Id.* at 193.

38. Only in limited circumstances of actual confinement has the Court recognized the kind of relationship that creates such a duty. *Estelle v. Gamble*, 429 U.S. 97 (1976) (criminal inmates); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (non-criminal custody). Indeed, it is unclear that Joshua’s constitutional claim would have prevailed even had a county official personally administered the beating. The Court has held that government employees’ intentional, random, and unauthorized deprivations of property, *Hudson v. Palmer*, 468 U.S. 517 (1984) (and presumably liberty as well, *Davidson v. Cannon*, 474 U.S. 344 (1986)), do not violate due process when a state tort remedy is available. This approach forces nice questions about when a deprivation results from an established state procedure rather than from the employee’s random and unauthorized act. *See, e.g., Zinermon v. Burch*, 494 U.S. 113 (1990) (failure to apply involuntary admission procedures to visibly disoriented “voluntarily” admitted patient to mental health facility held not “unauthorized” but instead pursuant to delegated authority). *But see Hudson v. McMillian*, 112 S. Ct. 995 (1992) (Eighth Amendment is violated when prison officials use excessive force maliciously and sadistically to cause harm, even absent a showing of significant injury—prisoner had been beaten while wearing handcuffs and shackles).

One can appreciate Chief Justice Rehnquist's fear that allowing Joshua's claim would plunge the state action doctrine down a slippery constitutional slope. But the dominant considerations in *DeShaney* seem to be the Court's negative rights paradigm, its conception of its own role in the constitutional process, and its assumptions about the detrimental impact of a positive rights model on that role. The Court seems to fear that judicial recognition of affirmative constitutional duties will require the courts to intrude improperly into the legislative sphere.³⁹ This concern is especially evident in the Court's sometimes categorical approach to equal protection analysis, which requires either a suspect class or infringement of a fundamental right to invoke strict scrutiny of the challenged government action, and otherwise generally defers to legislative judgment.⁴⁰ Although the Court has on occasion appeared to occupy various intermediate points between those largely outcome-determinative categories,⁴¹ it has refused to subject wealth-based classifications to heightened scrutiny. The abortion funding cases discussed above are good examples of the Court's response to such claims.⁴²

2. Entitlements

The Court expressly articulated these prudential concerns when it rejected a claim to an affirmative constitutional right to minimum subsis-

39. For an argument that judicial checks on administrative neglect can protect local democracy, see Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1100-08.

40. For examination of the relationship between categorical decision making versus balancing and the level of judicial deference, see Kathleen Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, Paper delivered at the Conference on Compelling Government Interests, Albany Law School (Sept. 26-28, 1991).

41. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

42. See *supra* notes 17-32 and accompanying text. Justice Douglas's opinion for the Court in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), did state that

[l]ines drawn on the basis of wealth or property, like those of race (*Korematsu v. United States*, 323 U.S. 214, 216), are traditionally disfavored. See *Edwards v. California*, 314 U.S. 160, 184-85 (Jackson, J., concurring); *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353.

Id. at 668. Each of the cited cases, however, expressly rested on a basis apart from equal protection of the poor. See *supra* note 16. In *Edwards*, the Court invalidated under the dormant Commerce Clause a state law making transportation of nonresident indigents into the state a misdemeanor. In concurrence, Justice Jackson observed that "the migrations of a human being do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually in distorting the commercial law or in denaturing human rights." 314 U.S. at 182. *Harper* itself eventually came to be seen as resting on the fundamental right to vote, and not on wealth as a suspect class. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 117-18 (1980).

tence in *Dandridge v. Williams*.⁴³ Plaintiffs challenged, on equal protection grounds, Maryland's \$250-a-month ceiling on Aid to Families with Dependent Children payments regardless of family size. The Court held that welfare assistance payments amount to mere "social and economic" regulation, to which the most deferential judicial review applies.⁴⁴ Because government is almost always able to articulate a barely less than irrational justification for social and economic policy choices⁴⁵—and because the Court stands ready to do so when the imagination of government lawyers fails to provide a *post hoc* justification⁴⁶—the Court's formula ensures that almost all such legislative judgments will be upheld.⁴⁷ The Court's institutional concerns are explicit in its insistence that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."⁴⁸ As Justice Marshall observed in his dissent, the Court's approach "avoids the task [of requiring a justification for the classification] by focusing upon the abstract dichotomy between the two different approaches to equal protection problems that have been utilized by the Court."⁴⁹ The Court's bipolar approach in other public assistance contexts has similarly refused to consider the interests of impoverished persons.⁵⁰

43. 397 U.S. 471 (1970). For an account of the unsuccessful campaign to establish a constitutional claim to minimal subsistence, see Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973).

44. 397 U.S. at 485-87 (1970).

45. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam).

46. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

47. Indeed, the Court will sustain even apparently irrational choices so long as the Court is able to keep a straight face while saying something like: "The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

48. *Dandridge*, 397 U.S. at 487.

49. 397 U.S. at 519.

50. E.g., *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding "household" eligibility criteria for federal food stamp program); *James v. Valtierra*, 402 U.S. 137 (1971) (declining to apply heightened scrutiny to California constitutional provision requiring a community referendum to approve any subsidized low rent housing project). For a thoughtful examination of the impact on privacy & dignity interests, especially for the poor, of administrative practices under AFDC, see Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 *Hastings L.J.* (1992) (forthcoming).

3. *State Action*

The Court's express consideration of the state action doctrine reflects a similar tendency to cabin the circumstances in which the Court must consider government's real-world impact and entertain a claim of constitutional right.⁵¹ The doctrine reflects the Court's general hostility toward recognition that underclass status is constitutionally germane. The Court has found state action more readily when the underlying claim stems from more familiar constitutional wrongs—such as racial discrimination—rather than the prudentially problematic realm of economic relations, especially economic disadvantage.

Compare, for example, the role of government in *Blum v. Yaretsky*⁵² and *Jackson v. Metropolitan Edison Co.*⁵³ with that in *Burton v. Wilmington Parking Authority*.⁵⁴ As lessor to its \$28,700-per-annum, apparently racist tenant, Wilmington's "degree of state participation and involvement" in the challenged action was not palpably more pervasive than in *Blum* or *Jackson*. For example, it is well recognized that cost-containment measures mandated by health-care payors, including Medicaid and Medicare, have had a dramatic impact on the decisions of health-care providers.⁵⁵ Nevertheless, the Court found no state action in *Blum* because Medicaid regulations did not directly and specifically mandate a nursing home's decision to transfer a particular Medicaid patient to a lower-care facility, even though the decision was made as part of federally required level-of-care review and undoubtedly was strongly influenced by the government's requirements.⁵⁶ Indeed, even when government actually approved a challenged service termination procedure employed by a heavily regulated, monopolistic utility company, the Court refused in *Jackson* to find state action on the grounds that the governmental approval was not focused with sufficient specificity on the termination procedure itself (which was one provision of the utility's general tariff).⁵⁷

Further, the extent of mutual benefit between private and public activities was not manifestly greater in *Burton*: Presumably the provision

51. Indeed, in one sense *Harris, Rust, and DeShaney* can be conceptualized as state action cases: The claimants lost because the state had done nothing constitutionally significant to them.

52. 457 U.S. 991 (1982).

53. 419 U.S. 345 (1974).

54. 365 U.S. 715 (1961).

55. See, e.g., William B. Schwartz & Daniel N. Mendelson, *Hospital Cost Containment in the 1980s—Hard Lessons Learned and Prospects for the 1990s*, 324 NEW ENG. J. MED. 1037 (Apr. 11, 1991).

56. 457 U.S. at 1005-06.

57. 419 U.S. at 357.

of nursing care and electricity also serve substantial state interests, while nursing homes plainly benefit from the availability of public funds and utility companies profit from their preferred status. Government involvement in and benefit from the particular level-of-care decision in *Blum* or termination procedure in *Jackson* would seem at least as patent as Wilmington's benefit from the Eagle Coffee Shoppe's segregationist policies in *Burton*. Moreover, the appearance of government approval of the challenged practice is no greater in *Burton*. And the grounds for the Court's selective rejection of the state inaction argument in *Burton* would seem to apply with equal force to *Blum* and *Jackson*: "[I]n its lease with Eagle, the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation."⁵⁸

The nexus between the Court's state action analysis and its substantive assumptions and choices continues to be a close one, with important implications for claims rooted in economic disadvantage.⁵⁹ The Court's model of the "passive state" in *DeShaney*, for example, suggests an underlying choice made by the Court about state action. While the Court disregarded government's role in perpetuating Robert's abusive custody of Joshua DeShaney, it expressly relied on a similar kind of governmental conduct as a ground for rejecting a Fifth Amendment claim against compelled incrimination when a mother refused to produce her child in *Baltimore City Department of Social Services v. Bouknight*.⁶⁰ Drawing parallels to heavily regulated industries, a context the Court has found justifies limitations on the Fifth Amendment privilege,⁶¹ the Court reasoned in *Bouknight* (without citing *DeShaney*) that "[o]nce Maurice was adjudicated a child in need of assistance, his care and safety became the

58. 365 U.S. at 725. Compare also *Norwood v. Harrison*, 413 U.S. 455 (1973), in which the Court held unconstitutional Mississippi's provision of textbooks to private, racially discriminatory schools, with *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), in which the Court found no state action in the dismissal of a teacher, allegedly for engaging in constitutionally protected speech, by a school for troubled high school students that received 90% to 99% of funds from public sources.

59. This pattern also occurs in the Court's standing doctrine. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) (indigents failed to show "injury in fact" from IRS rulings granting tax-exempt status to hospitals that provided inadequate services to indigents; plaintiffs failed to show a substantial likelihood that opposite outcome would improve service to indigents); *Allen v. Wright*, 468 U.S. 737 (1984) (parents of black school children lacked standing to challenge IRS policy with respect to tax-exempt status of segregated private schools).

60. 493 U.S. 549 (1990).

61. See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 431-34 (2d ed. 1992).

particular object of the State's regulatory interests."⁶² One suggested explanation for this apparent contradiction is that

the state action doctrine has embedded within it unarticulated natural law assumptions about the "rightness" of certain initial allocations—such as the allocation of children to their biological parents—and . . . these assumptions blind the court to state action that creates or maintains this "natural" state of affairs. Consider the possibility that the state action doctrine thus depends not at all on whether there has been state action, but on whether the state has deviated from a course of action that seems natural or desirable.⁶³

The Court's implicit assumption effectively reserves to the state legislature the power to decide when to intervene in that initial allocation by de-constitutionalizing the state's role in maintaining that allocation, as in *DeShaney*, or by narrowly reading constitutional limitations on "affirmative" government decisions to alter it, as in *Bouknight*.

The relationship between state action, this suggested judicial tendency to defer to legislative determinations concerning "natural" allocations, and the Court's receptivity to claims of racial discrimination crystallize in the *Shelley v. Kraemer*⁶⁴ problem. That problem is the Janus-faced nature of the state action issue's link to substance: Though the state actor's participation in the alleged unconstitutional conduct is obvious enough, the difficulty lies in attributing to the state actor the substantive element of discriminatory intent as required under *Washington v. Davis*.⁶⁵ One suggestion has been that such intent could be found in "Missouri's facially discriminatory body of common and statutory law [which selectively enforced racial covenants but otherwise was generally hostile to restraints on alienation of land]—the quintessence of a racist state policy."⁶⁶ The Court recently extended *Shelley* in *Edmonson v. Leesville Concrete Co.*, holding unconstitutional the use of race-based peremptory challenges to jurors in a civil case.⁶⁷ Unlike *Shelley*, *Edmonson* did not involve a "facially discriminatory" body of law. Instead, the Court found sufficient indicia of state involvement in the intentionally discriminatory conduct, largely symbolic in nature, to attribute the private litigant's race-based action to the state: the actor's reliance on gov-

62. 493 U.S. at 559. Compare also the Court's reasoning in *Jackson*, *supra* notes 57-58 and accompanying text.

63. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1610 (2d ed. 1991).

64. 334 U.S. 1 (1948).

65. 426 U.S. 229 (1976) (noting conflict between *DeShaney* and *Bouknight*).

66. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 260 (1985).

67. 111 S. Ct. 2077 (1991).

ernmental assistance and benefits;⁶⁸ the performance of a traditional government function;⁶⁹ and aggravation of the injury "in a unique way by the incidents of governmental authority."⁷⁰ The Court reasoned that "[b]y enforcing a discriminatory peremptory challenge, the [trial] court 'had not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.' . . . In so doing, the government . . . in a significant way has involved itself with invidious discrimination."⁷¹

Shelley is regarded by some as a troublesome and difficult case, and presumably *Edmonson* also will be controversial.⁷² In both cases, the Court appeared to fudge the intent issue to limit government's toleration of and participation in a pervasive pattern of discriminatory social *conditions*. As one writer has remarked, however, "[t]he problematic character of *Shelley* is the result not of judicial activism but of the impoverished conception of discrimination that is reflected in the intent test."⁷³

From this Article's perspective, both *Shelley* and *Edmonson* are the exceptions that prove the rule. They are not notable because the Court found a way around the intent requirement.⁷⁴ Instead, they demonstrate that the Court was willing to do so only in the limited case of governmental toleration of overt racial discrimination, in circumstances where the line between active involvement and mere inaction has blurred to the point of tainting the state with that "wrongness." This result is consistent with the Court's position, at least since *Brown v. Board of Education*, that such discrimination is beyond the pale of any assumptions about the "rightness" of initial allocations that the Court is willing to make. Similarly, the Court has found state action in, and held unconstitutional, legislative or constitutional provisions that authoritatively announce the state's toleration of private racial discrimination and that erect political barriers to enactment of antidiscrimination measures,⁷⁵ while expressly

68. See *Tulsa Prof. Collection Serv. v. Pope*, 485 U.S. 478 (1988).

69. See *Terry v. Adams*, 345 U.S. 461 (1953). It is curious that Justice Kennedy's opinion for the Court in *Edmonson* omitted, without explanation, express reference to the requirement that the function be traditionally performed *exclusively* by the government.

70. 111 S. Ct. at 2080 (citing *Shelley v. Kramer*, 334 U.S. 1 (1948)).

71. *Id.* at 2085 (citation omitted).

72. See, e.g., Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959).

73. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 990 (1989).

74. As argued below, the caste-abolition principle depends on a finding of *condition*, not *intent*. See *infra* notes 294-328 and accompanying text.

75. E.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating constitutional prohibition of laws proscribing racial discrimination in housing); *Hunter v. Erickson*, 393 U.S. 385 (1969)

declining to apply the same constitutional protection to provisions that disable government-sponsored remediation of poverty, such as low rent housing.⁷⁶ In other contexts, such as debtor-creditor relations, the Court has insisted on actual hands-on participation by state officials in the challenged conduct; even legislative creation of the background system of rights and remedies authorizing the challenged conduct—and presumably government's implicit threat to use coercive power to enforce those rights and remedies—are not sufficient.⁷⁷

In the realm of economic relations, therefore, the assumptions about initial allocations implicit in the Court's state action cases enjoy considerable vitality.⁷⁸ Similar assumptions are also evident in *Dandridge* and its progeny, which address the substantive constitutional status of government decisions to maintain initial allocations of wealth. Furthermore, the distinction between the substantive element of intent and the threshold requirement of state action is more apparent than real. *Washington v. Davis*, for example, could be explained as concluding that the relatively poorer performance of black applicants on Washington, D.C.'s Test 21 did not directly result from state action. Of course, a substantial cause of that disparity may well have been the decades of de jure segregation in Washington, D.C. schools and myriad other forms of state-sanctioned discrimination and disadvantage. Thus, both the intent and state action requirements reflect the Court's prudential reluctance to engage in deeply transformative constitutional decision-making.

The intent and entitlement cases, when read along with the state action cases and decisions such as *Harris* and *Rust*, deny the underclass *qua* class any meaningful constitutional consideration. Neither the language of the Fourteenth Amendment nor the prudential considerations that in part animate the Court's position, including federalism and separation of powers, command this result, as Part III discusses.⁷⁹ As Part

(invalidating city charter provision requiring voter approval of such antidiscrimination ordinances); see also *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (invalidating voter initiative prohibiting mandatory busing to achieve desegregation).

76. *James v. Valtierra*, 402 U.S. 137, 141 (1971) (declining to apply *Hunter v. Erickson* to California constitutional amendment requiring community approval by referendum of publicly subsidized low rent housing).

77. Compare *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (issuance of prejudgment writ of attachment by court clerk and execution by sheriff constituted state action for purposes of debtor's due process claim), with *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (warehouseman's statutorily authorized sale of goods to enforce statutory lien does not constitute state action).

78. Cf. *Lindsey v. Normet*, 405 U.S. 56, 68-69 (1972) (rejecting constitutional significance of Oregon's omission of a defense to a forcible entry and detainer action for nonpayment of rent, based on landlord's failure to maintain premises).

79. See *infra* notes 254-343 and accompanying text.

IV explains, those interests can be adequately accounted for at the remedy-definition stage of constitutional proceedings rather than through issue-obscuring threshold doctrines of state action or definition of rights.⁸⁰

B. Equality of Educational Opportunity

1. School Finance Cases

The Supreme Court has generally continued to apply its categorical approach to the problem of economic inequality in the allocation of educational resources. Although there are a few important exceptions, this approach has usually denied federal constitutional relief to the underclass. The school finance cases, together with the outcome of the Court's school desegregation cases, largely preclude constitutional consideration of the impact of inadequate education as a causal factor in the maintenance of a subordinate class. As Part IV describes, denial of equal (or any) education has long been an effective means to lock a group into the powerlessness, dehumanization, and isolation of caste status. Thus, not only has the Court directly refused to recognize the poor as a constitutionally significant class and refused to recognize many of the ways the state affects their lives, it also has denied them access to constitutional redress of their condition.

The leading Supreme Court statement on school finance is *San Antonio Independent School District v. Rodriguez*.⁸¹ In that case, the Court upheld the Texas system of financing schools, even though the system's partial reliance on local districts' taxing ability resulted in large interdistrict disparities in per-pupil funding.⁸² The Court first rejected the poor parents' assertion of suspect class status. Justice Powell reasoned that a class of parents of school-age children living in poor neighborhoods hardly counted as a class at all.⁸³ He concluded that both the class and the alleged pattern of discrimination lacked traditional indicia of suspectness because the class was "not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command ex-

80. See *infra* notes 344-495 and accompanying text.

81. 411 U.S. 1 (1973).

82. For example, the most affluent Texas district contributed a state and local total of \$558 per pupil (with a \$36 federal grant, the total came to \$594), while the poorest district contributed a state and local total of only \$248 (with a \$108 federal grant, the total came to \$356). *Id.* at 12-13. For more contemporary figures on the disparities in school finance, see *infra* notes 431-39 and accompanying text.

83. 411 U.S. at 25. The Court described the parents as "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than others. *Id.* at 28.

traordinary protection from the majoritarian political process.”⁸⁴ Second, the Court rejected the students’ claim of a fundamental right to an education. The Court was unwilling to infer constitutional rights from the instrumental relationship between education and exercise of the rights to vote and to speak, and the Court denied the constitutional significance of education’s “relative societal significance . . . as opposed to subsistence or housing.”⁸⁵ Third, the Court invoked the interests of federalism and judicial deference to legislative judgment, especially in the area of state revenue raising and in view of the Texas system’s remedial origins.⁸⁶

Rodriguez thus effectively denies the constitutional significance of underclass status. The Court refused to recognize both (1) the importance of sharp disparities in allocation of educational resources and residence in distressed neighborhoods to the perpetuation of that status, and (2) the reality of powerlessness faced by the underclass. The patency of the state’s involvement precluded the Court from deploying an explicit state action barrier to relief, and the Court could hardly deny that government’s action affected the asserted interests of the claimants. With those door-slamming moves foreclosed, the Court resorted to the stratagems of denying both that the claimants themselves existed as a meaningful class and that their most salient common feature—their residence in poor neighborhoods—counted in any constitutional sense.

The Court came closest to according constitutional recognition to the underclass problem in *Plyler v. Doe*⁸⁷, in which it struck down a Texas law denying free public education to school-age children not legally admitted to the United States. But this openness to the underclass issue was limited and short-lived. Eschewing a categorical approach, Justice Brennan’s opinion for the Court pointed out that while illegal aliens may not constitute a suspect class for equal protection purposes, the involuntary presence of the children rendered their case special.⁸⁸ Further, although *Rodriguez* may have held that education is not a fundamental right, Justice Brennan found constitutional significance in the observation that “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the

84. *Id.* at 28.

85. *Id.* at 33.

86. *Id.* at 58.

87. 457 U.S. 202 (1982).

88. *Id.* at 216-24.

values and skills upon which our social order rests.”⁸⁹ Central to Justice Brennan’s analysis was the explicit recognition of an underclass dynamic, at least in the context of undocumented aliens:

[T]he creation of a substantial “shadow population” of illegal immigrants . . . raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special [innocent and vulnerable] members of this underclass.⁹⁰

On this basis, the Court subjected Texas’s law to heightened scrutiny. The Court concluded that “[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”⁹¹

Plyler’s scope remains unclear. The Court’s most recent pronouncement in this area is *Kadrmas v. Dickinson Public Schools*, in which the Court upheld a school board’s refusal to provide free bus service to a poor schoolgirl against a challenge that the policy denied “minimum access to education.”⁹² The Court sought to confine *Plyler* to its “unique circumstances” and expressly stated that education is not a fundamental right.⁹³ Significantly, however, the Court asserted “[nor] do we see any reason to suppose that this user fee will ‘promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries’ ”⁹⁴ This reference appears to hint that federal constitutional relief remains available if a litigant can establish an adequate causal relationship between the challenged government action and the creation of a “sub-class” of

89. *Id.* at 221. The Court further noted the contradiction between a norm of equality and a state law perpetuating the “enduring disability” of illiteracy. *Id.* at 222.

90. *Id.* at 218-219.

91. *Id.* at 230. In a subsequent case, the Court observed that “this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” *Papasan v. Allain*, 478 U.S. 265, 285 (1986). In *Papasan*, the Court suggested that the Equal Protection Clause might prohibit differential school financing attributable not to district-based taxation, but to a state decision to allocate funds unequally among school districts. *Id.* at 289.

92. 487 U.S. 450, 458 (1988).

93. *Id.* at 459.

94. *Id.* (quoting *Plyler*, 457 U.S. at 230).

illiterates.⁹⁵

Nevertheless several considerations substantially attenuate such an inference. First, *Plyler* involved a complete de jure denial of access to education, not just a gross inequality in resource allocation. Anything short of an express exclusion from the school system therefore probably would be analyzed under *Rodriguez*. Second, although the Court has not extended suspect class status to illegal aliens, the ethnic basis of Texas's classification and its explicit aim at children appear to have colored the Court's perception of the case. The undocumented school children in Texas resembled the kind of class familiar to the Court—one defined by ethnicity or alienage and not just by socioeconomic disadvantage. Third, *Plyler* was a 5-4 decision; the Court is now dominated by Justices likely to be hostile to Justice Brennan's approach and result, on the federalism and separation of powers grounds expressed in Chief Justice Burger's *Plyler* dissent.⁹⁶ Finally, *Plyler* did not seek to redefine equal protection doctrine, but instead attempted to stretch the boundaries of the Court's paradigm to reach a deeply troubling state policy. Because *Plyler* did not clearly articulate an alternative to the fundamental rights/suspect class paradigm, it provides scant doctrinal foundation for the identification of an interpretive principle that would reach beyond the facts of the case.

2. Desegregation Cases

Almost four decades ago, a unanimous Supreme Court attributed constitutional significance to the "present place in American life throughout the Nation" of public education.⁹⁷ The Court saw that place as central to participation in organized society:

Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is the principle instrument in awakening the child to cultural values, in preparing him for late professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be ex-

95. See David C. Thompson, *School Finance and the Courts: A Reanalysis of Progress*, 59 W. EDUC. L. REP. 945 (1990) (arguing that federal constitutional relief may be available for a claim of equal educational opportunity, at least in limited circumstances).

96. For a description of the increasingly categorical approach of the current Court and the impact of that approach on results, see Sullivan, *supra* note 40. *Plyler* itself reveals the weakness of the categorical approach. Justice Powell, who provided the swing vote, attempted to cram the genie back into the bottle by asserting that Texas's law did not pass rational basis scrutiny. 457 U.S. at 239. Chief Justice Burger in dissent, however, was prepared to uphold the finance scheme *even though* he found it "senseless" and "folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language." *Id.* at 242.

97. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) [hereinafter *Brown I*].

pected to succeed in life if he is denied the opportunity of education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*⁹⁸

Those words, although bounded in negative rights terms, could have formed the prelude to constitutionally mandated distributive harmony of public educational resources. Instead, what followed was a discordant sonata, the three movements of which have contributed to the underclass's present circumstances.⁹⁹ Several themes predominate: The Court's own institutional inclination toward inertia; the Court's habitual insistence, when it ventures to move forward at all, on wrongful government action (in this context intentional racial discrimination); the Court's correspondingly narrow focus on compensation of identifiable victims, rather than on alleviation of the underlying social condition; and the Court's interpretive preoccupation with classes defined exclusively by race rather than by socioeconomic status. The combined effect of the Court's desegregation cases has been to tolerate and perhaps to exacerbate socioeconomic structures—especially large disparities in access to educational opportunity—that contribute to the underclass's isolation. The focus on intentional racial discrimination in the educational context has put the caste-creating and caste-perpetuating conditions impinging on the underclass largely outside the Constitution's remedial reach.

The first movement lasted from 1955 to 1968. Under the second *Brown* case,¹⁰⁰ school desegregation was to proceed "with all deliberate speed," relying primarily on voluntary "freedom of choice" plans with only occasional arm-twisting in the form of withheld federal funds. This *lento* tempo impelled little change in southern schools and almost none in northern districts. Central-city and suburban school districts alike remained highly segregated in both regions.¹⁰¹

In the second movement, from 1968 to 1973, the tempo freshened to *andante*. *Green v. County School Board*¹⁰² repudiated the inertial consequences of "all deliberate speed" and "freedom of choice" plans in favor

98. *Id.* at 493 (emphasis added).

99. For a discussion of *Brown*, redistributive policy, and reform, see James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990).

100. *Brown v. Board of Educ.*, 439 U.S. 294 (1955) (hereinafter *Brown II*).

101. For example, a study of 65 Standard Metropolitan Statistical Areas found a mean segregation level (with 1.0 indicating complete segregation) in 1968 of 0.86 in central-city districts and 0.74 in suburban districts in the South; and 0.80 for central-city districts and 0.73 for suburban districts in the North. David R. James, *City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public School Desegregation, 1968-76*, 54 AM. SOC. REV. 963, 969-70 (1989).

102. 391 U.S. 430 (1968).

of a judicially controlled remedial regime. Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁰³ the Court approved affirmative remedial measures that included use of mathematical ratios "as a starting point in the process of shaping a remedy," which remedy could itself involve "the pairing and grouping of non-contiguous school zones," and bus transportation of students.¹⁰⁴ Although the Court in *Swann* did not foreclose the theoretical possibility that a school district could establish that its student assignment patterns were "neutral," proving neutrality thereafter became almost impossible.¹⁰⁵ Together *Swann* and *Green* greatly increased the momentum toward desegregation in both the North and South.¹⁰⁶ One writer has characterized this movement as "away from formal equality and toward something like constitutionally mandated distributive equality."¹⁰⁷

In the third movement, however, the distributive equality theme was displaced by more dissonant "wavering between a relatively broad focus on historical and systemic evils, demanding systemwide correction, and a narrower focus on the individual misdeeds of idiosyncratic wrongdoers, requiring isolated compensation for identifiable victims."¹⁰⁸ While judicially mandated desegregation became more prevalent after 1973 in the North under *Keyes v. School District*, the Court's imposition of an intent requirement in that case significantly eroded the power of school desegregation as a vehicle for redressing the plight of the urban underclass.¹⁰⁹ This consequence stems principally from *Milliken v. Bradley*, which in 1974 applied a district-specific intent requirement to preclude interdistrict remedies absent evidence that "racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation."¹¹⁰ Subsequent cases confirmed the principle that the scope of the remedy would depend on the

103. 402 U.S. 1 (1971).

104. *Id.* at 25, 28. See generally Leonard Strickman, *School Desegregation at the Crossroads*, 70 NW. U. L. REV. 725, 740-41 (1976).

105. Strickman, *supra* note 104, at 741.

106. Many southern school districts came under court order, and James found a decrease in intra district segregation levels between 1968 and 1976 from 0.86 to 0.48 in southern central cities, 0.74 to 0.48 in southern suburbs; 0.72 to 0.61 in northern central cities, and 0.73 to 0.54 in northern suburbs. James, *supra* note 101, at 969-70.

107. Liebman, *supra* note 99, at 353.

108. *Id.* at 354.

109. 413 U.S. 189 (1973). The Court subsequently extended the requirement of intent to all equal protection cases in *Washington v. Davis*, 426 U.S. 229 (1976).

110. 418 U.S. 717, 744-45 (1974). The examples given by the Court indicate the role of intent: "Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." *Id.*

scope of the demonstrated intentional segregation.¹¹¹ And, as discussed above, the Court also held during this period that gross disparities in allocation of educational resources did not alone constitute an equal protection violation.¹¹²

The combined effect of *Milliken* and *Rodriguez* has been to reinforce the isolation of the urban underclass. One study found that although average racial segregation declined substantially nationwide between 1968 and 1976, it varied significantly across regions and between urban and suburban areas. The decrease was largest in the South, where levels were higher than the North before 1968 and lower after 1976.¹¹³

Those findings evidence the inability of the Court's model to address underlying socioeconomic, structural inequalities no matter how severe and how powerful their segregative force. Thus, in a development of special importance from the underclass's perspective, by 1976 central-city segregation persisted at high levels (above 0.80, with 1.0 indicating complete school segregation and 0.0 indicating complete school integration) or *increased* in several large (mostly northern) cities: Washington, D.C. (0.86), St. Louis (0.85), Los Angeles (0.81), Cleveland (0.90), Chicago (0.92), Newark (0.83), and Philadelphia (0.81).¹¹⁴ Moreover, "[r]acial segregation *between* central-city districts and their suburban rings actually *increased* between 1968 and 1976."¹¹⁵ Not surprisingly, economic disparities played an important role in perpetuating educational inequality: "The fiscal capacities of school systems, which are directly related to the financial status of the communities they serve, had strong effects on school segregation in both cities and suburbs."¹¹⁶

In sum, once again, the Court's baseline constitutional model (in this instance remedying specific, intentional governmental wrongdoing in the form of racial segregation) and commitment to abstract values (in this instance local autonomy) support or at least tolerate social structures that perpetuate inequality in educational opportunity and thus perpetuate the underclass problem. As one study concluded:

To the extent that residential segregation is linked to between-district school segregation, the fragmentation of metropolitan public-school systems serves the interests of the more affluent whites who can take advantage of it as class theorists suggest.

111. *E.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977).

112. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (discussed *supra* notes 81-86 and accompanying text).

113. *James*, *supra* note 101, at 975.

114. *Id.* at 969-70, 975.

115. *Id.* at 975.

116. *Id.* at 982.

. . . .
. . . [L]ocal state boundaries foster racial and economic inequalities in the consumption of public schooling when they split metropolitan areas into autonomous units. Ostensibly neutral state structures can facilitate unequal policy outcomes. Favored classes and racial groups can substitute private means for public goods. The less privileged have fewer options.¹¹⁷

After a rest in the area of school desegregation during most of the 1980s, the Supreme Court began the 1990s with two decisions that continued to recognize sweeping equitable remedial power in the federal district courts but narrowed the range of circumstances in which their exercise of such power is appropriate. This trend magnifies the importance of intent and the segregative force of socioeconomic inequality. In *Missouri v. Jenkins*, the Court affirmed the equitable power of the trial court to apportion intradistrict desegregation costs between state and local governmental entities and to "set aside state laws preventing local governments from raising funds sufficient to satisfy their constitutional obligations [even though] those funds could also be obtained from the States."¹¹⁸ Thus, although the Court reversed the district court's direct imposition of a tax to fund the \$200 million magnet school program (which had been sponsored by the defendant school district), the Court upheld the lower court's power to enjoin operation of state laws that prevented the school district from taxing at a rate sufficient to fund the remedy.¹¹⁹

In *Board of Education of Oklahoma City v. Dowell*, however, the Court ruled that a finding both that a school district "was being operated in compliance with the commands of the Equal Protection Clause . . . and that it was unlikely that the school board would return to its former ways" would suffice to establish that the purposes of the desegregation order had been achieved and hence that the injunctive decree could be

117. James, *supra* note 101, at 983. James goes on to observe:

The fact that the national school-busing controversy abated once it became clear that desegregation of central-city districts would be confined to the boundaries of those districts, and that large numbers of black students would not be transported to suburbs except in rare instances, is also consistent with this view.

Id.

118. 495 U.S. 33, 54 (1990).

119. *Id.* In a public housing segregation case from the same term, the Court held that the district court had abused its equitable discretion by ordering Yonkers City Council members to vote for measures to implement the remedial decree, but upheld a contempt sanction against the city itself that approached \$1 million per diem. *Spallone v. United States*, 493 U.S. 265 (1990).

dissolved.¹²⁰ Although the school district's implementation of a student reassignment plan left half of the district's primary schools at more than ninety percent black or ninety percent white, the district court based its dissolution of the decree on findings that a dual school system had not been re-established and that the plan had not been implemented with an intent to discriminate.¹²¹ Instead, the district court found that segregative patterns resulted from private residential decisions. Ongoing intent thus is more important to the availability of judicial remedies than the current effects of past discrimination, and certainly more important than the effects of socioeconomic forces less directly traceable to identifiable governmental wrongdoing.¹²²

C. The Paradigm as Problem

Although the Court's approach in the foregoing cases is open to substantial internal criticism, as the dissenting opinions in each demonstrate, ultimately an external perspective is needed. For example, this Article's discussion of *Harris*, *Rust*, and *DeShaney* implies that a more realistic appreciation of how government affects the lives of its citizens would produce more sensible and satisfactory results, as would recognition of the poor as a suspect class. But even a clearer perception of government's influence and a more coherent state action doctrine would still, under the negative rights paradigm, require identification of some intrusive conduct by the state. Suspect class status is no panacea either. First, as Japanese-Americans discovered¹²³ and white males are learning,¹²⁴ suspectness is vulnerable to the trump of state interests under the Court's equal protection balancing approach. Second, finding suspectness would not eliminate the confines of the Court's negative rights paradigm, nor

120. 111 S. Ct. 630, 636-37 (1991). As this Article was going to print, the Court returned to the problem of determining when school desegregation has been achieved in *Freeman v. Pitts*, 111 S. Ct. 2233 (1991). *Freeman* involves two issues. The first is whether a school system must attain desegregation on all six *Green* factors at once (student assignment, staff, faculty, facilities, transportation, and extracurricular activities). The second issue is whether de facto resegregation vitiates the school system's compliance. In a further retreat from a redistributive paradigm and an even stronger endorsement of an intent requirement, the Court ruled that a federal court may incrementally relinquish supervision over areas of compliance, even if further segregation occurs in such areas, so long as that further segregation is not traceable to intentional conduct by school officials.

121. *Dowell*, 111 S. Ct. at 634.

122. See *supra* note 120. The Court confronts the problem of the extent of the state's obligation to remedy lingering effects of past de jure discrimination again in the 1991 Term cases of *United States v. Mabus*, and *Ayers v. Mabus*, 111 S. Ct. 1579 (1991).

123. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

124. See *Judges, Light Beams*, *supra* note 9.

would it address the separation of powers concerns expressed in *Dandridge* and both the institutional and federalism concerns raised in *Rodriguez*. Further, by focusing on the classifications imposed by the government, claims of competing governmental interests continue to determine the extent of judicial review. This is, in essence, the outcome in *Rodriguez*. And the shortcomings of the Court's desegregation cases in part derive from the paradigmatic requirements of de jure segregation, intent, and interdistrict discrimination.

In sum, the Court's constitutional visions have contributed to the entrenchment of inequality by constitutionalizing the economic segregation of the underclass. The following Part carries this inquiry to the area of employment discrimination. An analogous pattern emerges in that context.

II. Affirmative Action and Disadvantaged Neighborhoods: Paradigms of Paralysis

Civil rights joins abortion¹²⁵ as among the most divisive issues of our day, while the civil rights agenda has shifted in recent years.¹²⁶ The 1980s saw the focus of the equality debate move from school desegregation to desegregation of the workplace, where the nature of available remedial measures helped to determine the shape of the right in that context as well. What busing was to school desegregation, affirmative action has become to workplace desegregation. This Part contends that the dominant paradigm in the affirmative action debate, and the manifestations of that paradigm, are more part of the problem than the solution from the underclass's perspective. First, the prevailing remedy—affirmative action—fails to take account of the most severely excluded group (the underclass) and thus is likewise inadequate to remedy the grossest forms of inequality. Second, the affirmative action debate contributes to the perpetuation of the underclass problem by distracting attention from,

125. See, e.g., LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

126. That shift became painfully evident in last year's rancorous conflict over civil rights legislation and preferences. See, e.g., Peter Applebome, *Rights Movement in Struggle for an Image as Well as a Bill*, N.Y. TIMES, Apr. 3, 1991, at A1. For an overview of the emergence of racial preferences from executive orders and civil rights legislation, see Martin Schiff, *Reverse Discrimination Re-defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627 (1985).

Scholarly reaction to the Supreme Court's decision in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), also illustrates the focus of the current debate. Compare, e.g., William B. Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984), with Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990). Compare Smolla, *supra* note 9, with Judges, *Light Beams*, *supra* note 9.

and undermining the case for, provision of equal educational opportunity. This Part briefly describes the affirmative action remedy and the debate, both in the literature and on the Supreme Court, concerning the normative premises and constitutional status of affirmative action, and then addresses the impact of affirmative action on the underclass.

A. Affirmative Action: Definition of a Remedy

“Affirmative action” generically refers to the use of race or gender as a criterion in hiring, most frequently through the application of goals and timetables for the attainment of some predetermined range of racial or gender mix, although there may well be important differences in degree.¹²⁷ The Supreme Court’s interpretation of Title VII of the Civil Rights Act of 1964¹²⁸ in *Griggs v. Duke Power Co.*¹²⁹ gave substantial impetus to affirmative action in the private sector.¹³⁰ Title VII expressly

127. One characteristic of the affirmative action debate, like that surrounding abortion, is that disagreement about fundamental values often is obscured in debate about labels and meaning. See generally Mark Killenbeck, *Introduction: Prologues Without Pasts, Answers Without Questions*, 44 ARK. L. REV. 915 (1991). Discourse-defeating terms in the abortion debate (pro-choice, right to life, baby-killing) have their affirmative action counterpart in the great “quota” controversy. “Quota” is a politically charged term that brings more heat than light to the discussion. Some writers appear to lump most preferential programs together as a practical matter. E.g., Smolla, *supra* note 9, at 957-58. Others, including the Supreme Court, distinguish between “rigid quotas” and more flexible preference programs. See *infra* notes 143-48, 189-202 and accompanying text. I suggest that sufficient common understanding of what constitutes affirmative action can be reached to permit attention to shift from definition to substance.

128. 42 U.S.C. §§ 2000e to 2000e-16 (1981). Other statutory provisions, deriving from the 1866 Civil Rights Act, also address the problem of discrimination in the workplace, although none has the reach of Title VII. Under 42 U.S.C. § 1981, a person suffering intentional discrimination in hiring can sue a private employer at his or her own expense. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The Supreme Court recently narrowed the availability of claims under section 1981 to the formation of an employment contract only, and not to discriminatory practices occurring once the employer-employee relationship has been established. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Congress, however, overruled *Patterson* in section 101 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Discrimination claims can be brought against a governmental employer under 42 U.S.C. § 1983 (1981), and against two or more persons engaging in a conspiracy to discriminate intentionally. See generally Schiff, *supra* note 126, at 631-32.

129. 401 U.S. 424 (1971).

130. Affirmative action as a remedial measure to end segregation in the workplace traces its roots to Executive Order 11,246, issued by President Johnson in 1965, which prohibits government contractors from discriminating on the basis of race, religion, age, national origin, or physical handicap. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), *reprinted as amended in* 42 U.S.C. § 2000e (1981). This background is related in Schiff, *supra* note 126. Under rules developed by the Office of Federal Contract Compliance Programs (within the Department of Labor), Executive Order 11,246 was to be enforced through the use of affirmative action plans, goals, and timetables to attain greater proportions of minorities in the workforce. See Schiff,

forbids hiring quotas¹³¹ and embodies an intent requirement,¹³² and the legislative history indicates that Congress rejected both a disparate-impact test and race or gender preferences in hiring.¹³³ Nevertheless, the Court interpreted Title VII to allow a plaintiff to make out a prima facie case of discrimination by proving that employment tests and qualifications, such as the requirement of a high school diploma or literacy, had a disparate impact along racial or gender lines. Such a showing would then shift the burden to the employer to justify the practice as a matter of business necessity because it was related to job performance.¹³⁴ The Court also upheld under Title VII affirmative action plans that reserved half of the openings in an in-plant training program for minorities¹³⁵ and that expressly considered gender in hiring decisions.¹³⁶ In its 1989 *Wards Cove Packing Co. v. Antonio* decision, however, the Court substantially relaxed the employer's burden by requiring the plaintiff to show which specific practice has created a disparate impact, and by allowing the employer to defend a prima facie case by showing merely that the practice serves a legitimate business purpose.¹³⁷

In response to *Wards Cove* and other recent restrictive Supreme Court interpretations of Title VII,¹³⁸ Congress once again joined the civil

supra note 126 at 633. Executive Order 11,375 added gender discrimination to the list and rules promulgated thereunder mandated that affirmative action plans include increased hiring of women. *Id.* at 634.

131. 42 U.S.C. § 2000e-2(j) (1981).

132. § 2000e-2(h).

133. As Senator Humphrey, who promised to eat "the pages [of Title VII] one after another" if any Senator could find language requiring an employer to hire "on the basis of percentage or quota related to color, race, religion, or national origin," observed, "[t]he express requirement of intent is designed to make it wholly clear that inadvertent or accidental [sic] discriminations will not violate the title . . ." 110 CONG. REC. 6549, 7420, 12,723-24 (1964) (statement of Sen. Humphrey). See Charles J. Cooper, *Wards Cove Packing Co. v. Antonio: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991); Schiff, *supra* note 126, at 641-42.

134. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

135. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

136. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

137. 490 U.S. 642 (1989). The Court also held in *Wards Cove* that to establish a prima facie case of disparate impact, plaintiffs must show specifically that each challenged business practice had a significant disparate impact. *Id.* at 659. The Court reasoned that any other rule would subject employers to liability for disparities not caused by factors within their control. For a recent selection of brief essays on quotas, *Griggs*, and *Wards Cove*, see Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68 (1991); Cooper, *supra* note 133; Randall L. Kennedy, *Competing Conceptions of "Racial Discrimination": A Response to Cooper and Graglia*, 14 HARV. J.L. & PUB. POL'Y 93 (1991); see also William Cohen, *Proving Discriminatory Intent in Constitutional Law Disparate Impact Cases*, 14 HARV. J.L. & PUB. POL'Y 78 (1991).

138. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (mixed-motive cases); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies, Inc.*, 490

rights debate. President Bush originally opposed a civil rights bill as mandating quotas, because of its reliance on numerical goals and timetables.¹³⁹ The first legislative response to the President's veto, after the override effort failed, attempted to contain the "quota" concept through express definitional and prohibitory provisions.¹⁴⁰ Ultimately, the compromise engineered by Senator Danforth that became the Civil Rights Act of 1991¹⁴¹ omitted express reference to "quotas" and thus apparently left the issue to be determined by the courts through application of the resurrected "business necessity" and "job related" standards.¹⁴²

A key issue in the "quota" debate thus remains defining "qualification."¹⁴³ After more than twenty years of race and gender preferences in

U.S. 900 (1989) (limitations period for challenging facially discriminatory seniority system begins to run upon adoption of such system); *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white fire fighters who had failed to intervene in previous employment discrimination proceeding to bring action challenging employment practices instituted pursuant to those decrees); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (Title VII does not apply to U.S. citizens working abroad for American companies).

139. See Ann Devroy & Sharon LaFraniere, *Bush Outlines Objections to Civil Rights Proposal; President Says He Won't Sign "Quota Bill,"* WASH. POST, May 18, 1990, at A6. As good as his word, Bush vetoed the Civil Rights Act of 1990 on October 22, 1990. *Message to the Senate Returning Without Approval the Civil Rights Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). For analysis of the 1990 bill, see Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595 (1991).

140. Supporters of the House bill pointed out that it in fact would prohibit quotas. See 137 CONG. REC. H3938 (daily ed. July 16, 1991) (statement of Rep. Fish); Civil Rights and Women's Equity in Employment Act of 1991, H.R. REP. NO. 1, 102d Cong., 1st Sess. § 111(a)(2) (1991). That bill defines quotas as "a fixed number or percentage of persons of a particular race, color, religion, sex, or national origin which must be attained, or which cannot be exceeded, regardless of whether such persons meet necessary qualifications for the job." H.R. REP. NO. 1, 102d Cong., 1st Sess. § 111(b) (1991).

141. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

142. See *id.* §§ 3(2), 105(a)(i) (stating purpose to codify "business necessity" and "job related" concepts as enunciated in *Griggs v. Duke Power Co.*, and applying those terms to employers' burden of proof in disparate impact cases). The difficulty of achieving a stable compromise, and legislators' ambivalence about returning the issue to the judiciary, are evident in the Act's unusual provision to limit by statute the scope of "authoritative" legislative history that may be considered in construing the Act. *Id.* § 107(b). The Act does provide, however, that it is not intended to change the law regarding what constitutes lawful affirmative action. *Id.* § 116. The current debate over civil rights legislation is a remarkable reenactment of the debate over Title VII itself, when the Congress rejected the disparate-impact test and adopted instead an intent test. See *supra* notes 131-33 and accompanying text.

143. This point is illustrated by a recent General Accounting Office report on "EEO at Justice." GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON GOVERNMENT INFORMATION, JUSTICE AND AGRICULTURE, HOUSE COMM. ON GOVERNMENT OPERATIONS, 102D CONG., 1ST SESS., EEO AT JUSTICE: PROGRESS MADE BUT UNDERREPRESENTATION REMAINS WIDESPREAD (1990) [hereinafter GAO REPORT]. The GAO found that minorities and women were underrepresented at the Justice Department for several key jobs by comparison to their representation in related occupations (for attorneys) or catego-

hiring under explicit goals and timetables, it ought to be apparent that regardless of how they are labelled, such measures will continue under the new legislation. It is difficult to see how, as a practical matter, executives can be expected to meet numerical goals without employing substantial race- or gender-based preferences. Even if the law does not require, for example, that blacks who have not graduated from law school be hired for attorney positions, it surely means, as any law school administrator knows,¹⁴⁴ that in at least some cases the factor of race or gender will go very far, once such a threshold qualification is met, toward offsetting differences on other dimensions conventionally regarded as qualifications, such as class rank, law review editorship, and law school prestigiousness.¹⁴⁵ For busy decision-makers who will be held accountable for meeting numerical goals, the natural tendency most likely will be to accept as many "qualified" members of the underrepresented group as quickly as possible, further elevating the importance of race or gender over other dimensions.¹⁴⁶

In the context of antidiscrimination legislation, this issue translates into the problem of determining what kinds of qualifications really are necessary for a particular job, whether the employer or the employee must bear the burden of proof on that question, and how heavy that burden will be. Under *Griggs*, the presumption was that any general ability test or criterion on which minorities fared relatively poorly as a group reflected unlawful discrimination. This approach required employers to

ries of employment (for other professional, administrative, technical, and clerical positions) in the civilian labor force. (This means persons employed or seeking employment, according to the latest census data.) The GAO concluded that the Justice Department should implement goals and timetables, enforceable by holding executives "accountable," for the attainment of representational proportions; and the GAO contended that this did not require quotas because "numerical goals do not require or mandate selection of unqualified persons or preferential treatment of EEO groups . . ." GAO REPORT, *supra*, at 8-9. The GAO apparently can say this with a straight face because the question of qualification is one of degree once a minimum threshold has been crossed.

144. What is common knowledge among law school admissions committees erupted into a bitter public dispute when a Georgetown University law student published what he characterized as a "random sample" of admissions data to demonstrate that the law school admitted blacks who scored lower than whites in terms of undergraduate GPA and LSAT scores. *See, e.g.,* Michel Marriott, *Unresolved: Role of Race in Law Class Admissions*, N.Y. TIMES, Apr. 28, 1991, at sec. 4, p. 5.

145. The likelihood of this result presumably will also be enhanced by the Act's moderation of the specificity requirement. Under the 1991 Act, a complaining party is relieved of demonstrating that each particular employment practice caused a disparate impact when "the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis" in which case "the decisionmaking process may be analyzed as one employment practice." Pub. L. No. 102-166, § 105(a), 105 Stat. 1071 (1991).

146. *See infra* notes 215-16 and accompanying text (convenience of "quotas").

demonstrate, for example, that literacy requirements were related to job performance.¹⁴⁷ The 1991 Act apparently would reinstate that presumption.¹⁴⁸

Another response to the disparate impact problem has been to institute a kind of incremental affirmative action program at the screening stage. This practice, known as "within-group scoring" or "race norming," ranks test scores relative to a racially defined subset of the entire population as a means to adjust for such groups' relatively poorer performance on the test.¹⁴⁹ The prototype for this practice was developed by the Department of Labor's United States Employment Service (USES), which reported candidates' scores on the General Aptitude Test Battery (GATB) in relation to race.¹⁵⁰ Thus, blacks are ranked with other blacks, Hispanics with other Hispanics, and everyone else together. Consequently, a black or Hispanic with a lower raw score than a white on the GATB could receive a substantially higher percentile score.¹⁵¹ The rationale¹⁵² for race norming is that because tests such as the GATB

147. The Court also eventually rejected the so-called "bottom-line" defense, in which employers sought to justify their use of tests as an initial screening device so long as the end result produced racial balance (usually achieved by racial preferences implemented later in the hiring process). *Connecticut v. Teal*, 457 U.S. 440 (1982).

148. *See supra* note 142.

149. At least initially, prospective employers were not informed that the scores had been adjusted.

150. The GATB is a "referral system. It functions as an initial screen, determining which clients will have the opportunity to compete for positions with a given employer." Alexandra K. Wigdor & John A. Hartigan, *The Case for Fairness, Soc'y*, Mar.-Apr. 1990, at 12, 15.

151. For example, one critic of race-norming reports the following data: Percentile Conversion Tables

Jobs are grouped into five broad families: Family I includes, for example, machinists, cabinet makers, and tool makers; Family II includes helpers in many types of agriculture, manufacturing, and so on; Family III includes professional jobs such as accountant, chemical engineer, nurse, editor; Family IV includes bus drivers, bookkeepers, carpet layers; Family V includes exterminators, butchers, file clerks. A raw score of 300 would convert to the following percentile rankings:

	I	II	III	IV	V
Black	79	59	87	83	73
Hispanic	62	41	74	67	55
Others	39	42	47	45	42

Sources: Virginia Employment Commission; U.S. Department of Labor, Employment and Training Administration; Validity Generalization Manual (Section A: Job Family Scoring).

Robert G. Holland, *Civil Wrongs: Big Brother's Test Scores*, NAT'L REV., Sept. 3, 1990, at 35.

152. The justification for this practice was provided (after its implementation) by a National Research Council (NRC) study of the GATB's predictive validity. Although the USES concluded in its validity generalization analysis of the GATB that the battery "is a valid predictor of job performance for all 12,000 jobs found in the U.S. economy," the NRC study found an average predictive validity of 0.3, which means that "only 60 percent of the people who ranked in the top half of the test would be expected to rank in the top half on job perform-

have an adverse impact on minorities and imperfect predictive power, "use of the test scores without adjustments would erect an 'artificial barrier' to their [blacks' and Hispanics'] employment chances."¹⁵³ The USES practice had widespread impact, because "more than 19 million people pass through the 1,800 offices of the Public Employment Service annually. About 3.5 million of them are actually placed in jobs."¹⁵⁴ Under the 1991 Act, however, "race norming" constitutes an unlawful employment practice;¹⁵⁵ but, again, the burden will be on the employer to establish a job-related business necessity for use of a test that yields such disparate results.

B. Affirmative Action's Search for Justification

1. Scholarly Views

Debate concerning affirmative action transpires within a paradigm that forces one to choose between the allegedly competing values of individualism versus collectivism, or individual versus group rights.¹⁵⁶ The level of hostility in the affirmative action debate is evidenced by the allegations of racism hurled by each side against the other.¹⁵⁷ Affirmative action's critics charge that the agenda has abandoned a "principled campaign for equal justice under law to engage in an open contest for social and economic benefits conferred on the basis of race or other classifica-

ance." Wigdor & Hartigan, *supra* note 150, at 15. This is a "meaningful, though only modest, relationship to performance on the job, again roughly comparable to other general employment tests." *Id.*

153. *Id.* at 16.

154. *Id.* at 13. For debate concerning the issue of race-norming, see Jan H. Blits & Linda S. Gottfredson, *Equality or Lasting Inequality?*, SOC'Y, Mar.-Apr. 1990, at 4; Mary L. Tenopyr, *Fairness in Employment Testing*, SOC'Y, Mar.-Apr. 1990, at 17; Mark Kelman, *The Problem of False Negatives*, SOC'Y, Mar.-Apr. 1990, at 21; O. Peter Sherwood, *Court Innocence*, SOC'Y, Mar.-Apr. 1990, at 24; Robert G. Holland, *Race-Norming by Any Other Name*, NAT'L REV., July 29, 1991, at 36; Laurence I. Barrett, *Cheating on the Tests*, TIME, June 3, 1991, at 57; Peter Brown, *Normin' Stormin': Why Republicans Love "Race-Norming."* NEW REPUBLIC, Apr. 29, 1991, at 12; Holland, *supra* note 151 at 35.

155. Pub. L. 102-166, 105 Stat. 1071 (1991).

156. See, e.g., Judges, *Light Beams*, *supra* note 9; Smolla, *supra* note 9.

157. Randall Kennedy has argued, for example, that opponents of affirmative action are not just opponents in a good-faith debate occurring within a consensus of opposition to racial unfairness that involves disagreement about means. Instead, he says they are "enemies," whose objective is to rationalize white supremacy. It therefore is appropriate to question their underlying motives. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1338 (1986). He points to the civil rights record of the Reagan Administration to support that conclusion. *Id.* at 1341-45. But see Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990).

tions previously thought to be invidious.”¹⁵⁸ They argue that “one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race.”¹⁵⁹ In reply, affirmative action’s advocates characterize the shift as an evolution beyond the original demand for race-neutrality to an insistence on race-conscious measures to remedy “the self-perpetuating dynamics of subordination that had survived the demise of American apartheid.”¹⁶⁰ They argue that getting beyond racism first requires that we take race into account.¹⁶¹

This struggle reflects the tension between two divergent principles of equality: the “antidiscrimination principle” and the “group-disadvantaging principle.” The antidiscrimination principle has been defined in terms of the kinds of harm it seeks to prevent. First, certain kinds of classifications, like race and gender, can be applied “to shame and degrade a class of persons by labeling it as inferior.”¹⁶² Stigmatizing classifications thus “inflict psychological injury by assaulting a person’s self-respect and human dignity, and they brand the individual with a sign that signals her inferior status to others and designates her as an outcast.”¹⁶³ “Because race is not a factor indicating anything about the moral worth of persons, race is morally irrelevant to state laws and policies.”¹⁶⁴ Second, judicial intervention is justified to correct prejudicial

158. Abram, *supra* note 157, at 1312.

159. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (emphasis in original). See also Kennedy, *supra* note 157, at 1327-28 (describing, and then criticizing, the position of opponents of affirmative action).

160. Kennedy, *supra* note 157, at 1335.

161. *Id.* at 1328 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., plurality opinion)).

162. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350 (1987).

163. *Id.* at 351. Outside the context of affirmative action, the Supreme Court has recognized that “[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character.” Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991). And the Court has concluded that this offense to “the dignity of persons” is unconstitutional regardless of identity of race between the defendant and the excluded juror, *id.* at 1366, or whether the trial is civil or criminal. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

164. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030 (1979). Perry has described the “central guiding principle of decisions such as [Brown v. Board of Education, 347 U.S. 483 (1954), and Loving v. Virginia, 388 U.S. 1 (1967)]” as “the principle that no person is morally inferior to another by virtue of race.” *Id.* Perry qualifies this notion of moral equality: “[A]lthough not every person is the moral equal of every other person, there are some traits and factors—of which race is the paradigmatic example—by virtue of which no person ought to be deemed morally inferior to any other person.” *Id.* at 1031.

distortions or defects in the democratic process resulting from exclusion of a minority group, defined in terms of immutable characteristics, from that process.¹⁶⁵ Some writers have described how the destructive effects of both stigmatic and processual harm reinforce one another.¹⁶⁶

Owen Fiss offers the seminal formulation of the competing princi-

165. See ELY, *supra* note 22 at 135-79 (1980). For a summary of the two theories, see Lawrence, *supra* note 162.

166. Paul Brest describes concerns of both process and result that animate an antidiscrimination principle. Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). Defects of process arise either because (1) race-dependent decisions rest on irrational assumptions "that members of one race are less worthy than other people," or (2) "race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference." *Id.* at 6-7. That phenomenon is the "unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group." *Id.* at 7-8. Harmful results arise because "[d]ecisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative, and debilitating injuries." *Id.* at 8. At least one writer, however, who styles himself as an individualist, has rejected the idea that psychological injury resulting from racial discrimination has a proper place in equal protection analysis. Clarence Thomas, *Toward a "Plain Reading" of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983 (1987).

Brest goes on to argue that

[r]acial generalizations usually inflict psychic injury whether or not they are in fact premised on assumptions of differential moral worth. Although all of us recognize that institutional decisions must depend on generalizations based on objective characteristics of persons and things rather than on individualized judgments, we nonetheless tend to feel unfairly treated when disadvantaged by a generalization that is not true as applied to us. Generalizations based on immutable personal traits such as race or sex are especially frustrating because we can do nothing to escape their operation.

Brest, *supra*, at 10.

Charles Lawrence has described racism as "both a crime and a disease." Lawrence, *supra* note 162, at 321. He addresses in terms of unconscious racial motives the problem of distortions in the political process, described by Ely and others, that underlie suspect classification analysis. See ELY, *supra* note 22, at 135-79; Brest, *supra*, at 15-22. The requirement that discriminatory intent be shown subverts application of the Equal Protection Clause because it leads to repression of racial motives by law-makers:

Where a society has recently adopted a moral ethic that repudiates racial disadvantaging for its own sake, governmental decisionmakers are as likely to repress their racial motives as they are to lie to courts or to attempt after-the-fact rationalizations of classifications that are not racial on their face but that do have disproportionate racial impact.

Lawrence, *supra* note 162, at 349. He also applies his concern with unconscious racial motives to the problem of stigmatizing effect, and concludes that "[i]f stigmatizing actions injure by virtue of the meaning society gives them, then it should be apparent that the evil intent of their authors, while perhaps sufficient, is not necessary to the infliction of the injury." *Id.* at 352.

ple.¹⁶⁷ He argues that the "antidiscrimination principle," which he describes as "highly individualistic and confined to assessing the rationality of means," is inadequate and should be supplemented or supplanted by the "group-disadvantaging principle," under which the Equal Protection Clause is seen as a mechanism for protecting specially disadvantaged groups—African-Americans in particular but not necessarily exclusively.¹⁶⁸ Other writers have asserted that it is constitutionally and morally correct for government to extend benefits to individuals on the basis of their membership in a disadvantaged group. Some argue that because blacks have historically been injured by discrimination as a group, compensation is due them today purely by virtue of their membership in that group.¹⁶⁹ These writers also contend that the current chronically disadvantaged status of many blacks in American society justifies implementa-

167. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

168. *Id.* at 108, 147-56.

169. See, e.g., Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 510-20 (1982). In response to arguments that race is "morally irrelevant" whether taken into account in remedial or discriminatory measures, advocates of this justification point out that America's history of racial discrimination has always made race morally relevant—originally to discriminate and now to compensate. Duncan, *supra*, at 514-15 (citing J.L. Cowan, *Inverse Discrimination*, 33 ANALYSIS 10, 12 (1972)). In response to the objection that affirmative action is overinclusive in that it helps those who have not been demonstrably discriminated against, see *infra* note 209-16, this side argues first that even middle-class blacks have suffered discrimination (that their social, professional, and economic success evidences triumph over, not an absence of, discrimination), and second that even if they were not materially disadvantaged (e.g., by attending inferior schools), they nevertheless suffered the humiliation and stigmatization inflicted on all blacks in America. Duncan, *supra*, at 516-17 (quoting Justice Marshall's separate opinion in *Bakke*: "[It] is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." 438 U.S. 265, 400 (1978)). Furthermore, discrimination can occur through vectors other than the direct denial of a job because of race. For example, Duncan suggests that employers may rely on "their white male work force to do word-of-mouth recruitment, thereby effectively excluding minority applicants"; and that some blacks may be discouraged from even applying because of employers' past patterns of exclusion. Duncan, *supra*, at 518.

Others point out that affirmative action has had an enormously positive impact on the position of African-Americans:

It has enabled blacks to attain occupational and educational advancement in numbers and at a pace that would otherwise have been impossible. These breakthroughs engender self-perpetuating benefits: the accumulation of valuable experience, the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations, the eradication of debilitating stereotypes, and the inclusion of black participants in the making of consequential decisions affecting black interests.

Kennedy, *supra* note 157, at 1329. For a brief discussion of the complexities of evaluating whether antidiscrimination legislation, which has been enforced through racial preferences and numerical goals, has aided the economic condition of blacks, see John J. Donohue, *The Impact*

tion of programs, including affirmative action, to achieve distributive justice, independently of the existence of past wrongs.¹⁷⁰ Finally, proponents of affirmative action have argued the social utility of preferential treatment of members of disadvantaged groups. Benefits are said to include the displacement of negative stereotypic images of blacks and the inclusion of blacks in important public positions, provision of positive role models, increased provision of services to the minority community, and increased diversity.¹⁷¹

These two principles thus are divided by a chasm of widely divergent normative premises and empirical assumptions. Two general objections to affirmative action, whatever the justification, further illustrate the gulf between these antipodal positions. One is that affirmative action programs, which often in practice subject applicants to different criteria based on race, will erode standards of competence in professions and skilled trades.¹⁷² More strongly stated, this objection insists that affirmative action is antithetical to the American stratification system of rewarding individual achievement and initiative.¹⁷³ Affirmative action proponents reply that the United States has never had a meritocracy, but instead has had a system of racial and gender privilege.¹⁷⁴ Further, beyond pointing out that affirmative action programs generally do require

of Federal Civil Rights Policy on the Economic Status of Blacks, 14 HARV. J.L. & PUB. POL'Y 41 (1991).

Another common objection is that affirmative action hurts blacks in several important ways. First, the objection goes, affirmative action exacerbates racial tension and provokes white backlash. Kennedy responds that white resistance has met every effort at remedying the racial subordination of blacks, no matter how circumspect, and that racial justice will never be accomplished if fears of white animosity hamstring reform efforts. Kennedy, *supra*, at 1330. The second argument is that affirmative action stigmatizes blacks by reinforcing the belief that they cannot compete on equal terms and by tainting the accomplishment of those who attain success without the assistance of affirmative action. Kennedy responds that although affirmative action may have some stigmatizing effect, blacks are already stigmatized anyway and affirmative action's benefits far outweigh and partially counteract any further stigmatizing effect of affirmative action. *Id.* at 1330-31.

170. Duncan, *supra* note 169, at 520-24; Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986). The distributive justice claim has been met with over-inclusiveness arguments similar to those raised against compensatory justice claims, and its proponents have responded in kind. See, e.g., Duncan, *supra* note 169, at 520-24.

171. Kennedy, *supra* note 157, at 1329; Duncan, *supra* note 169, at 525; Sullivan, *supra* note 170, at 96; Williams, *supra* note 126, at 525; Smolla, *supra* note 9, at 958-63.

172. E.g., Abram, *supra* note 157, at 1319-20. This aspect of the controversy includes the debate over "race-norming" job-related test scores of blacks and Hispanics to compare more favorably with those of whites. See *supra* notes 149-55 and accompanying text.

173. Abram, *supra* note 157, at 1316.

174. Duncan, *supra* note 169, at 529-30.

applicants to possess some minimum level of qualification,¹⁷⁵ they challenge the very notion of "merit" and the means used to measure it.¹⁷⁶ Some have argued that race itself can be a badge of merit, particularly in advancing the goal of diversity.¹⁷⁷

The other general objection is that affirmative action unfairly imposes its entire burden on "innocent" victims, who themselves may never have engaged in racial discrimination.¹⁷⁸ It is here that the two groups most clearly appear to be talking past each other. Owen Fiss replies that fairness among individuals is simply not what equal protection is centrally about.¹⁷⁹ Instead, he argues, equal protection is about aiding disadvantaged groups. Others reply that white males' claims of innocence and unfair treatment rest on dehistoricized premises. They insist that the notion of equality of opportunity is unintelligible unless it takes into account the disadvantages historically inflicted on minorities and women. Affirmative action is necessary to ensure equality of opportunity from the outset; far from giving minorities and women an unfair advantage, it merely equalizes the unfair advantage society has given white males at every turn.¹⁸⁰ Thus, proponents defend affirmative action against objections of unfairness to individuals by pointing to unfairness to groups.

Critics of affirmative action complain that it tests one's faith in reasoned discourse to be confronted with accusations of racism (or sexism) for invoking the antidiscrimination principle when the issue is affirmative action.¹⁸¹ Some writers, acknowledging the substantial demise in

175. *Id.* at 531.

176. *Id.* at 530-31.

177. See Smolla, *supra* note 9, at 935-36; Duncan, *supra* note 169, at 531; Williams, *supra* note 126, at 533-38.

178. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294-95 n.34 (1978) (opinion of Powell, J.). As Rod Smolla readily acknowledges, "[r]eal affirmative action programs work when they hurt; the racial preference granted to members of some groups necessarily creates racial disadvantages to members of other groups—the notion of a preference is meaningless unless someone is preferred." Smolla, *supra* note 9, at 951. For an argument that this harm may be more severe than commonly appreciated, thus undermining affirmative action's claim to moral legitimacy, see Judges, *Light Beams*, *supra* note 9, at 1027-39.

179. Fiss, *supra* note 167, at 173-77.

180. Duncan, *supra* note 169, at 534-36.

181. As Alexander Bickel observed,

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation; discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, [proponents of equal opportunity] now claim support for inequality under the same Constitution.

ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

America of old-fashioned racism (i.e., notions of white supremacy), reply that it has been supplanted by a "new" or "symbolic" racism, manifested in opposition to affirmative action programs and busing, that blames blacks for perceived major threats to the social order and accuses them of violating cherished beliefs of individualism and self-reliance.¹⁸² One study, however, has concluded that

all opposition to these programs cannot be seen as indicating white racial antagonism. The partial effects of several aspects of stratification beliefs, controlling for racial affect and other factors, show that whites' evaluation of affirmative action also is directly based on beliefs about how the American stratification system should and does work.¹⁸³

Opposition to affirmative action is at least partially rooted in widely held normative beliefs that one's social position and rewards should be based on demonstrated ability and individual effort, and on faith that the American stratification system can be made to work for blacks. These beliefs in part account for the pattern of white attitudes toward affirmative action: overwhelming white opposition to preferential treatment for blacks coexisting with strong white support (at least in the abstract) for programs to assist blacks in gaining access to jobs or higher education.¹⁸⁴ The demand that individuals must be evaluated and rewarded on their own merits resonates strongly with the antidiscrimination principle described above.¹⁸⁵

182. For an overview of the literature, see Cardell K. Johnson, *Resistance to Affirmative Action: Self-Interest or Racism*, 29 J. CONFLICT RESOL. 306 (1985) (concluding that the "new racism" scale is the best predictor of attitudes concerning affirmative action, and that the "new" racism shares much in common with the old). For a somewhat more balanced study, which does not limit its vision to a choice between racism and self-interest, see James R. Kluegel & Eliot R. Smith, *Affirmative Action Attitudes: Effects of Self-Interest, Racial Affect, and Stratification Beliefs on Whites' Views*, 61 SOC. FORCES 797 (1983).

183. Kluegel & Smith, *supra* note 182, at 814.

184. See, e.g., *id.* at 797-98.

185. One study of the relationship between social and personal identity offered the following observations:

While everyone would deplore discrimination based on an individual's social identity, the present results suggest that affirmative action programs may also backfire. That is, people seem to analyze positive feedback subtly and to react negatively to judgments directed at the social aspect of their identity. But this is precisely the ideology underlying affirmative action programs for women, and for ethnic and racial minorities. Such programs may thus evoke unintentional negative feelings among the very people they want to treat more justly. . . . [A recent study] asked male and female undergraduates the extent of their endorsement for a policy whereby preference would go to the female candidate if a man and woman of equal qualifications were considered for a position. That men disagreed with such a policy is not surprising. More surprising, but consistent with the present argument, women were also fundamentally opposed to such an affirmative action policy.

2. *Constitutional Standards*

The Supreme Court, like the country as a whole, has found it difficult to reconcile affirmative action with its conception of equality, which draws largely from the antidiscrimination principle. Typically, the Court has responded by attempting to fit the issue into its categorical framework of levels of judicial review, finally settling (by a thin majority) on strict scrutiny for state and local government programs. This strategy has proved unruly, and the Court's most recent effort in *Metro Broadcasting, Inc. v. FCC* reflects more an ad hoc balancing approach resembling intermediate scrutiny, at least with respect to certain federal programs. Further, the Court in *Metro Broadcasting* appeared to endorse the group-disadvantaging principle of equal protection, again at the federal level.¹⁸⁶

The Court has struggled with voluntary¹⁸⁷ government-sponsored affirmative action programs in five cases.¹⁸⁸ The first four of those cases (before *Metro Broadcasting*) yielded twenty-three opinions; and the Court did not assemble a majority in support of an opinion until *City of Richmond v. J.A. Croson Co.*, in which the Court held that racial preference programs (at least those implemented by state and local governments) would be subject to strict scrutiny.

Although the outer boundaries of that standard are unclear, it at least means that government must establish by strong evidence a very good reason indeed before discriminating on the basis of race, and that it can discriminate, if at all, only to the extent necessary to that reason.¹⁸⁹ Thus, state-mandated minority preference programs may be permissible to remedy past discrimination and perhaps to achieve diversity in an educational context, but not simply to achieve racial balance or proportional

Donald M. Taylor & Lise Dubé, *Two Faces of Identity: The "I" and the "We"*, 42 J. Soc. ISSUES 81, 92 (1986) (citing F. Tougas *et al.*, *Privation Relative et Programmes d'Action Positive* (1985) (unpublished manuscript, Université d'Ottawa)).

186. See *infra* notes 199-202 and accompanying text.

187. Voluntary programs are distinguished from court-ordered programs directed at remedying employment discrimination. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28 v. EEOC*, 478 U.S. 421 (1986).

188. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

189. This summary derives largely from Judge Silberman's opinion in one of the Court of Appeals cases that went to the Supreme Court in the *Metro Broadcasting* proceedings. The judge's opinion provides a convenient overview of the parameters established by the Supreme Court. *Shurberg Broadcasting v. FCC*, 876 F.2d 902, 912-13 (D.C. Cir. 1989) (opinion of Silberman, J.), *rev'd sub nom.* *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

representation of minorities.¹⁹⁰ State and local governments must meet a stringent standard of proof that discrimination has occurred;¹⁹¹ congressional determinations are accorded more deference.¹⁹² The requirement that the plan be narrowly tailored to the remedial purpose involves several factors. First, "a racial preference plan must allow for case-by-case consideration of applicants to ensure that each minority has in fact suffered from the effects of past discrimination."¹⁹³ Second, "[t]he preference also must be structured in a way that minimizes the burden on nonminorities, so that innocent people are not asked to shoulder an undue share of the cost of remedying discrimination."¹⁹⁴ Although some burden may incidentally fall on innocent third parties, "the government's compelling need to employ a race-conscious remedy must outweigh the unfairness to innocent nonminorities."¹⁹⁵ A key consideration in this determination will be whether the governmental entity considered race-neutral alternatives before adopting the minority preference.¹⁹⁶ And

190. *Shurberg Broadcasting*, 876 F.2d at 912 (citing *Fullilove*, 448 U.S. at 475).

191. The *Croson* Court, in striking down Richmond's 30% minority set-aside program for public works subcontractors, clarified the showing that state and local government must make. The Court concluded that generalized assertions of past discrimination within an industry are insufficient to establish a remedial justification, and required instead comparison to the number of qualified minority firms. *Croson*, 488 U.S. 469.

192. *Shurberg Broadcasting*, 876 F.2d at 912 (citing *Croson*, 488 U.S. at 490-491; *Fullilove*, 448 U.S. at 472, 483, 499-502 (Powell, J., concurring)).

193. *Id.* (citing *Croson*, 488 U.S. at 490, 504-511; *Fullilove*, 448 U.S. at 486-87).

194. *Id.* at 913 (citing *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring)). In *Wygant v. Jackson Board of Education*, Justice O'Connor's plurality opinion invalidated a layoff policy that preferred minorities over more senior nonminorities. Justice O'Connor's opinion rejected as a justification the need to provide role models, because it had "no logical stopping point"; and she concluded that goals based on the ratio of black teachers to black students (as opposed to the ratio of black teachers to qualified minority teachers within the relevant labor pool) was not narrowly tailored to remedying past discrimination. She also observed that the provision placed its entire burden on particular individuals, by depriving them of legitimate interests in their jobs. *Wygant*, 476 U.S. at 284-94. In *Fullilove v. Klutznick*, Chief Justice Burger's plurality opinion relied heavily on congressional enforcement authority under Section 5 of the Fourteenth Amendment. Justice Powell's separate opinion, in contrast, emphasized the findings of past discrimination in public works contracting and the narrowness of the minority set-aside program. In particular, the federal program was designed to give a preference only to disadvantaged minority owned businesses and to minimize the burden imposed on nonminorities. The preference was available only to enterprises that could show, in the face of challenge, that they were suffering the effects of past discrimination. The burden was light and diffuse because the amount of set-aside funds was small in proportion to the total amount spent in the construction industry and the impact was not concentrated on particular individuals. *Fullilove*, 488 U.S. at 495-517.

195. 876 F.2d at 913 (citing *Fullilove*, 448 U.S. at 515).

196. In finding the City's plan not narrowly tailored, the Court in *Croson* noted that the City had failed to consider race-neutral means (such as financial assistance) to increase minority contracting and to provide some means for inquiry into whether the particular minority owned business had suffered the effects of past discrimination.

third, before *Metro Broadcasting*, minority set-asides could not be used to promote diversity as that would be “synonymous with the illegitimate objective of racial balance or proportional representation and is thus equivalent to ‘discrimination for its own sake.’”¹⁹⁷ “Because ethnic (or racial) origin is just one of many factors that combine to create ‘genuine diversity’ in an educational environment, the state’s interest is better promoted when ancestry is one element of a multi-factor evaluation that takes into consideration a variety of characteristics and attributes.”¹⁹⁸

In *Metro Broadcasting*, however, a five-to-four majority of the Court applied intermediate scrutiny to uphold an FCC program that gave broadcasters with minority ownership either special preference in competitive applications for licenses or exclusive and discount bidding rights in distress sales. The Court’s ruling was significant in at least two respects. First, a majority of the Justices held that Congress enjoys greater power to implement affirmative action programs than do states, and therefore intermediate scrutiny is appropriate for federal programs.¹⁹⁹ Second, a majority held for the first time that diversity, which some writers characterize as a positive, forward-looking value, suffices to justify an affirmative action program; and the Court did not require government to establish retrospective, remedial objectives.²⁰⁰ Thus, at least with respect to some federal programs, the Court has moved away from the antidiscrimination principle and toward the group-disadvantaging principle.²⁰¹ The Court’s commitment to the group-disadvantaging principle, however, as well as the precedential stability of *Metro Broadcasting* itself, are in doubt. The replacement of Justice Marshall by Justice Thomas, who is openly hostile to affirmative action and who wrote an opinion for the D.C. Circuit holding unconstitutional the FCC’s licensing preference for women, may well signal the demise of *Metro Broadcasting*.²⁰²

C. Impact on the Underclass

Affirmative action in the workplace, like its counterpart in the school system, has done little or nothing to relieve the plight of the un-

197. 876 F.2d at 913 (quoting *Bakke*, 438 U.S. at 307).

198. *Id.* (citing *Bakke*, 438 U.S. at 315-318).

199. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); see also Neal Devins, *Metro Broadcasting v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990); Smolla, *supra* note 9.

200. *Metro Broadcasting*, 110 S. Ct. at 3009-11.

201. Smolla, *supra* note 9 at 958-63.

202. *Lamprecht v. FCC*, No. 88-1395, 1992 WL 27168 (D.C. Cir. Feb. 19, 1992). Circuit Judge Thomas distinguished *Metro Broadcasting* on the basis that the record in *Lamprecht* failed to support the assumption that women who own radio or television stations are more likely than white men to broadcast “women’s programming.” *Id.* at 30.

derclass. If anything, affirmative action has only made matters worse. Not only is the affirmative action debate cast in terms that largely omit consideration of the underclass problem, but it may also have crowded out consideration of relief for the underclass by dominating the political agenda and by advocating a narrow conception of social justice in terms that conflict with the principles of individual justice, meritocracy, and a commitment to basic educational achievement. And it has done so self-righteously in the name of fairness by accusing anyone who dares to question the affirmative action mission of racism, selfishness, and social irresponsibility.

1. *Misplaced Focus*

In the first place, affirmative action simply is not addressed to the underclass problem in any direct way. Instead, some members of the black middle class and middle class women are the primary direct beneficiaries of affirmative action programs, which tend to target white-collar positions and depend on at least some minimal level of employability even if within-group criteria and race-conscious preferences are used.²⁰³ Although recent data indicate that there remains much room for improvement because blacks and women continue to lag behind white men in income and encounter the "glass ceiling" phenomenon in corporate advancement,²⁰⁴ substantial progress has been made.²⁰⁵ Meanwhile,

203. That middle class blacks are the primary beneficiaries is recognized by conservatives and liberals alike. See Christopher Jencks, *Affirmative Action for Blacks: Past, Present, and Future*, 6 AM. BEHAVIORAL SCI. 731, 749-52 (1985) (affirmative action has helped black women and highly educated black men, but not less educated black men); *America's Wasted Blacks*, ECONOMIST, Mar. 30, 1991, at 11:

For some individuals, affirmative action may still do more good than harm. But the real problem is that it reaches mainly those who need it least. The chief beneficiaries of affirmative action are university students and black businessmen, who are the blacks most likely to succeed anyway. It does not touch most poor blacks' lives.

See also James W. Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 538 (1975); Fullilove v. Klutznick, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting) ("[T]hose who are the most disadvantaged . . . are the least likely to receive any benefit[s] from the special privilege.") As even advocates of affirmative action concede, it does appear to be the case that affirmative action programs have primarily benefitted the black middle class. See, e.g., Kennedy, *supra* note 157, at 1333 n.23 (citing J. LEONARD, *THE IMPACT OF AFFIRMATIVE ACTION* 132 (1983) (noting that federal affirmative action programs have "raised the demand for black males more in the highly skilled professional and technical occupations and in white collar clerical jobs than in the blue collar operative and laborer occupations"))).

204. For example, of persons 25 years old or older with four or more years of college in 1989, white men earned an average of \$41,090, black men earned \$31,380, white women earned \$27,440, and black women earned \$26,730. ARK. DEMOCRAT, Sept. 20, 1991, at 5A. The congressional response to this problem is the Glass Ceiling Act of 1991, Title II of Pub. L. 102-166, 105 Stat. 1071 (1991), which creates the Glass Ceiling Commission, mandates study

although the black middle class is growing rapidly, the number of black families in poverty has reached distressing levels.²⁰⁶

The problem is that the affirmative action debate typically is confined to race- and gender-specific, as opposed to socioeconomic, dimensions. Affirmative action therefore is indifferent to the extreme economic and political powerlessness of the underclass, whose minority and female members are in no position to benefit from hiring preferences for jobs for which they are unqualified and cannot reach because of their disadvantaged status.²⁰⁷ And affirmative action actively discriminates against the large and growing number of white males living in conditions of extreme disadvantage,²⁰⁸ who neither share in nor benefit from the alleged unfair advantages obtained by some other persons who possess the same gender or racial characteristics.

of the problem, and establishes the Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management.

205. For example, black affluence has increased markedly since 1967: The number of black families with an annual income of \$50,000 or more (in constant 1987 dollars) has increased 360%, so that today 9.5% of black families have an income of \$50,000 or more. William O'Hare, *In the Black*, AM. DEMOGR., Nov. 1989, at 25. And black representation in the workplace has increased markedly, in part because of affirmative action. *See, e.g., Years Later: A Civil Rights Scorecard*, SCHOLASTIC UPDATE, Apr. 7, 1989, at 20-21:

Corporate affirmative-action programs have also brought millions of blacks into the factories and offices that were once lily white. Blacks now represent 9.4 percent of all teachers, 18.1 percent of all social workers, and 7.4 percent of all accountants and auditors. In 1987 there were 799,000 black managers and executives—5.6 percent of the total—compared to 506,000 (4.7 percent) only four years earlier.

On the other hand, the median income of black families was only 57% that of whites in 1988. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES, 1990, at 450, tbl. 727 (1990).

206. For example,

the proportion of black families with incomes over \$35,000 grew from 15.7 percent to 21.2 percent between 1970 and 1986 while the number of black families with incomes of more than \$50,000 increased from 3.7 percent to 8.8 percent. During the same period, the proportion of black families with incomes of less than \$10,000 also grew substantially, from 28.8 percent to a staggering 30.2 percent.

Derek T. Dingle, *An Agenda for the Black Middle Class*, BLACK ENTERPRISE, Nov. 1989, at 53, 55 (citing NATIONAL RESOURCE COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (1990)). *See also infra* notes 345-70.

207. Further, it has been observed that

[T]he composition of litigation has shifted dramatically: While most cases formerly attacked discrimination in hiring, today the vast majority of all litigation suits challenge discrimination in discharge. Although the authors and early architects of employment discrimination laws envisioned them as tools for opening employment opportunities to blacks, women, and other minorities, this is no longer their primary use. Instead, the antidiscrimination laws are predominantly used to protect the existing positions of incumbent workers.

John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991).

208. *See infra* notes 367, 405-06 and accompanying text.

2. *Politics of Race and Politics of Poverty*

The affirmative action debate has had the unfortunate side-effect of contributing to the overall problem. "The number and difficulties of the estranged poor grew during the 1970s and 1980s because of foreseeable, intelligible, and avoidable choices made by other Americans."²⁰⁹ Those choices include, in addition to macroeconomic policies that have increased joblessness among inner-city blacks and a decline in society's commitment to educational and subsistence programs, a preference for affirmative action programs rather than economic and social restructuring to address inequality.²¹⁰ It should not be surprising that, in view of the large and growing disparity in economic and political power between the black middle class and the black urban underclass, socially conscious policy-making should prefer programs that promote the interests of the former.

For example, one scholar has argued that affirmative action programs reflect the familiar process of interest-group rent-seeking,²¹¹ which creates incentives for perpetuating race-consciousness and politicians' exploitation of racial hostility.²¹² The relevant interest group would appear

209. Jennifer L. Hochschild, *The Politics of the Estranged Poor*, 101 *ETHICS* 560, 561 (1991). In view of the causal factors he cites, William Julius Wilson argues that solutions must come in the form of comprehensive macroeconomic restructuring and social programming:

I therefore proposed a liberal-Left social democratic policy agenda that highlights macroeconomic policies to promote balanced economic growth and create a tight job market, public sector employment programs for those who have difficulty finding jobs in the private sector, manpower training and education programs, a child support assurance program, a child-care strategy, and a family allowance program.

William J. Wilson, *The Truly Disadvantaged Revisited: A Response to Hochschild and Boxill*, 101 *ETHICS* 593, 595-96 (1991).

As I have observed elsewhere:

More broadly, affirmative action may be the path of least resistance for those in power. Wilson's suggestion that his reforms should be politically palatable because they would increase employment across racial lines underestimates the resistance of the relatively affluent to redistributive policies. The economic and social policies Wilson identifies as important causal factors in the underclass's condition are perhaps the strongest evidence of the wealthier classes' increasing political dominance. Those classes, which include a growing number of relatively affluent blacks, have little incentive to undertake the complex and messy task of addressing the hardship of the underclass, and plainly have refused to do so. The final bitter irony is that affirmative action thus may represent more an *accommodation of* than a *challenge to* the status quo.

Judges, *Light Beams*, *supra* note 9, at 1045-46.

210. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* at vii-19 (1985) (summary).

211. "Rent-seeking" is the creation through the political process of returns in excess of normal market returns or opportunity costs.

212. Jennifer Roback, *Racism as Rent Seeking*, 27 *ECON. INQUIRY* 661 (1989); Jennifer Roback, *The Separation of Race and State*, 14 *HARV. J.L. & PUB. POL'Y* 58 (1991) [hereinafter

to be the black middle class. Another study found that political mobilization and official recognition as a deserving category were the key mediators in groups' success in attaining admission to elite colleges: During a period of general expansion of the nation's system of higher education, women and blacks succeeded in improving their access to such institutions. Lacking either official recognition or political mobilization as a group, however, persons defined by low socioeconomic status were relatively unsuccessful in improving their access.²¹³

Affirmative action thus in a sense reflects one more triumph of the relative haves over the relative have-nots, and demonstrates that the politics of wealth may be more powerful than the politics of race.²¹⁴ There may be an element of co-optation in the process. To be sure, as discussed above, whites tend to prefer in principle antidiscrimination programs and nonpreferential programs that assist blacks in overcoming the effects of historical discrimination. In practice, however, affirmative action programs in the form of numerical goals offer a much simpler and less costly approach to the problem of racial discrimination; and, as a practical matter, affirmative action programs are most conveniently implemented that way.²¹⁵ These advantages in part account for the programs' prevalence in the face of white hostility. The antidiscrimination principle may yield to pragmatic self-interest as public-sector bureaucrats and private-sector managers, who do not personally bear the burden anyway, find it expedient to adopt affirmative action quotas to satisfy the requirements of an-

Roback, *Separation*]. Roback points out, however, that blacks certainly did not invent the venerable practice of rent-seeking, and may not even be net beneficiaries, all rents considered. She asks:

So long as the timber companies are unwilling to give up the [taxpayer-]subsidized Forest Service, so long as the teachers' unions are unwilling to give up the taxpayer-supported Department of Education, why should African-Americans give up the Equal Employment Opportunity Commission? I can think of no particular reason why ethnic minorities should be the first groups in the economy to give up their rents.

Roback, *Separation*, *supra*, at 62.

213. David Karen, *The Politics of Class, Race, and Gender: Access to Higher Education in the United States, 1960-86*, 99 AM. J. EDUC. 208 (1991).

214. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 91-92 (1991). Those forces combine when macroeconomic changes result in increasing unemployment. A recent study has found that

[t]he link between macroeconomic performance and the number of employment discrimination filings is therefore a strong one. . . . The increase in the unemployment rate has had a major effect on the volume of litigation, by itself explaining 19.5 percent of the growth in cases since 1969. Other exogenous economic factors seem less significant in explaining the rising caseload.

Donohue & Siegelman, *supra* note 207, at 999-1000.

215. For a description of how this process occurs, see Jencks, *supra* note 203, at 754-56. For an example that this result is indeed the case, see *supra* note 143.

tidiscrimination laws.²¹⁶

3. *The Politics of Stalemate*

The affirmative action debate has become a "diversion,"²¹⁷ in which conservatives and liberals in the past two decades have occupied themselves with hurling epithets at one another and seeking to monopolize the rhetorical agenda on racial issues, while the position of the most severely disadvantaged class in this country has deteriorated catastrophically despite broad antipoverty and antidiscrimination legislation and aggressive affirmative action programs.²¹⁸ On one side, the liberal agenda has been busy advancing the difficult case for affirmative action and attempting to preclude any critical examination of this nation's priorities for achieving racial and social justice. For example, fearing racial stigmatization and destructive criticism of social welfare programs, liberals have frequently reacted to bad news about lower-class urban black life (especially unflattering descriptions of behavior among that class) by vehement denial and resistance.²¹⁹ Sociologist William Julius Wilson observes:

Thus, after 1970, for a period of several years, the deteriorating social and economic conditions of the ghetto underclass were not addressed by the liberal community as scholars backed away from research on the topic, policymakers were silent, and civil rights leaders were preoccupied with the affirmative action agenda of the black middle class.

. . . .

By 1980, however, the problems of the inner-city social dislocations had reached such catastrophic proportions that liberals were forced to readdress the question of ghetto underclass, but this time their reactions were confused and defensive. The extraordinary rise in inner-city social dislocations following the passage of

216. See, e.g., Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 658-62 (1989) (businesses have come to accept and even favor affirmative action programs); Cindy Skrzycki, *Civil Rights and Corporate Qualms: Executives Fear Huge Damage Awards as Result of Hiring Bill*, WASH. POST, June 13, 1991, at B11:

"Most companies have accepted affirmative action," said Larry Lorber, an attorney who represented the Business Roundtable, a group of 200 of the nation's largest companies, in recent informal talks with civil rights groups involved with the [civil rights] legislation. "In some respects, they view it as a helpful management tool to keep them from getting sued."

217. *America's Wasted Blacks*, *supra* note 203, at 11: "The whole argument is a diversion. Blacks need to realize that affirmative action cannot solve their most serious problems, whites need to remember that affirmative action does not make it an advantage to be born black."

218. See *infra* notes 344-70 and accompanying text (deteriorating plight of underclass).

219. This pattern first emerged in the firestorm of criticism that greeted Daniel Patrick Moynihan's 1965 report on black family life. See WILSON, *supra* note 210, at 8-15; DANIEL P. MOYNIHAN, OFFICE OF POL'Y PLAN. AND RES., U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

the most sweeping anti-discrimination and antipoverty legislation in the nation's history could not be explained by the 1960s explanations of ghetto-specific behavior. Moreover, because liberals had ignored these problems throughout most of the 1970s, they had no alternative explanations to advance and were therefore ill prepared to confront a new and forceful challenge from conservative thinkers.²²⁰

The consequence of this process was that the neoconservative perspective came to dominate policy making in the 1980s. According to Wilson, that "culture-of-poverty" perspective

has focused almost exclusively on the interconnection between cultural traditions, family history, and individual character. For example, [neoconservatives] have argued that a ghetto family that has had a history of welfare dependency will tend to bear offspring who lack ambition, a work ethic, and a sense of self-reliance. Some even suggest that ghetto underclass individuals have to be rehabilitated culturally before they can advance in society.²²¹

The neoconservative agenda has added little to the original conservative position, except to argue unconvincingly that "the growth of liberal social policies has exacerbated, not alleviated, ghetto-specific cultural tendencies and problems of inner-city social dislocations."²²² And the neoconservative movement has failed to offer constructive solutions of its own,²²³ as the underclass has continued to lose even more ground

220. WILSON, *supra* note 210, at 15.

221. *Id.* at 13.

222. *Id.* at 16. For an example of neoconservative writing on the subject, see CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984).

223. Instead, the neoconservative position has advanced an agenda ostensibly devoted to "limited government." *Cf.* CHARLES FRIED, *ORDER AND LAW* 89-131 (1991) (describing conservative objections to affirmative action). The *National Review* recently published musings from several leading conservatives about "what the future may hold—politically, socially, economically, [and] technologically—as we approach the end of a century and a millennium." The following excerpt captures the flavor of the neoconservative position with respect to the underclass:

We seem to have ignored conservative wisdom and, instead, left social policy to the bad guys. Welfare schemes that guarantee a permanently dependent underclass are now thoroughly embedded in our political and social life. Neither the intellect of Charles Murray nor the energy of Jack Kemp can cope with the grim determination of ghetto politicians to hold their constituents in thrall by denying them incentives to work and to establish normal family lives; by insulating them from pressures to use our language and otherwise enter the American mainstream; and by blaming the lethal nature of street life on the police rather than on the dealers and muggers.

These malignancies, and others like them, might, of course, be excised from the body politic. But that would mean enduring short-term pain in exchange for long-term gain—something our political system is not organized to do. There is simply no constituency for it. The apparent beneficiaries of the welfare system (in fact, its victims) can't do without their transfer-payment "fix"; the dispensers of the welfare narcotic, fearing redundancy if those clients kick the habit, dole out enough money

under the Reagan and Bush administrations.²²⁴ Instead, neoconservatives have advocated an economic and social restructuring that has produced the most massive upward redistribution of wealth in American history.²²⁵ With respect to the underclass, the neoconservative agenda has been one of “masterly inactivity,”²²⁶ which has effectively exploited the liberals’ disarray.

4. *Impact on Education*

This dynamic contributes to society’s failure to provide adequate and equal educational opportunity to its children. Most generally, as the foregoing suggests, liberal concern with the affirmative action agenda has displaced attention to social programs that directly aid disadvantaged children, such as equality across the socioeconomic scale of resource allo-

to retain control; the great majority crinkles up its nose, moves to the suburbs, and contents itself with a tax revolt that is negated by huge budget deficits.

Irwin M. Seltzer et al., *Millennial Thoughts: The Shape of Things to Come*, NAT’L REVIEW, July 8, 1991, at 26 (emphasis added) [hereinafter *Millennial Thoughts*]. Seltzer’s use of the exclusionary and inclusionary pronouns “them” and “our” is especially revealing, if that is possible in such a rich passage. For a discussion of this phenomenon of “negative identity” and the process by which we “turn real people into objects, to see not the person but the abstract image of the Other” and thereby to “rationalize the subordinate position of a group,” see KARST, *supra* note 10, at 23.

224. The Brookings Institution recently compiled studies re-examining the underclass issues raised by Wilson. THE BROOKINGS INSTITUTE, *THE URBAN UNDERCLASS* (Christopher Jencks & Paul E. Peterson eds., 1991). For discussion of a selection of those studies, see *infra* notes 357-61 and accompanying text.

225. For recitation of the facts and figures to substantiate these claims, see KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN ADMINISTRATION* (1990). Phillips’ detailed indictment indicates that conservatives are beginning to become concerned about these trends. Indeed, even Charles Murray appears to be worried about the urban underclass’s alienated “caste” status and the increasing concentration of wealth and power in the hands of a selfish elite. Charles Murray et al., *Millennial Thoughts*, *supra* note 223, at 29-30; see also Karen Pennar, *The Rich Are Richer—And America May Be the Poorer*, BUS. WEEK, Nov. 18, 1991, at 85.

226. The phrase “masterly inactivity” has an apt pedigree. Originally coined in James Macintosh’s *Vindicae Galliae* (1797) (in response to Burke’s *Reflections on the French Revolution*), the phrase appeared in a newspaper editorial advising the South on how best to resist radical Republican proposals for black suffrage and the Fourteenth Amendment:

We answer, let them do nothing, so far as political action is concerned. Let them simply watch and wait. A masterly inactivity is the best policy they can adopt. Time, that will gradually teach the masses of the North the necessity of redeeming the republicanism of the country, will work out the problem in the interests of the South. The Radicals demand negro suffrage and the ratification of the Constitutional Amendment. They can get neither except by the consent of the Southern States and the suffrages of the Southern people

Benjamin Wood, *Masterly Inactivity the Policy of the South*, N.Y. DAILY NEWS, Dec. 1, 1866, quoted in Charles Fairman, *Reconstruction and Reunion 1864-88 (Part One)*, in 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 256 (Paul A. Freund ed., 1971).

cation, nutrition and health-care programs, job training and education programs, an adequate child-support program, and child-care programs.²²⁷ By suggesting that affirmative action is the path to social justice, liberals may be assisting the neoconservative agenda of ignoring the educational disadvantages faced by the underclass. As suggested above, affirmative action's challenge to the antidiscrimination principle is heavy lifting indeed; and the task of convincing political leaders, judges, and the public that what looks very much like racial or gender discrimination is really a form of justice and equality leaves scant energy—or credibility—for advocating redistributive programs for education.²²⁸ On the contrary, the political and moral demand for long-term structural reform at the beginning of the opportunity cycle—at the education stage—has been blunted by emphasis on short-term remediation at the mid- and end-points of that cycle—at the hiring and promotion stages. The legislative record reflects this choice and the distribution of power it implies: The political response to *Wards Cove's* threat to affirmative action was immediate and forceful—comprehensive civil rights legislation became a national priority and was enacted within a scant two years. By contrast, no effective national policy to equalize educational opportunity has emerged in the twenty years since *Rodriguez*,²²⁹ while the underclass's circumstances have deteriorated alarmingly and the education-funding gap in many areas has widened to a chasm.²³⁰

227. See Wilson, *supra* note 209, at 595-96.

228. See Thomas B. Edsall, *Why Liberals Lose: Willie Horton's Message*, N.Y. REV. OF BOOKS, Feb. 13, 1992, at 7, 10 (liberal demands of majority sacrifice to assist minorities, for example through affirmative action programs, are undercut "by the visible decay of cities with large majority populations, [and] by the worsening of conditions in the black underclass"). Even proponents of affirmative action recognize that advocacy of such programs consumes scarce political resources, especially under the demanding standard that application of the antidiscrimination principle yielded in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989). See Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1531 (1990) ("In the last decade of the twentieth century, the Court demands that the precious political capital of minorities seeking economic equality be spent determining the existence of racial economic discrimination, rather than pursuing policies to insure minority participation in public economic programs."). Recent research demonstrating that contemporary black Americans continue the emphasis blacks historically have placed on educational attainment makes this dilemma more acute. A. Wade Smith, *Educational Attainment as a Determinant of Social Class Among Black Americans*, 58 J. NEGRO EDUC. 416 (1989).

229. For discussion of the shortcomings of the so-called "excellence movement," which is to date the principal national response to the crisis in education, see *infra* notes 454-58 and accompanying text. As this Article was going to print, the Senate passed the Neighborhood Schools Improvement Act, S. 2, 102d Cong., 2d Sess., 138 CONG. REC. S476-02 (1992), which would partially address the problem of inequality of educational opportunity by allocating federal funds for "high need schools."

230. See *infra* notes 344-70 and accompanying text.

More specifically, but also less directly, the affirmative action concept contains elements that actually conflict with remedying the educational disadvantages of the underclass. As described above, affirmative action programs sometimes attempt to redress the results of the historical disadvantages of a group by "levelling" strategies such as race norming, or by shifting the burden to employers to establish the "business necessity" of generalized tests.²³¹ Taken on their own terms, such strategies may be intelligible—it may make some sense, for example, to attempt to mitigate the difficult burden of establishing discriminatory intent and to put the burden of production concerning the relationship between test and job performance on the party with the best access to the relevant information.²³² The problem, however, is that such strategies implicitly discount the importance of basic educational skills and individual academic achievement by labelling deficiencies in those areas as "artificial barriers." By concentrating on adjusting standards so that disadvantaged groups can meet them in roughly the same proportions as more advantaged groups, affirmative action diminishes the importance of devoting resources to help groups become less disadvantaged in the first place and thus more competitive relative to others (and, concomitantly, perhaps better able to contribute more fully to society as a whole).²³³ It may be difficult to obtain the resources needed to achieve real equality of opportunity—by directly remedying the educational and other disadvantages of excluded groups—when one must spend the energy required to sustain the case for what appear to be double standards.²³⁴

231. See *supra* notes 129-55 and accompanying text.

232. This "smoke out" function is familiar to other legal contexts, such as the tort doctrine of *res ipsa loquitur*. See, e.g. *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944). When the shoe was on the other foot, Justice O'Connor recognized that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

233. As discussed above, much of the argument for affirmative action rests on a challenge to the American meritocratic stratification system. See *supra* notes 156-85 and accompanying text. Affirmative action seeks to go beyond requiring the procedural fairness of holding everyone to the same conventional standards and instead demands a remedial, group-based adjustment of the standards themselves. Whether this approach has actually reduced competence in the workplace, as some of its critics charge, is a difficult empirical question that I leave for others.

234. It appears that employers, their receptivity to goals and timetables notwithstanding, continue to need their employees to possess basic skills; and literacy has been shown to be related to job performance in a variety of contexts. See, e.g., COMMITTEE ON SCIENCE, ENGINEERING, AND PUBLIC POLICY OF THE NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING, & INSTITUTE OF MEDICINE, *HIGH SCHOOLS AND THE CHANGING WORKPLACE: THE EMPLOYERS' VIEW*, REPORT OF THE PANEL ON SECONDARY SCHOOL EDUCATION FOR THE CHANGING WORKPLACE (1984) (young employees show the greatest deficiencies in the basic intellectual skills most demanded by employers: "the ability to draw

A related problem stems from the theories advanced under the rubric of “critical race theory” (sometimes “CRT”). This theory involves taking a scholar’s race into account in evaluating his or her work. Like other forms of affirmative action, it proceeds from a claim of discrimination; and it adds an assertion that members of minority groups have a unique contribution to make when they speak in “voices of color.”²³⁵ One goal of this theory is to deconstruct the validity of objectivist, liberal, “hierarchical majoritarian” neutral standards for assessing the quality of academic work, and to contend that such standards are hopelessly indeterminate instruments of oppression by the hegemonic white male professorate.²³⁶ Another goal is to promote the “[m]onistic dialect of the voice of color,” which supposedly “focus[es] on the community’s pressing concerns and issues, advocating the expansion of opportunities for those socioeconomically disadvantaged, racially disadvantaged, or both.”²³⁷ Those pressing concerns presumably will be taken into account by critical race theory’s asserted ability to “look at the bottom.”²³⁸ And some critical race theorists have argued that an interpretation of the Equal Protection Clause that applies the antidiscrimination principle to affirmative action is an example of how “potentially disruptive and transformative forces like the Reconstruction Amendments in general and the fourteenth amendment in particular, are roped off, domesticated, and neutralized by powers seeking to preserve the status quo.”²³⁹

correct inferences from written, pictorial or mathematical information; to understand oral instructions; to develop alternatives and reach conclusions; to express their ideas intelligibly and effectively”); Larry Mikulecky & Dorothy Winchester, *Job Literacy and Job Performance Among Nurses at Varying Employment Levels*, 34 ADULT EDUC. Q. 1 (1983) (effective use of job literacy skills related to job performance); Larry Mikulecky & Jeanne Ehlinger, *The Influence of Metacognitive Aspects of Literacy on Job Performance of Electronics Technicians*, 18 J. READING BEHAV. 41 (1986) (metacognitive aspects of literacy significantly and consistently correlates with job performance).

235. See, e.g., Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

236. For citations to the literature and a reprise of this argument, along with all its code words and slogans, see *id.* Although Johnson seeks to limit his claim to the judgmental indeterminacy of objective criteria for scholarship to exclude works that are “conventional” and “acolored,” the viability of his distinction is open to challenge from his own premises and apparently is not shared by other advocates of a “voice of color.” See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

237. Johnson, *supra* note 235, at 2011.

238. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

239. Anthony Cook, *Critical Race Law and Affirmative Action: The Legacy of Dr. Martin Luther King, Jr.*, 8 HARV. BLACKLETTER J. 61, 74-75 (1991). Cook characterizes suggestions that Dr. King embraced the antidiscrimination principle as a “murderous. . . reconfiguring and packaging of an image given meaning by those who wish to neutralize the revolutionary potential of prophetic struggle.” *Id.* Critical race theory thus approves the result in *Metro Broadcasting*, but argues that the Court should abandon its “formalistic and mechanical” approach,

A kind of analogue to critical race theory finds expression in the debate over public school curricula that is referred to as "multiculturalism," and in some more specific applications as "Afrocentrism." Proponents of these measures allege that existing public school curricula constitute a propagandistic form of intellectual discrimination that imposes a "Eurocentric" perspective, dominated by Western European cultural values and traditions to the exclusion of perspectives from African, Asian, Hispanic, and American Indian cultures.²⁴⁰ Some advocates argue that such a shift in perspective is necessary to preserve the self-image of minority children and to enable those children to identify with the subject matter, rather than simply to imbibe the accomplishments of the dominant white majority.²⁴¹

Critical race theory and multiculturalism, to be sure, offer important contributions. Among the more obvious benefits are their potential to broaden and to enrich everyone's cultural perspective and to stimulate critical examination of curricula and evaluative standards. Not only do critical race theory and multiculturalism offer an avenue for inclusion of historically excluded groups from academic and pedagogic legitimacy, but they also provide an opportunity for whites to learn how to live in an increasingly pluralistic society.²⁴² And the narrative style advocated by some critical race theorists²⁴³ has long been a vital medium for communicating the perspective of the disadvantaged.²⁴⁴

There are, however, several problems. First, critical race theory's deconstructive mission undermines the very concept of academic

and instead "talk in terms of historically deconstructed identities, the need for empowerment of historically disempowered groups, and the efficacy and mutual benefits of Black self-determination." *Id.* at 83.

240. See, e.g., Elizabeth Steinberger, *America's Identity in Transition: Multicultural*, SCH. ADMIN., Apr. 1991, at 8. For a discussion of the distinction between multiculturalism and Afrocentrism, see Robert K. Landers, *Conflict Over Multicultural Education*, EDITORIAL RES. REPS., Nov. 30, 1990, at 682. For a brief discussion of Afrocentric studies, see Bayo Oyebade, *African Studies and the Afrocentric Paradigm: A Critique*, 21 J. BLACK STUDIES 233 (1990).

241. See Landers, *supra* note 240, at 684, 691; Steinberger, *supra* note 240, at 9.

242. A recent survey reveals that while most racial and ethnic groups continue to harbor some prejudice against all other groups, education is a powerful force in fostering positive or at least neutral inter-group attitudes. See Liz S. Armstrong, *Racial, Ethnic Prejudice Still Prevalent, Survey Finds*, EDUC. WEEK, Jan. 16, 1991, at 7 (citing National Opinion Research Survey).

243. See, e.g., Johnson, *supra* note 235, at 2015-20.

244. For example, slave narratives played a key role in the abolition movement. See *infra* notes 329-43 and accompanying text. The narrative style embraced by some critical race theorists, however, is not their exclusive preserve; and it has been adopted for much the same reasons by their critics. See, e.g., STEPHEN L. CARTER, *supra* note 214; SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990).

achievement and excellence.²⁴⁵ If standards based on what one does and says are hopelessly indeterminate, and if one's work can be evaluated only in terms that include reference to one's racial or gender characteristics, then the case for demanding the resources necessary to bring minority achievement up to that of other groups has been diluted. If it is identity and not performance that counts, it is difficult to see why society should be concerned at all about "sub-standard" performance—a concept that critical race theory implies is epistemologically suspect.²⁴⁶ Multiculturalism presents an analogous risk if taken to an obsessive extreme. In an educational system whose *average* students cannot locate Sudan or Guatemala on a map, are barely able to read, and lag behind the industrialized world in math and science skills,²⁴⁷ one must question whether the educational needs of its most disadvantaged students are best served by making a pedagogical priority out of achieving the appropriate quota of ideologically correct geocultural representation in the curriculum. In view of the acutely limited resources at the disposal of poor public school districts, it would seem advisable to consider the risk that commitment to teaching basic reading, writing, math, and science skills might suffer from excessive focus on cultural diversity themes.²⁴⁸

245. See, e.g., Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991) (response to Alex Johnson); DINESH D'SOUZA, *THE ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991).

246. See Carter, *supra* note 245 at 2067:

Nowadays, however, a great deal of academic dialogue turns out to be not about the ideas that people express but about the people who express the ideas. It isn't what one says that matters, it is who is doing the saying. . . . The more assumptions one can attach to the author before the process of reading begins, the greater the number of biases and preconceptions that one will bring to the reading itself. And the greater the number of biases and preconceptions the reader brings along, the lower the probability that true communication might occur.

247. For example, on a 1981-82 international mathematics test of eighth grade students the United States' performance (mean score 45.3% correct) was below the average of 18 selected countries (47.4%) and lagged far behind, for example, Belgium (53.2% for Flemish, 51.4% for French), Canada (51.6% for British Columbia), France (52.5%), Hungary (56%), Japan (whose *seventh* grade students scored 62.1%), and the Netherlands (57.1%). NATIONAL CENTER FOR EDUCATION STATISTICS, *DIGEST OF EDUCATION STATISTICS 1990*, at 383 (Thomas D. Snyder, Project Director, 1991). The United States scored worse than all reported countries on a 1981-82 international mathematics test administered to twelfth graders. *Id.* (selected countries were: Belgium, Canada, England and Wales, Finland, Hungary, Israel, Japan, New Zealand, Scotland, Sweden, Thailand, and United States). Further, Americans aged 18 to 24 years again found themselves at the bottom of the class on a test of areas correctly identified in a test of geography knowledge. *Id.* at 385 (test results reported for Canada, France, West Germany, Italy, Japan, Mexico, Sweden, United Kingdom, and United States).

248. For a description of multiculturalism's potential for creating conflict between pedagogical and political goals, see Jane Gross, *A City's Determination to Rewrite History Puts Its Classrooms in Chaos*, N.Y. TIMES, Sept. 18, 1991, at A17. The following passage from

Second, both critical race theory and multiculturalism can be pursued in a way that is hostile to the value of open intellectual debate and thus ironically can threaten the value of diversity that they invoke.²⁴⁹

Jonathan Kozol's *Savage Inequalities*, quoted in part above, describes (in narrative style) his visit to Clark Junior High School in East St. Louis:

Christopher approaches me at the end of class. The room is too hot. His skin looks warm and his black hair is damp. "Write this down. You asked a question about Martin Luther King. I'm going to say something. All that stuff about 'the dream' means nothing to the kids I know in East St. Louis. So far as they're concerned, he died in vain. He was famous and he lived and gave his speeches and he died and now he's gone. But we're still here. Don't tell students in this school about 'the dream.' Go and look into a toilet here if you would like to know what life is like for students in this city."

Before I leave, I do as Christopher asked and enter a boy's bathroom. Four of the six toilets do not work. The toilet stalls, which are eaten away by red and brown corrosion, have no doors. The toilets have no seats. One has a rotted wooden stump. There are no paper towels and no soap. Near the door is a loop of wire with an empty toilet-paper roll.

"This," says Sister Julia, "is the best school that we have in East St. Louis."

KOZOL, *supra* note 3, at 36.

For an argument that "multiculturalism's critics are selling students short by propagating five key myths"—that multiculturalism and affirmative action cause divisiveness, dilute standards, are unnecessary, subvert meritocracy, and dominate academic thought—see Troy Duster, *They're Taking Over! And Other Myths About Race on Campus*, MOTHER JONES, Sept.-Oct. 1991, at 30.

249. In the context of critical race theory, this problem is known as "essentialism," in which one faction attempts to achieve a kind of rhetorical hegemony by purporting to define what counts as a true "voice of color." While Alex Johnson, for example, denies making such moves and instead professes a "pluralistic interpretation of Critical Race Theory," his article nevertheless begins with an attempt to determine whether Randall Kennedy and Stephen Carter are persons of color legitimately speaking in voices of color. For further indications that "voices of color" are limited to only the ones critical race theorists want to hear, consider the brickbats that greeted Shelby Steele's collection of essays on his own black experience and his perception of race in America. Steele had the temerity to suggest that some black Americans have a demoralizing "hidden investment in victimization and poverty" that inhibits individuality and achievement. STEELE, *supra* note 244, at 15. In view of her own impressionistic, autobiographical-psychological narrative approach in *The Alchemy of Race and Rights*, for example, Patricia Williams' criticisms of Steele's use of narrative suggest that the only stories ("limited personal circumstances") that count are the ones that have the "correct" moral:

While there is undoubtedly some truth to Mr. Steele's characterizations as individual psychological models, they do not adequately address the complex reinforcements of group behavior. More dangerous still, they tend to minimize the force of deeply embedded social pathologies. Yet a distinguishing feature of Mr. Steele's message is precisely his use of psychology as politics. As a device, this risks substituting limited personal circumstances for broader historical analyses. In Mr. Steele's case, it has produced a narrative perspective that is relentlessly isolationist, even as it claims to be all-knowing.

Patricia Williams, *A Kind of Race Fatigue*, N.Y. TIMES, Sept. 16, 1990, § 7, at 12. Adolph Reed described Steele's book as "abominably thin" and "simply[sic]-minded," and he accuses Steele of pandering to "the social prejudices of the wealthy and powerful, all the while complaining of censure and persecution and receiving praise for courageously taking an unpopular stand." Adolph Reed, *Book Review*, NATION, Mar. 4, 1991, at 274. For criticism of Williams's own narrative as "clumsy and ideologically predetermined" and failing "miserably as

This conflict is part of the larger debate over "political correctness."²⁵⁰ As indicated above, Wilson argues that liberal refusal to engage in an open and critical dialogue about the condition of the underclass contributed to an intellectual vacuum that conservatives have been able to exploit to advance their agenda of not-so-benign neglect. A similar taboo has been noted surrounding open inquiry into the impacts of affirmative action.²⁵¹

Beyond those effects, collateral damage may also be done to the value of education itself. Long a familiar tool of both the extreme right and left, suppression of debate and inquiry stabs at the heart of what intellectual life is about. As described above, obsession with political correctness can compromise the instrumental value of education by mandating a cramped version of diversity and by crowding out attention to basic skills. Insistence on political correctness also erodes the intrinsic value of education—the self-affirming and communication-building experience of open, critical examination and discourse. The importance of developing, examining, and sharing ideas becomes subordinated to a coerced, slanted vision of political and cultural morality. And the damage to those values may be especially serious when inflicted by members of the institutions that embody society's highest intellectual aspirations. It is hard to see how education as a social value can be expected to thrive in such a hostile environment. Society's commitment to education in general is tenuous enough as it is, and commitment to education of the underclass in particular is in extremis; it is doubtful whether either commitment will be hardy enough to survive such an assault on its roots.

rigorous analysis," see Jonathan Rieder, *Tawana and the Professor*, NEW REPUBLIC, Oct. 21, 1991, at 39-41.

250. See, e.g., ArLynn L. Presser, *The Politically Correct Law School: Where It's Right to be Left*, A.B.A. J., Sept. 1991, at 52; Jane E. Bahls, *Dissenting Opinions: What's Happening to Dialogue in the Law Schools?*, STUDENT LAW., Sept. 1991, at 12. For an example of a college professor who alleged that expression of his controversial views on affirmative action, race relations, and the relative intelligence of racial groups was unconstitutionally suppressed by a pattern of harassment and retaliation by the college, see *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991). For analysis of the problem of so-called "hate speech" on university campuses, and argument that the nature of the university entity as speech-regulator is a basis for relaxed first amendment concern, see J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991). For an argument that the "political correctness" debate is a bogus neoconservative creation, see David Beers, *PC? B.S.; Behind the Hysteria: How the Right Invented Victims of PC Police*, MOTHER JONES, Sept-Oct. 1991, at 34. For an example of a right-wing version of political correctness, see the discussion of *Rust v. Sullivan* and the "gag rule" imposed on federally funded family planning clinics, *supra* notes 23-32 and accompanying text.

251. See Judges, *Light Beams*, *supra* note 9, at 1059.

Finally, critical race theory and multiculturalism are troublesome, again in their extreme forms, because they hold out a false promise of justice. Like the more overt forms of affirmative action that it endorses, critical race theory offers little to the most disadvantaged classes, its claims to communitarian values notwithstanding. If it really “looked at the bottom,” critical race theory would see Third World conditions right in our own cities that have gotten worse despite twenty years of affirmative action and more than a decade of an abstract, sometimes almost unintelligible critical legal studies movement. Real justice will elude us until we aggressively remedy those conditions, regardless of how many tenure decisions take race and racial scholarship into account. And sending inner-city children to school in crime-, poverty-, disease-, and toxin-ridden “death zones”²⁵² will remain a monstrous injustice no matter how many African-American heroes they hear about during Black History Month.²⁵³

III. Remediating Myopic Visions of Equality: The Caste-Abolition Principle

Only a society with an eroded ethical base would allow more than a fifth of its children to live in abject poverty in the midst of the greatest affluence the world has ever known and to have the audacity to think it does not and will not affect us all.²⁵⁴

This Article commenced with a description of the ways in which constitutional paradigms—both interpretive and remedial—have not only largely failed to mitigate but have actually contributed to the social, economic, and consequently political exclusion of an identifiable, severely disadvantaged class. This Part argues that the Civil War Amendments to the Constitution require positive measures to redress those conditions—in particular through the establishment of a claim for equality of educational opportunity under the caste-abolition principle.²⁵⁵ Before moving to consideration of that suggestion, a brief description of the in-

252. KOZOL, *supra* note 3, at 5.

253. *See supra* note 248 (Christopher quote).

254. REPORT OF THE CITIZENS' COMM'N ON CIVIL RIGHTS, ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S 215 (Reginald C. Govan & William I. Taylor eds., 1989) (quoting CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET FY 1989, AT xxiv (1989)).

255. As an initial matter, one might question whether, given the emergence of a solid extreme right-wing majority on the Supreme Court, it is worth the effort to develop critical constitutional arguments on behalf of the poor. I believe it is. First, that development is itself evidence that times change and can change again. Second, constitutional law debates are, among other things, public debates about the heart and soul of this country and are addressed to a wider audience than the federal courts. We will have reached an ethically and intellectu-

interpretive and normative criteria such a claim ought to meet will set the stage. The debate over positive rights to minimal subsistence provides that frame of reference.

A. Positive Rights to Minimal Subsistence

An argument that the Constitution may impose positive obligations on government to address the problems of severe poverty²⁵⁶ must take seriously two general kinds of considerations.²⁵⁷ Originalism aside, the first arises from constitutional interpretive theory and largely rests on prudential separation-of-powers concerns.²⁵⁸ According to Frank

ally impoverished place indeed when critical constitutional discourse ceases to be worth the candle.

One might further question whether the courts are institutionally capable of creating the kind of social transformation needed to remedy the caste-creating tendencies of the underclass dynamic. The judiciary's power to effect deep social change has been questioned. *E.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). There is considerable force to Rosenberg's challenge. Indeed, much of this Article is devoted to describing how aspects of the Supreme Court's constitutional work have exacerbated the underclass's plight and hence the caste problem. Nevertheless, although the courts plainly cannot do the job alone, it surely would be a mistake to ignore their duty to deploy whatever persuasive and coercive resources they command to enforce the state's constitutional obligations. Education-finance litigation at the state level and *Missouri v. Jenkins* indicate that the courts, when mobilized, can have a substantial and tangible impact on the allocation of social capital for education. See *infra* notes 479-85 and accompanying text. Furthermore, courts have been described as serving a kind of oracular function, contributing to our moral evolution as a people. Michael Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981). Therefore, just as critical constitutional scholars serve a valuable function by reminding the courts of their responsibilities, the courts play a vital political and social role by declaring constitutional imperatives.

256. This Article is hardly the first to raise such an argument. See, e.g., Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter *Welfare Rights*]; Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Melvyn R. Durchslag, *Constraints on Equal Access to Fundamental Liberties: Another Look at Professor Michelman's Theory of Minimum Protection*, 19 GA. L. REV. 1041 (1985); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

257. Another set of objections asserts that welfare rights are bad policy because welfare allegedly corrupts those whom it feeds. *E.g.*, MURRAY, *supra* note 222. The empirical premises of this argument, which do not purport to involve constitutional theory, have been refuted. See *infra* note 357-59 and accompanying text.

258. This Article assumes that *Brown I* correctly rejected the originalist interpretation of the Equal Protection Clause. Karst argues that

[b]y providing firm constitutional protection for the substantive rights of the 1866 act, the framers expected that all citizens, including blacks, who were the most obvious stigmatized caste, would share equally the civil rights that seemed most significant at the time. But they deliberately cast the amendment in general terms, declining to use the language of specific rights and particular groups that they had used in the 1866 act.

Michelman's convenient summary of objections to welfare rights claims, those issues include the idea

that the concept of welfare rights is fanciful, uncorroborated by legal texts or decisions; that the notion is ill-conceived because there is no justiciable standard for determining when the supposed rights are satisfied; that the courts, in the absence of a justiciable standard, cannot presume to define or enforce these rights without usurping legislative and executive roles; that the judicial vindication of these rights would be illegitimate and undemocratic because nothing in our traditional law or written Constitution signifies any general acceptance of the obligations these rights entail. . . .²⁵⁹

The second set of considerations rests on more explicitly normative premises concerning claims of distributive justice, which, according to Thomas Grey, "can usefully be classified as either egalitarian or libertarian."²⁶⁰ John Rawls²⁶¹ and Robert Nozick²⁶² represent the two extremes in that normative debate. According to Grey: "Egalitarians hold that economic assets should be distributed equally—allowing various exceptions. Libertarians hold that economic assets should be left in whatever hands they reach through free and fair individual transactions—again, allowing various exceptions."²⁶³

Michelman, Peter Edelman, and Grey have presented responses to the interpretive and libertarian objections that are relevant to the caste-abolition principle. Michelman bases his argument²⁶⁴ on John Hart Ely's interpretivist conception of the Constitution, especially the Equal Protec-

KARST, *supra* note 10, at 54. He concludes that "[w]hat has changed in the century since the adoption of the Fourteenth Amendment is not the principle of equal citizenship, but the idea of what it means to be a fully participating member of our society." *Id.* at 56.

259. Michelman, *Welfare Rights*, *supra* note 256, at 659-60 (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977)); see also Henry P. Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

260. Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976).

261. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

262. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

263. Grey, *supra* note 260, at 877. Grey is careful to note that Karl Marx's views "do not fit well within this framework precisely because he was not primarily concerned with questions of distribution." *Id.* at 877 n.1.

264. Michelman argues first that at least on several occasions, for example in the right to interstate migration cases, the Supreme Court's opinions have appeared to reflect some recognition of a constitutional claim to minimal subsistence. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); Michelman, *Welfare Rights*, *supra* note 256, at 661-63. But Michelman concedes, as he must, that many contrary cases can be cited and that the case law only weakly supports an assertion of a welfare-rights claim—although it does respond to the objection of "fancifulness." *Id.* at 664.

tion Clause, as embodying a “representation-reinforcing” principle.²⁶⁵ This approach responds to the “lawlessness” concerns. Michelman characterizes the representation-reinforcing principle as describing an ellipse embracing two cores related to protecting access to political participation and prohibiting stigmatizing discrimination.²⁶⁶ Extreme poverty and deprivation of basic education inflict both harms and thus violate Ely’s principle, Michelman argues, because they disable any real participation in politics and plainly do ascribe social and political stigma.²⁶⁷ Edelman adds that recognition of a welfare rights claim, although presenting remedial complexities such as eligibility determinations, would not so exceed courts’ institutional competence as to threaten the idea of law.²⁶⁸

Michelman and Edelman also respond to the special objections raised against recognition of positive rights—the problems of voracity and nonreciprocity.²⁶⁹ Michelman responds that the problem is not inherent in positive rights themselves; for we of course recognize positive rights all the time, “when fashioned in contracts, legislation, or conditions.”²⁷⁰ Thus, if positive rights are not unbearably troubling when they come from institutional deliberation, then there seems no greater reason to fear boundlessness and nonreciprocity when such rights are “consid-

265. Michelman, *supra* note 256, at 667-70; see ELY, *supra* note 22. (At the time Michelman wrote, Ely had presented his ideas in a series of articles that formed the basis for his subsequent book.) Peter Edelman adds that *denial* of basic subsistence “destroys the idea of law, since it perpetuates shameful and shocking suffering in the richest nation on earth, suffering that could be alleviated by a relatively modest expenditure.” Peter Edelman, *Mandated Minimum Income, Judge Posner, and the Destruction of the Rule of Law*, paper delivered at “Conference on Compelling Government Interests,” Albany Law School (Sept. 26-28, 1991).

266. For an overview of the stigmatic- and processual-harm aspects of the antidiscrimination principles, *supra* notes 162-66 and accompanying text.

267. Michelman, *Welfare Rights*, *supra* note 256, at 677-79. Edelman responds to the objection that the poor are simply political “losers” in a constitutionally protected contest by arguing that, “[a]t least since footnote 4 of *Carolene Products*, especially as elaborated by the representation-reinforcement theories of John Hart Ely and others, the nature of the political weakness of a legislative loser is relevant to the decision whether it can claim constitutional protection and how much.” Edelman, *supra* note 265, at 19. The poor, Edelman goes on to argue, have largely been legislative losers and have “always been stereotyped and classified on the basis of popular attitudes that had little to do with the truth.” *Id.* at 20.

268. Edelman, *supra* note 265, at 30-33.

269. Michelman describes one aspect of those problems thus:

Positive rights, including welfare rights, pose problems largely because the reciprocity and boundedness of duties seem gravely threatened by the idea of being duty-bound to contribute actively to the satisfaction of other people’s interests or needs. Needs are neither equal, nor reciprocal, nor quite finite. They are to some extent unilaterally controllable, inasmuch as one’s needs may be traceable to one’s prior choices, but the resource requirements of satisfying them may be virtually limitless.

Michelman, *Welfare Rights*, *supra* note 256, at 681.

270. *Id.*

ered as a priori claims that *condition* the workings of institutions.”²⁷¹ Edelman suggests noncontroversial examples of such obligations, to establish that the concept of positive constitutional obligations is not inherently foreign to the Constitution, and concludes that governmental obligations give rise to correlative rights: “If there is a fundamental right of life, liberty, and property to receive enough income to subsist in America in 1991, it is not a shocking idea that this right takes a positive form.”²⁷²

A corollary of the positive rights objection is insistence on a state action requirement. Edelman first notes the incoherence of the Court’s state action doctrine, then observes that legislative silence as well as positive laws reflect legislative outcomes, and finally counters that

[b]oth the distinction between state “action” and “inaction” and the distinction between “positive” and “negative” rights are artificial and misleading. The real question is not whether there is a legislative outcome, but whether the minority coming to court is identifying a public value which is not outweighed by a public value asserted by the majority. . . . The constitutional work—that of discovering and explicating a public value espoused by a minority and matching it against the public value identified by the majority—is the same. The same adverse impact on the minority—in this case on the poor—is equally measurable and analytically the same.²⁷³

As mentioned above, welfare rights claims also raise normative libertarian concerns. Grey attempts to reconcile a redistributive right to a minimal subsistence income with Nozick’s libertarianism.²⁷⁴ The fulcrum for Grey is “a moral claim to the bare biological necessities of life, a claim that would arise even under the pure individualism of a Lockean state of nature,” expressed in the familiar Lockean proviso that “the

271. *Id.*

272. For example, the existence of specie being essential to commerce, Edelman suggests that Congress’s power to coin money “may well transform into an obligation which even an electoral majority could not negate.” Edelman, *supra* note 265, at 26. The government may also have an obligation to defend the nation from foreign invasion. Indeed, the Supreme Court recognized such an obligation in dicta in *The Prize Cases*, in which the Court stated, for example, that “[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.” 67 U.S. (2 Black) 635, 668 (1863). The limits of that example, however, are set by the Court’s conclusion therein that determination of the necessity for application of military force (at least to suppress rebellion) rested exclusively with the President and in effect constituted a political question. *Id.*

273. Edelman, *supra* note 265, at 29-30.

274. Grey first notes that Rawls’ liberty principle is lexically superior to his equality principle, so that distributive equality claims cannot trump valid liberty claims. Grey concedes that Nozick’s property rights claim must be taken seriously and is not adequately accounted for in Rawls’ theory, and admits that corrective justice claims are inadequate to justify substantial egalitarian redistribution. Grey, *supra* note 260, at 880-88.

right of appropriation of resources from nature existed only so long as there was 'enough and as good left in common for others.'²⁷⁵ That proviso is consistent with the concession by some libertarians that, for example, one may not appropriate the only water hole in a desert to the life-threatening exclusion or the extortion of others.²⁷⁶ Because most libertarians would accept the Hobbesian formation of the minimal state to protect their property, Grey concludes that "[t]he existence of even this minimal state—the sort accepted by many libertarians who fall short of the full measure of anarchist purity—would now make it quite possible to enforce the right of otherwise helpless persons to live."²⁷⁷ For Grey, American taxpayers today thus are the appropriators of the desert's only water hole; and the extremely indigent are the thirsty onlookers whose claim to minimal subsistence is made tolerable under libertarian theory by the existence of the facilitative minimal state.

In short, a claim for minimal subsistence income fits within the bounds of a coherent interpretive theory that identifies a constitutional principle of representation reinforcement. The baseline assumption that the Constitution does not create positive rights, and its corollary state action requirement, have been challenged. A welfare-rights claim would present complex questions, as do many other less controversial constitutional claims, but would not exceed the institutional competence of the courts. And a claim to minimal subsistence is consistent with a constraint on liberty that even many libertarians would concede. These arguments inform consideration of a constitutional claim to equality of educational opportunity for the underclass. That claim derives from an interpretation of the Civil War Amendments as embodying a "caste-abolition" principle.

275. *Id.* at 888; see also NOZICK, *supra* note 262, at 175 (quoting the Lockean proviso).

276. Even Nozick accepts this constraint; but he seeks to delimit the Lockean proviso to protect the property claim of the appropriator who invests special precautions to prevent that water hole from drying up and who leaves others in no worse position than nature would have done. Grey asserts that "there is no significant justification for this result under any conception of justice that deserves to be recognized as governing human conduct." Grey, *supra* note 260, at 889.

277. The existing taxing mechanism could spread the burden of support over the productive taxpayers. Each of them would then be in the situation of the water-owner on the desert island: at very little cost, a sharing of his property could preserve human life. . . . If through [some] catastrophe, there came to be too many helpless persons relative to the number of productive taxpayers, the cost to the rest would no longer be slight. In that case, the *right* to subsistence would no longer exist; the helpless would have to fall back on appeals to compassion and generosity.

Id. at 890.

B. Constitutional Basis for a Right to Equality of Educational Opportunity for the Underclass: The Caste-Abolition Principle

The foregoing overview suggests that a claim to some kind of positive constitutional obligation on government to provide minimally adequate social programs must meet several requirements to be taken seriously by rights-based legal institutions. First, it must be founded on a principle that satisfies the interpretivist demand of a basis "in legally admissible sources construed by legally acceptable methods, as distinguished from, say, the sources and methods of moral philosophy or from mere judicial preference."²⁷⁸ Second, it must not threaten the idea of law by overwhelming the institutional competence of the courts. And third, it ought to be consistent with those values that are constituent elements of our national normative culture.²⁷⁹ This section argues that the caste-abolition principle satisfies these criteria and provides a claim to equality of educational opportunity for the underclass.

1. *The Caste-Abolition Principle*

Webster's dictionary defines "caste" as "a system of social stratification more rigid than a class and characterized by hereditary status, endogamy, and social barriers rigidly sanctioned by custom, law, or religion."²⁸⁰ The term thus describes an extreme, institutionalized form of social immobility. Derived from the historical context of the Civil War Amendments, as discussed below, the caste-abolition principle is violated whenever social conditions impinging on a segment of the population (not necessarily defined exclusively by race) threaten to recreate the

278. Michelman, *Welfare Rights*, *supra* note 256, at 664-65.

279. Of course, one might challenge the premises of a rights-based approach. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). This Article seeks instead to supplement, not supplant, rights-based constitutionalism with a more complete account of governmental obligation to remedy at least the most severe allocational inequalities while preserving a more morally responsible conception of individual liberty. An agenda that requires wholesale abandonment of individually enforceable rights calls to mind a line from one of the first soul ballads to make the national charts: "You don't miss your water/ till the well runs dry." WILLIAM BELL, *You Don't Miss Your Water* (Stax/Volt Records 1961).

280. WEBSTER'S THIRD NEW INT'L DICTIONARY 348 (Philip B. Gove ed., 1969). Social stratification at all levels may be sufficiently impermeable in other cultures to require clarification of the term "caste" by a relativistic adjective. I use the term unqualifiedly in this Article, however, to emphasize that the social and economic barriers between America's underclass "caste" and the upper classes are qualitatively more upwardly impenetrable than are the distinctions among those upper classes themselves: While perhaps no one stands on a solid floor, the underclass huddles under an impervious ceiling. In other words, social mobility (either upwards or downwards) may continue to be a possibility for upper classes; but the underclass here has been locked into its caste status.

kind of severe and chronic inequality, dehumanization, and powerlessness that characterized the caste system the Civil War was fought to abolish. The principle thus prohibits, and affirmatively requires the state to remedy, actions or conditions that recreate a caste society in which one group is systematically and grossly disadvantaged and excluded from participation in the American promises of class mobility and meritocratic stratification. As discussed below, denial of minimal equality of educational opportunity is the quintessential caste-creating and caste-perpetuating condition.

a. The Principle's Roots

The idea that the Civil War Amendments, particularly the Fourteenth, established the constitutional illegitimacy of caste is well recognized.²⁸¹ The Supreme Court, and individual Justices from Marshall and Douglas to Scalia and Rehnquist, have acknowledged this interpretation on numerous occasions.²⁸² The caste-abolition principle nevertheless has

281. During Senate debate preceding adoption of the Fourteenth Amendment, for example, Senator Howard stated that "[t]his [Amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). And Charles Sumner has been quoted as stating that the Fourteenth Amendment abolished "oligarchy, aristocracy, caste, or monopoly with peculiar privileges and powers." See FAIRMAN, *supra* note 226, at 1348 (quoting unsuccessful brief of J.Q.A. Fellows in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872)).

282. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (a quota is constitutionally objectionable because it is a "creator of caste", (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 113 (1975)); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 468 (1988) (Marshall, J., dissenting) ("The intent of the Fourteenth Amendment was to abolish caste legislation."); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 471 (1985) (Marshall, J., concurring in part in the judgment and dissenting in part) ("the Fourteenth Amendment does prohibit other results under virtually all circumstances, such as castes created by law along racial or ethnic lines"); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting) (a racial quota violates the equality norms expressed in Title VII because it is a creator of "castes, a two-edged sword that must demean one in order to prefer another"); *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting) (University of Washington's "segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom," because black graduates' accomplishment will be tainted); *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (opinion of Douglas, J.) ("In a Nation committed to equal protection of the laws there is no permissible 'caste' system of law enforcement," yet death penalty is selectively applied, "feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position"; noting that Brahmans were exempt from capital punishment under ancient Hindu law); *Boddie v. Connecticut*, 401 U.S. 371, 385 (1971) (Douglas, J. dissenting) (Equal Protection Clause's reach is not precise, but "rather definite guidelines have been developed: race is one . . . class or caste yet another"); *Bell v. Maryland*, 378 U.S. 226, 287 (1964)

remained largely a rhetorical device, and has not become a potent constitutional principle, because of the constraining force of the Court's negative rights paradigm—which implicitly assumes that the Constitution is an inert, passive instrument of the socioeconomic status quo. That assumption is incorrect. The Civil War Amendments themselves definitely sought to produce dramatic and positive social change. They were born of a violent revolution in America's social, political, and economic life that in some respects was more profound (and infinitely more bloody) than the Revolution of 1776. Surely the transformative objectives of the bloodiest war in the history of the Western Hemisphere carry immense weight in our interpretation of the amendments resulting from that war.

The content of the caste-abolition principle, its historical roots, and the positive rights issue are interrelated. A positive constitutional right demands that today's society honor the constitutional commitments of prior generations. The unique provenance of the Civil War Amendments establishes an especially appropriate basis for a positive rights claim under the caste-abolition principle. The Union's extraordinary war effort rested in part on the assumption that constitutional imperatives justified the government in demanding of its citizens that revolution's enormous sacrifices.²⁸³ In a flesh-and-blood sense, the true Framers of the Civil War Amendments were the men and women who made those sacrifices. Their moral and political claim on the faithfulness of subsequent generations to the constitutional articulation of their revolutionary objectives is certainly no weaker than that of the participants in the Revolution of 1776. Thus, positive rights claimants today are not the illegitimate usurpers of our national heritage and institutions that their opponents make them out to be, but instead are like private attorneys general, ensuring

(Goldberg, J., concurring) ("The denial of the constitutional right of Negroes to access to places of public accommodation would perpetuate a caste system in the United States"; invoking all three Civil War Amendments); *Reynolds v. Sims*, 377 U.S. 533, 600 (1964) (Harlan, J., dissenting) (quoting Senator Howard's description, quoted *supra* note 281); *Garner v. State*, 368 U.S. 157, 185 (1963) (quoting Justice Harlan's dissent in *Plessy v. Ferguson*, quoted below); *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring) (to allow state to create exception to right of national citizenship to prevent indigents from entering the state "would . . . introduce a caste system of government" by relegating indigents "to an inferior class of citizenship"); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., concurring) ("But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens."); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Civil War Amendments intended to protect former slaves from state laws that are "steps towards reducing them to the condition of a subject race").

283. See generally ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS (1863).

that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.²⁸⁴

The content of the caste-abolition principle derives from the objectives of the revolution of 1860—“the cause for which they gave the last full measure of devotion.” Those objectives were not limited to preservation of the Union.²⁸⁵ Historian Eric Foner observes instead that with President Lincoln’s signing of the Emancipation Proclamation, the Civil War officially and irretrievably turned from a “war of armies into a conflict of societies, ensuring that Union victory would produce a social revolution within the South.”²⁸⁶

For emancipation meant more than the end of a labor system, more even than the uncompensated liquidation of the nation’s largest concentration of private property (“the most stupendous act of sequestration in the history of Anglo-Saxon jurisprudence . . .”). The demise of slavery inevitably threw open the most basic questions of polity, economy, and society. Begun to preserve the Union, the Civil War now portended a far-reaching transformation in Southern life and a redefinition of the place of blacks in American society and of the very meaning of freedom in the American republic.²⁸⁷

The most important transforming objective of the revolution of 1860 was to eradicate an extreme form of a caste system called slavery.²⁸⁸ Of course, the chattel principle of slavery, upheld by the Court in *Dred Scott v. Sandford*,²⁸⁹ was the most obvious and readily objectionable manifestation of that system.²⁹⁰ But the emergence of the Black Codes following ratification of the Thirteenth Amendment demonstrated that the sys-

284. *Id.*

285. The overriding of President Johnson’s veto of the Sherman Bill concerning readmission of the rebellious states constituted a resounding repudiation of Johnson’s veto message that, in Charles Fairman’s words, “the sole objective in the Civil War . . . had been to enforce the Constitution” and that the political procedures specified in the Constitution “supplied all that the country needed.” FAIRMAN, *supra* note 226, at 308.

286. FONER, *supra* note 1, at 7.

287. *Id.* at 2-3.

288. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872).

289. 60 U.S. (19 How.) 393 (1856).

290. In the words of Thomas W.C. Pennington (an escaped slave who received a Doctor of Divinity from the University of Heidelberg while still legally a slave):

[T]he sin of slavery lies in the chattel principle, or relation. . . . The being of slavery, its soul and body, lives and moves in the chattel principle, the property principle, the bill of sale principle; the cart-whip, starvation, and nakedness, are its inevitable consequences to a greater or lesser extent, warring with the dispositions of men.

tem's scope was broader than the legalistic question of title to human beings.²⁹¹ This is the insight that the Supreme Court captured, and ultimately imprisoned, in the phrase "badges and incidents of slavery."²⁹² The incidents of a caste system go beyond the specific legal disabilities the Court has recognized under the Thirteenth Amendment.²⁹³

b. The Principle's Reach

Modern scholars' reexamination of the Civil War Amendments in an effort to restore them to their original revolutionary force provides perspective on the reach of the caste-abolition principle. Akhil Reed Amar, for example, argues forcefully that the Thirteenth Amendment is a powerful redistributive provision, not dependent on a finding of state action, that provides a sound constitutional basis for positive claims like Joshua DeShaney's.²⁹⁴ The system of domination, humiliation, and abuse that marked the institution of slavery finds a modern counterpart in child abuse, Amar contends, so that the Thirteenth Amendment provides a remedy for the "servitude" of abuse inflicted on Joshua by obligating the state to intervene to protect him.²⁹⁵ Amar avoids reliance on the Fourteenth Amendment because of its state action requirement, the overworked and textually problematic nature of the Due Process Clause, the failure of equal protection doctrine to take seriously the concept of "protection," and the potentially voracious demands of a robust "equal-

James W.C. Pennington, *The Fugitive Blacksmith, or Events in the History of James W.C. Pennington*, GREAT SLAVE NARRATIVES 196 (Arna Bontemps ed., 1969) [hereinafter SLAVE NARRATIVES].

291. *The Slaughterhouse Cases*, 83 U.S. at 70-71.

292. See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). For a modern example of the Supreme Court's constricted interpretation of that phrase, see *City of Memphis v. Greene*, 451 U.S. 100 (1981) (finding no badge or incident of slavery in the closing of a city street through a white neighborhood, forcing residents of a nearby black neighborhood to go around the white community).

293. Those disabilities include prohibitions on owning and conveying real estate, bringing and defending civil actions, and testifying as a witness in court. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Solicitor General Phillips, arguing before the Court in *The Civil Rights Cases*, emphasized the role of social structures in perpetuating the caste system:

Granting that by *involuntary servitude*, as prohibited in the Thirteenth Amendment, is intended some *institution*, viz., custom, etc., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations, to create an *institution*.

109 U.S. at 7.

294. Akhil Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. (forthcoming 1992).

295. *Id.*

ity” principle as opposed to one demanding only minimal protection.²⁹⁶

Amar’s is a useful starting point; but I would go further and derive the caste-abolition principle from all three Civil War Amendments, at least so far as that principle supports a claim for equal educational opportunity.²⁹⁷ First, all three amendments must be considered together to appreciate fully the extent of the constitutional commitment to abolition of the caste system, as Amar himself recognizes:

When the Reconstruction Amendments are viewed as a whole, a radically different vision of society emerges. Precisely because the Fifteenth Amendment gave former slaves the right to vote, and the Fourteenth Amendment made them citizens by dint of their birth, we should interpret the Thirteenth Amendment to guarantee each American a certain minimum stake in society.²⁹⁸

Second, all three amendments taken together form a more solid basis for a claim of equality of educational opportunity than any one taken separately. Abolition of slavery; vesting of citizenship; guarantees of due process, privileges or immunities, and equal protection; and extension of the franchise all were necessary to bring former slaves out of their caste status and into the remainder of American society.²⁹⁹ The Framers’ recognition of this relationship is partly evidenced, for example, in the debates over the Fourteenth Amendment that followed President Johnson’s veto of the second Freedman’s Bureau Bill and the Civil Rights Bill of 1866.³⁰⁰ The Thirteenth Amendment certainly directs attention to the

296. *Id.*

297. The Court’s crabbed interpretation of the Fourteenth Amendment apparently has forced scholars like Amar to resourceful quests for fresh, “untainted” constitutional sources. But advocates of recognition of a constitutional right to minimal entitlements already are necessarily challenging prevailing conclusions about what the Constitution demands. Today’s Supreme Court seems no more likely to adopt Amar’s Thirteenth Amendment argument than it is to embrace Michelman’s or Edelman’s arguments under the Equal Protection Clause—or my caste-abolition principle, for that matter. Critical discourse might as well also challenge the Court’s narrow conception of state action and equality that underlie the Court’s impoverished paradigm.

298. Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 40 (1990).

299. In this regard, the caste-abolition principle rests on a more solid textual foundation than the “penumbras” and “emanations” that form the basis for the modern right to privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

300. See, for example, the history compiled by Justice Black in the appendix to his dissent in *Adamson v. California*, 332 U.S. 46, 92 (1947), in which he asserts that the Fourteenth Amendment incorporated the first eight amendments to the Constitution. For detailed consideration of the incorporation problem, see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968).

caste problems of servitude, but it is not the sole constitutional measure for remedying caste conditions.

In particular, the concept of equal protection of the laws is an essential component of the caste-abolition principle, which principle provides a much richer frame of reference than does the Court's suspect class/fundamental rights paradigm and its concomitant means-end analytical structure. The shortcoming of the Court's paradigm is evident, for example, in *Rodriguez*. As described above, the Court in that case was able to acknowledge the necessity of education for full participation in society and exercise of the fundamental rights to speak and to vote, while denying any meaningful constitutional protection to equal educational opportunity itself.³⁰¹ The caste-abolition principle avoids this contradiction by not depending on whether education is deemed a "fundamental right" inferable from the text. Instead, the principle considers the tendency of the challenged action or condition systematically and grossly to disadvantage one group, and thus to create a caste. The principle also avoids the excessive demands of strict egalitarianism because it is activated by inequalities of a severity and kind that tend to create a caste society, rather than all distributive inequalities.³⁰²

Further, the caste-abolition principle does not confine the operation of the Equal Protection Clause to groups conveniently identified by indicia of discreteness, such as race or gender. To be sure, African ethnicity originally defined membership in the Antebellum slave caste,³⁰³ but the Court itself quickly realized³⁰⁴ that the Civil War Amendments embody a broader principle than protection of one race. The caste-abolition principle examines the realities of a group's situation in society, rather than simply the members' most superficial visible characteristics. Thus, consigning the underclass-perpetuating disadvantage of grossly inferior educational opportunity to the poorest school districts would raise serious constitutional concerns under the caste-abolition principle even if the affected group looked like an "amorphous class" in the Court's categorical vision and was racially heterogeneous. The caste-abolition principle would not tolerate race or gender discrimination either, however, be-

301. See *supra* notes 81-86 and accompanying text.

302. It is not immediately apparent why the potential for this kind of over-articulation should be a basis for denying any vitality to an equality principle. The Court is capable of applying other constitutional guarantees of individual right with less force than an absolutist interpretation would require.

303. See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872).

304. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Court has rejected the argument that evenhanded application of invidious discriminatory measures, e.g. punishing blacks and whites alike for interracial marriages, insulates such measures from equal protection challenge. *Loving v. Virginia*, 388 U.S. 1 (1967).

cause history teaches that discrimination along such lines is the caste-creating condition *par excellence*.³⁰⁵

c. The Principle's Interpretive Coherence

The caste-abolition principle's roots and branches are joined by a solid trunk. In general, the caste-abolition principle complements and overlaps the widely accepted representation-reinforcing principle. Deliberate constitutional efforts to empower the freedman were necessary both to abolish the caste system of slavery and to establish representative democracy for a large segment of the people.³⁰⁶ Prohibiting social structures that threaten to return anyone to the powerlessness of a caste society provides protection against a particularly pernicious form of representation-defeating conditions, as Michelman's description of Ely's principle illustrates.³⁰⁷

Next, the caste-abolition principle's imposition of an affirmative constitutional obligation to remedy caste-creating conditions is consistent with a coherent resolution of the positive rights and state action problems. In addition to being internally contradictory, the Court's approach effectively rewrites the text of Section 1 of the Fourteenth Amendment. That text provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of 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 the equal protection of the laws.³⁰⁸

It is the Privileges or Immunities Clause, not the Equal Protection Clause, that expressly refers to "make or enforce any law." The Equal Protection Clause is insulated from the modifying force of those words by two semicolons and the Due Process Clause, which stands as an independent clause. The Equal Protection Clause in terms thus forbids *denial* of equal protection by the state, not the *making or enforcing of laws* that deny equal protection. As Edelman has pointed out,³⁰⁹ the Court in other contexts has recognized,³¹⁰ and experience confirms,³¹¹

305. Judges, *supra* note 9.

306. See *supra* notes 294-305 and accompanying text.

307. See *supra* notes 264-67 and accompanying text.

308. U.S. CONST. amend. XIV, § 1.

309. See *supra* note 273 and accompanying text.

310. On numerous occasions the Court has inferred legislative intent from legislative inaction, thus according legislative silence the force of law. *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

311. See *supra* notes 217-26 and accompanying text (demonstrating impact of conservative agenda's "masterly inactivity").

that profound governmental impacts follow from legislative activity and silence alike.

There is thus both textual and historical support for the conclusion that the Fourteenth Amendment affirmatively obligates the state to protect persons against caste-creating conditions. First, the Court's insistence on overt state misfeasance would revise the Equal Protection Clause itself to read "nor deny to any person within its jurisdiction the equal protection *from* the laws." "Of," however, is "used as a function word indicating the object of an action denoted or implied by the preceding noun."³¹² Thus, the Equal Protection Clause prohibits states from denying to persons an equal measure *of* the protection that the laws could provide them, and is not limited to protecting persons equally *from the laws themselves* as the Court's doctrine implies. Second, Steven Heyman has recently shown how the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment embody a positive obligation of protection that has roots in social contract theory, common law tradition, and Framers' intent.³¹³ The caste-abolition principle requires the state to *protect* persons from conditions that tend to force them into caste status. A state's failure to provide such protection, whether arising from a governmental act or omission, offends the Equal Protection Clause as interpreted under the caste-abolition principle.

The caste-abolition principle's equality norm also avoids some of the difficulties of Fiss's group-disadvantaging principle. One problem with his approach is that it contradicts the antidiscrimination principle, a principle that resonates strongly with deeply held values and the notion of evenhandedness implied by the idea of equality. Another problem is that Fiss's principle does not really empower the least powerful, and thus does not reach the core problem to which the Civil War Amendments were addressed. This shortcoming is evident in the effect of affirmative action programs in relation to the underclass.³¹⁴

312. WEBSTER'S THIRD NEW INT'L DICTIONARY 1565 (Philip B. Gove ed., 1969).

313. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991). Heyman describes the content of the obligation of protection as including civil protection (the right of civil redress), criminal protection (the right to share in the benefit of criminal laws to protect the security of life, liberty, and property), and the prevention of injury (the right to prevention of private violence). *Id.* at 566-70. This understanding is consistent with common definitions of "protection," which include: "the act of protecting; the state or fact of being protected: shelter from danger or harm," and "the oversight or support usu[ally] of one that is smaller and weaker . . . government [protection] for small business . . . her brother's [protection] was very welcome on the way home from school." *Id.* at 1822.

314. *See supra* notes 203-53 and accompanying text.

The caste-abolition principle, by contrast, synthesizes both the antidiscrimination and group-disadvantaging approaches and has the added benefit of focusing on the underlying social problem rather than any particular government conduct. Satisfaction of the obligation thus depends on remediation of caste *conditions*. As to institutional concerns, the Court need only make a finding that caste conditions exist and order their remediation. The more difficult details, resolution of which raises the prudential concerns of separation of powers and federalism, may largely be left to legislators and administrators.³¹⁵ Of course, the key question will be determining when such conditions exist. This Article focuses on education because of its historical importance (denial of education was a central tool in sustaining the Antebellum caste system), the powerlessness of children, and the role of inequality in educational opportunity in perpetuating the caste-like condition of the underclass.

Finally, the caste-abolition principle finds support in the normative traditions that permeate our national constitutional culture. First, it fits within the resolution of the tension between liberty and equality described by Grey. Society has the means, and thus the moral obligation, to ensure the social survival of all its members without substantially intruding on the liberty of individuals.³¹⁶

Second, the caste-abolition principle straddles the two traditions most commonly associated with the American constitutional culture—the liberal, possessive, individualist tradition and the civic republican, communitarian tradition. It has been asserted that although the Framers of the Constitution of 1789 recognized some convergence between individualism and communitarianism, “the liberal tradition is so dominant today that it has become difficult to appreciate the force of the civic republican tradition.”³¹⁷ Yet civic republicanism may still have constitutional lessons for today’s society;³¹⁸ and, as both Amar and Edelman have argued, it substantiates a constitutional claim to minimal subsistence. Under the republican tradition, institutions are designed to instill civic virtue in citizens and “[p]roperty provides the independent foundation that a citizen needs for proper consideration of the public interest.”³¹⁹ Without at least minimal sustenance and shelter, Amar and Edelman observe, citizens have little basis for a stake in the community

315. See *infra* notes 450-80 and accompanying text.

316. See *supra* notes 274-77 and accompanying text.

317. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 5-6 (1988).

318. See, e.g., Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

319. TUSHNET, *supra* note 317, at 11.

from which to form civic virtues.³²⁰ One might also argue, as suggested by the Lockean proviso, that at least a minimal amount of wealth redistribution is necessary to preserve “a government of ordered liberty.”³²¹ Converging on some aspects of republicanism, the liberal tradition not only protects property, but in part also depends on distribution of property as a means to preserve the independence of citizens; for it also depends on the diffusion of power: “Widespread property holding gives many people a stake in maintaining the order that secures their holdings.”³²² What has been said of property under either tradition would apply with equal or greater force to education, which is a prerequisite in today’s society to the preservation of both civic virtue and liberty (as well as an important tool for the acquisition of property).³²³

Once we accept the establishment of universal citizenship, as the Fourteenth Amendment commands, the creation of a caste system offends both traditions in important ways. Caste members by definition are denied the stake in and access to society that republicanism requires for development of civic virtue among all citizens,³²⁴ and the remainder of society’s toleration of caste conditions, no less than the active creation of them, ought to count as among the most objectionable forms of civic corruption. And a caste system effectively denies much of the liberty (at least of opportunity) of citizens forced into the disadvantaged caste. Such systems also threaten the “ordered liberty” of the favored classes, as both the Civil War and modern urban violence vividly demonstrate.

320. Amar, *supra* note 298; Edelman, *supra* note 265; see also, Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

321. Tushnet describes our Constitution in those terms, borrowing a phrase from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). TUSHNET, *supra* note 317, at 7.

322. TUSHNET, *supra* note 317, at 9.

323. See Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 93-96 (1989) (education and republican theory). As Amar has observed,

The idea of popular education resurfaces over and over in the Bill of Rights. As we have seen, each of the three intermediate associations it safeguards—church, militia, and jury—was understood as a device for educating ordinary Citizens about their rights and duties. The erosion of these institutions over the last 200 years has created a vacuum at the center of our Constitution. Thus, one of the main tasks for today’s constitutional theorists should be to explore ways this vacuum might be filled. Revisiting the *Rodriguez* case and establishing a constitutional right to public education might be one place to start. An uneducated populace cannot be a truly sovereign populace.

Amar, *supra* note 7, at 1210.

324. For an anecdotal description of the alienated attitudinal correlates of underclass status, see KENNETH AULETTA, *THE UNDERCLASS* (1982). For a discussion of the adverse impact of life in the impoverished ghetto on the development of civic values, see Hochschild, *supra* note 209, at 563-70.

The caste-abolition principle thus seeks to synthesize individualism and communitarianism into an autonomy-respecting form of caring connectedness to one another.³²⁵ Liberty and civic responsibility need not always be incompatible. In other words, recognition of a value of individual liberty need not require indifference to the social injustice of gross inequalities in the distribution of wealth and power, and programs premised on collectivistic justifications are not necessarily morally superior or even adequate.³²⁶ A caring connectedness, properly articulated, would recognize our intrinsic worth as individuals and would respect our autonomy to find our own meaning and fulfillment in life,³²⁷ yet it would also require that we make sacrifices to take care of our neighbors when necessary.³²⁸

325. For consideration of this ethic in other contexts, see Judges, *supra* note 9; Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice* (forthcoming).

326. See Judges, *supra* note 9.

327. This value of self-fulfillment or self-fulfillment as a political norm has been described in MICHAEL PERRY, *MORALITY, POLITICS, AND LAW* (1988); considered an animating constitutional principle in the First Amendment area, THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); MARTIN REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 11 (1984); and regarded as a constituent element of civic virtue in Aristotle, *Nichomachean Ethics*, in *ON MAN IN THE UNIVERSE* 85 (W.J. Black ed. & J.E.C. Welldon trans., 1943). For a qualification in the First Amendment context, see C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541 (1991).

328. Robin West's recent analysis of Czechoslovak President Vaclav Havel's theory of responsibility-based "postdemocratic" individualism offers valuable insights to help us bridge this conceptual gulf. Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 71 (1990). She contrasts the modern vision of liberal legalism's atomistic individual focus with Havel's conception of civic responsibility:

[I]n liberal legalism's conception of public life, a central feature of "rights" is that they "insulate" the subjectivity of the individual right-holder against the judgment, scrutiny, sympathy, or simple understanding of presumably hostile dictators, majorities, communities, or fellow citizens. For the liberal legalist, the individual's possession of a "right" must be totally independent of the moral worthiness of the right-holder. . . . Nevertheless, this insularity has its cost. Precisely because of its insistence on insularity, liberal legalism demands of the citizen almost none of the so-called "civic virtues": mercy, compassion, public involvement, fellow-feeling, sympathy, or, simply, love. . . . By contrast, Havelian postdemocratic liberalism demands of the citizen a great deal of communitarian virtues of compassion, sympathy, fellow-feeling, and love.

Id. at 71-72 (footnotes omitted). This is not, however, simply collectivism in mufti. Instead, "Havelian liberalism views the individual rather than the group, the community, or any other social structure as the basic moral unit of political society. . . . In short, Havel is as skeptical of collective politics as he is of constitutionalism as a guardian of individual freedom." *Id.* at 76. West urges not the displacement of the rights-based form of American constitutional liberalism by Havelian postdemocratic liberalism, but rather the examination of "our own premises from Havel's point of view." *Id.* at 78. That perspective insists that "[a] meaningful commitment to individual freedom surely requires that individuals—not legislative process or the

The viability of this interpretive principle of caste abolition depends on the salience of the conditions that tend to recreate a caste system. And its susceptibility to judicially manageable implementation is a question best considered in terms of its remedial shape. The following subsection briefly describes such conditions and concludes that the caste-abolition principle satisfies the criteria for interpretive legitimacy described above. Part IV's discussion of remedies takes up the problem of workability.

2. *Incidents of a Caste System*

Amar's insight is that we must look deeply into the nature of the social system that the Civil War sought to abolish to identify the animating principle behind the amendments resulting from that war. Here the critical race theorists also make a valuable contribution: No interpretation of the Civil War Amendments can be meaningful without consideration of the perspective of the class of persons whose status lay at the center of that conflict.³²⁹

Slave narratives indicate that the core attributes of that social institution were the utter dehumanization of its victims by systematic domination of key aspects of their lives, a crushing deprivation of their personal integrity and dignity, and their effective exclusion from the remainder of society.³³⁰ It must be understood that a caste system is a collection of *conditions* and *results*, not intentions and actions. Slavery demonstrates that actual malice toward the victims is not a necessary element of such a system. Instead, "[t]he dehumanization process was less a conscious and deliberate attempt on the part of the slaveholders to deprive the slaves of their humanity than it was a natural consequence of the system."³³¹ Second, as Amar has pointed out, it is not necessary to

machinations of the rule of law—bear the responsibility for the personal and public decisions they make." *Id.* at 79.

329. The most comprehensive collection of slave narratives is the nineteen-volume series THE FEDERAL WRITERS' PROJECT OF THE WORKS PROGRESS ADMINISTRATION, THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY (George P. Rawick ed., 1941; reprint 1972). More easily accessible collections, largely taken from the Writers' Project, include: SLAVE NARRATIVES, *supra* note 290; SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES (John W. Blassingame ed., 1977) [hereinafter SLAVE TESTIMONY]; THE SLAVE'S NARRATIVES (Charles T. Davis & Henry Louis Gates, Jr., eds., 1985); SOLOMON NORTHRUP, TWELVE YEARS A SLAVE, NARRATIVE OF SOLOMON NORTHRUP, A CITIZEN OF NEW YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853, FROM A COTTON PLANTATION NEAR THE RED RIVER IN LOUISIANA (Sue Eakin & Joseph Logsdon eds., 1968); STANLEY FELDSTEIN, ONCE A SLAVE: THE SLAVES' VIEW OF SLAVERY (1971).

330. *See generally*, FELDSTEIN, *supra* note 329, at 41-86.

331. *Id.* at 41. Feldstein goes on to explain:

the establishment of such a system that the rational self-interest of the dominant party be furthered by its abuses. The narratives are full of examples of masters or their agents viciously and senselessly abusing and even destroying their own "property" for no apparent pecuniary advantage.³³²

Next, this dehumanization process did not depend on hard treatment of the slave by the master, although the treatment often was hard indeed. Slaves of "kind" and "generous" masters were slaves nonetheless and therefore suffered the dehumanizing force of that caste status. According to escaped slave Lewis Clarke, speaking eloquently at an abolitionists' rally in 1842, degradation and not physical deprivation was the worst aspect of the institution:

I want to tell you, not so much about the slave's being whipped, or about his not having enough to eat; though I could tell you enough of that, too, if I had a chance. But what I want to make you understand is, that A SLAVE CAN'T BE A MAN! Slavery makes a brute of a man; I don't mean that he *is* a brute, neither. But a horse *can't* speak; and [the slave] *daren't*. He *daren't* tell what's in him; it wouldn't do. The worse he's treated, the more he must smile; the more he's kicked the lower he must crawl.³³³

The abject powerlessness of the slaves' position is wrenchingly illustrated by their attempts to purchase their own freedom or the freedom of loved

The basic purpose of the slave system was surely not a grand design to perpetuate a horrendous crime on the black race. Notwithstanding the psychological motivations that are the source of racial prejudice and, later on, the fear of a black revolt against the masters, the system was designed primarily for its economic advantages to the masters. Nevertheless, in order to perpetuate the institution, and simply to make it work, it was essential that a strict code of rules, regulations, punishments, and controls be established and followed. The enforcement of these rules resulted in what I call the slave's dehumanization—his eventual inability to fulfill his natural human desires, needs, instincts and to maintain his integrity and dignity.

Id. at 41-42.

332. A few vivid examples will suffice. Former slave Moses Roper reports that a slaveowner paid \$550 to recover an escaped slave (who had fled his master's threat of 500 lashes for preaching to fellow slaves), whom he promptly burned alive at the stake. Letter from Moses Roper to Thomas Price, London (June 27, 1936) reprinted in *SLAVE TESTIMONY* *supra* note 329, at 23-26. Roper also tells of a slaveowner flogging a slave at intervals from eight a.m. until five p.m. The slave's offense was "working on the Sabbath," which he had done to complete Saturday's assigned chores for fear of receiving one hundred lashes. *Id.* Mr. Johnson, a former slave of Judge Jabez Bowen, Jr., judge of the Eastern Circuit of Georgia (1802-04), related at an abolition meeting in 1837 an account of another slaveowner who casually decapitated a slave girl for spilling gravy on her mistress at a dinner with Judge Bowen. *SLAVE TESTIMONY*, *supra* note 329, at 124-28 (by way of corroboration, the editors note that Judge Bowen's impassioned speech to the Chatham County grand jury advocating emancipation, which resulted in his own imprisonment and impeachment for fomenting insurrection, may have resulted from his having witnessed the event described by Johnson).

333. *SLAVE TESTIMONY*, *supra* note 329, at 152.

ones.³³⁴ For slave women and girls, the degradation and exploitation was often absolute; and frequently slave men were reduced to the emasculating position of beseeching sympathetic whites for the means to rescue their wives and daughters from being sold into a kind of uncompensated prostitution.³³⁵ Other graphic indicia of former slaves' sense of powerlessness were their fierce expressions of independence once they attained liberty and autonomy, and the deprivations they were willing to endure to reach freedom.³³⁶

Of course, the physical conditions facing slaves were inhuman. Families were generally commingled and crowded into crude cabins. Their food rations were chronically inadequate, forcing them to forage and to appropriate from the slaveowner. Clothing allocations also were inadequate. Working and living conditions often exposed the slaves to grievous injury, disease, exhaustion, and, of course, flogging.³³⁷ Beatings

334. See e.g. SLAVE TESTIMONY, *supra* note 329, at 84 (citing May 13, 1850, letter from James R. Starkey to Gerard Hallock requesting \$450 to buy his freedom to emigrate to Liberia).

335. See e.g., Pennington, *supra* note 290, at 193, 199-200 (describing Paul Edmondson's successful effort to raise \$2,250 with which to purchase his daughters Mary Jane and Emily Cathrine, fourteen and sixteen years of age, who were to be sold for purposes of prostitution). Another example is Harriet Newby's entreaties to her husband:

I want you to buy me as soon as possible, for if you do not get me some body else will. . . . It is said Master is in want of monney. If so, I know not what time he may sell me, an then all my bright hops of the futer are blasted, for their has ben one bright hope to cheer me in all my troubles, that is to be with you, for if I thought I shoul never see you this earth would have no charms for me. Do all you can for me, witch I have no doubt you will.

SLAVE TESTIMONY, *supra* note 329, at 117-18 (Aug. 16, 1859, letter from Harriet to Dangerfield Newby). Archer Alexander (who supplied intelligence to Union forces while still a slave, ultimately escaped to avoid execution as a "traitor," and served as the artist's model for the slave kneeling at Lincoln's feet at the Freedom Memorial) attempted to buy his wife in 1863. When her owner said she "would never get free only at the point of the Baynot," he persuaded a German farmer to help his wife and daughter to escape. *Id.* at 119 n.69 (Nov. 16, 1863, letter from Louisa to Archer Alexander). Lewis Clarke described examples of the sexual exploitation of slave women and girls, including his own sister, by their owners. He concluded:

I can't tell these respectable people as much as I would like to, but jest think for a minute how you would like to have *your* sisters, and *your* wives, and *your* daughters, completely, teetotally, and altogether, in the power of a master. —You can picture to yourselves a little, how you would feel; but on, if I could *tell* you! A slave woman an't allowed to respect herself, if she would.

SLAVE TESTIMONY, *supra* note 329, at 156 (emphasis in original).

336. Well-known examples are the letters of Henry Bibb (1815-54) to his former owners and vendors. For a selection of his letters, see SLAVE TESTIMONY, *supra* note 329 at 48-57. Bibb attempted many escapes and had six different owners. He finally attained freedom in Detroit in 1840, and then moved to Canada upon passage of the Fugitive Slave Law in 1850. *Id.* at 48 n.43.

337. For a description of living and working conditions, see FELDSTEIN, *supra* note 329, at 42-52.

and killings were commonplace.³³⁸ Breakup of families was a notorious and “integral part of the system.”³³⁹ Mothers sometimes would even resort to killing their own children and then themselves to avoid seeing their offspring sold away.³⁴⁰

The system’s impact on children thus was especially acute. Narratives reveal that their families were destroyed, they were malnourished, and they were deprived of a fundamental sense of *place* in society. Selling of children or parents “down South” and harsh conditions cut children off from their connection to both their past and contemporary social existence:

About this time, I began to feel another evil of slavery—I mean the want of parental care and attention. My parents were not able to give any attention to their children during the day. I often suffered much from *hunger* and other similar causes. To estimate the sad state of a slave child, you must look at it as a helpless human being thrown upon the world without the benefit of its natural guardians. It is thrown into the world without a social circle to flee to for hope, shelter, comfort, or instruction. The social circle, with all its heaven-ordained blessings, is of the utmost importance to the *tender child*; but of this, the slave child, however tender and delicate, is robbed.³⁴¹

Finally, and most pertinent to today’s application of the caste-abolition principle, slavery further dehumanized children by cutting them off from their *future* by denying them education. State laws and masters’ rules strictly forbade teaching slaves to read or to write.

To educate a slave was to make him discontented with slavery, wrote [Frederick] Douglass, and to invest in him a power which could open the treasuries of freedom. Thus, he reasoned, since the object of the master was to maintain control over the slave, constant vigilance was exercised to prevent anything which would militate against or endanger the stability of his authority.³⁴²

338. See, e.g., *supra* note 332.

339. FELDSTEIN, *supra* note 329, at 56.

340. *Id.* at 58.

341. Pennington, *supra* note 290, at 207-08.

342. FELDSTEIN, *supra* note 329, at 61. Penalties for educating slaves were severe. “The Georgia Narratives reported that the owners who caught their sons teaching slaves to read and write would become so furious they would give their children severe beatings, and cut off the thumb and forefinger of the slave. Such mutilation became known as the sign of attempted education.” *Id.* at 62. Illiteracy and ignorance likewise can be painful, as evidenced by escaped slave John Pennington’s reactions when first exposed to formal education:

I now began to see, for the first time, the extent of the mischief slavery had done to me. Twenty-one years of my life were gone, never again to return, and I was as profoundly ignorant, comparatively, as a child of five years old. This was painful, annoying, and humiliating in the extreme. . . . It is quite easy to imagine, then, what

Once again, however, it is important to realize the indirect way in which the dehumanization process occurred. In fact, recorded instances of enforcement of governmental prohibitions on slave education are rare. First, few freeman were inclined to violate such laws. Second, slaves' living and working conditions left them scant wherewithal to tempt them to violate those proscriptions.³⁴³ Thus, although a de jure ban on education existed, the deprivation resulted largely from de facto forces arising out of the entire social framework.

The foregoing overview of antebellum caste conditions informs the content of the caste-abolition principle. The Civil War Amendments articulate the social revolution undertaken in the Civil War. That revolution would abolish the caste system prevalent in the South, the chief incident of which was the profound dehumanization and disempowerment of its victims. Such dehumanization can be inflicted by pervasive social structures quite apart from positive legislative enactments, individual or collective intent, or a discernable net benefit to any particular party. Among the most vulnerable victims of the caste system were the children, and an important vector for trapping them within their caste status was the systematic denial of education—although, once again, that deprivation could and did occur without actual intervention by state authorities.

Considered as an expression of the constitutional response to the range of dehumanizing conditions called slavery, the caste-abolition principle satisfies the interpretive demand mentioned above. It finds a comfortable footing in the text and history of three closely related amendments. It identifies a unifying purpose behind those amendments that is consistent with a national commitment so strong that the United States was willing to endure the bloodiest war in our history for its accomplishment. That kind of historical context provides an especially compelling claim on subsequent generations. Moreover, the caste-abolition principle is congruent with the widely accepted representation-reinforcing and antidiscrimination principles. Further, enforcement of the caste-abolition principle does not depend on a finding of direct state action. Instead, that principle imposes an affirmative duty on government to provide *protection* from the conditions that threaten to recreate the caste system; and one especially potent kind of protection is the empowering force of adequate educational opportunity. Finally, the caste-aboli-

was the state of my mind, having been reared in total moral midnight; it was a sad picture of mental and spiritual darkness.

Pennington, *supra* note 290, at 237.

343. FELDSTEIN, *supra* note 329, at 61.

tion principle is strongly connected to the traditions of our normative political culture. Consideration of the adequacy and manageability of the caste-abolition principle as a judicial implement is taken up in the following Part, which discusses application of the principle to the inequality of educational opportunity facing today's underclass children.

IV. Application of the Caste-Abolition Principle to Disadvantaged Neighborhoods and Equality of Educational Opportunity

This Part contends that a look at today's underclass, and especially its children, finds conditions of dehumanization, powerlessness, and exclusion severe enough to recreate a caste society in violation of the Civil War Amendments. These people face dehumanizing conditions of poverty, joblessness, crime, welfare dependency, drug addiction, inadequate health care, and broken families—a combination that leaves them in a state of chronic powerlessness relative to the rest of society. As the gap widens between the richest and poorest classes in America, and as the poor become even more desperately poor in absolute terms, the underclass's status becomes ever more marginal and its plight becomes ever more hopeless. Like the members of the antebellum slave caste, a few lucky individuals manage to escape through rare good fortune or almost superhuman effort, but most are locked into their status by an overwhelming combination of adverse social forces. And the growing power of the dominant class ensures the preservation of social, economic, and legal institutions that contribute to such extreme disparity—including the greatly unequal distribution of educational resources.³⁴⁴

A. The Underclass

The United States now leads all other major industrial nations in the inequality of wealth distribution, and the gap is widening.³⁴⁵ For example, the percentage of money income received by the poorest quintile has fallen steadily from 5.6% in 1969 to 4.6% in 1988, while the richest quintile's share has increased steadily from 40.6% to 44%.³⁴⁶ Poverty is

344. See *supra* note 225 (noting that even neoconservatives, such as Charles Murray, are concerned with the increasing marginalization of the underclass).

345. See generally PHILLIPS, *supra* note 225, at 11.

346. *Id.* at 13 (citing U.S. Census Bureau data). The disparity is even more striking when stated in dollar terms. Between 1977 and 1987,

the average after-tax family income of the lowest 10 percent, in current dollars, fell from \$3,528 to \$3,157. That's a 10.5 percent drop. During the same period, average family income of the top 10 percent increased from \$70,459 to \$89,783—up 24.4

nothing new to America, and its cities have had ghettos for over a century. But

[d]espite a high rate of poverty in ghetto neighborhoods throughout the first half of the twentieth century, rates of inner-city joblessness, teenage pregnancies, out-of-wedlock births, female-headed families, welfare dependency, and serious crime were significantly lower than in later years and did not reach catastrophic proportions until the mid-1970s.³⁴⁷

This new American “underclass”³⁴⁸ is not merely poor. Its members face an overwhelming combination of socioeconomic problems—including long-term unemployment and unemployability, street crime and other antisocial behavior, drug dependency, residential segregation, broken families, chronic poverty, and welfare dependency—that trap them “in an intergenerational cycle of dysfunction and self-destruction

percent. The incomes of the top 1 percent, which were “only” \$174,498 in 1977, are up to \$303,900—a whopping 74.2 percent increase over the decade.

Id. at 14 (quoting *Gap Grows Between Rich, Poor*, COLUMBUS DISPATCH, July 16, 1988). Other data reflect a 14.8% decrease (from \$4,113 to \$3,504) in the average income of the lowest decile between 1977 and 1988. *Id.* at 7 (citing Urban Institute, *Challenge to Leadership*). Thus, not only is the gap enormous, but the depth of poverty faced by persons at the bottom is almost unimaginable to middle-class Americans (let alone persons on the high end of the income scale).

347. WILSON, *supra* note 210, at 3 (1987).

348. Use of the term “underclass” has provoked objection from some liberal scholars in part because of its associations with the victim-blaming “culture of poverty” explanation offered by neoconservatives. *See, e.g.*, Herbert J. Gans, *Fighting the Biases Embedded in Social Concepts of the Poor*, CHRON. OF HIGHER EDUC., Jan. 8, 1992, at A56; Hochschild, *supra* note 209. In my view, this kind of sterile debate over labels and symbolism exemplifies the manner in which liberals sometimes spike their own cannon and thus unwittingly advance the conservative mission of preserving the status quo. The word “underclass” does convey the image of marginalization relevant to the group it describes, is not inherently pejorative, and finds general currency in the social science literature. One wonders whether, instead of diverting discourse into this kind of rhetorical cul-de-sac, we might better spend our energy searching for ways concretely to solve social problems as profound as the plight of underclass children. According to Paul E. Peterson,

underclass is a word that can be used by conservatives, liberals, and radicals alike. . . . But underclass, like lumpen proletariat, is also a suitable concept for those who, like Karl Marx, want to identify a group shaped and dominated by society’s economic and political forces but who have no productive role. And underclass is acceptable to some liberals who somewhat ambiguously refuse to choose between these contrasting images but who nonetheless wish to distinguish between the mainstream of working-class and middle-class America and those who seem separate from or marginal to that society. But, above all, the concept has been called back into the social science lexicon because it offers an explanation for the paradox of poverty in an otherwise affluent society that seems to have made strenuous efforts to eradicate this problem.

Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, in THE URBAN UNDERCLASS 3-4 (Christopher Jencks & Paul E. Peterson eds., 1991).

...³⁴⁹ And, although analysts disagree about the underclass's precise ethnic composition, it consists of a disproportionate number of blacks and Hispanics.³⁵⁰

Wilson describes how the social transformation of the inner city has left the underclass isolated in pockets of extreme poverty and despair.

349. Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 HARV. BLACKLETTER J. 1, 4 (1991).

350. *Id.* Some data illustrate the magnitude of this crisis. Wilson reports the alarming increase in inner-city crime, poverty, family dissolution, welfare dependency, and underclass isolation. For example, homicide rates increased in Chicago from 195 in 1965 to 970 in 1974 (201%), and most were intraracial. WILSON, *supra* note 210, at 22-23. Wilson reports that in 1983, 98% of the perpetrators of black homicide were black, 81% of the perpetrators of Hispanic homicide were Hispanic, and 52% of the perpetrators of white homicide were white. *Id.* at 25. Crime rates correlate strongly with socioeconomic class: violent crime is disproportionately concentrated in disadvantaged neighborhoods. In 1980, 11% of Chicago's homicides, 9% of its rapes, and 10% of its aggravated assaults were committed in the Robert Taylor Homes public housing project, which housed a mere 0.5% of the city's population. *Id.* at 25 (citing N. Sheppard, Jr., *Chicago Project Dwellers Live Under Siege*, N.Y. TIMES, Aug. 6, 1980, at A14).

Welfare dependency and dislocation of families also characterize the inner-city underclass. For example, in 1983, the Chicago Housing Authority's projects contained 92% single-parent families (overwhelmingly female-headed); and 80% of the inhabitants received Aid to Families with Dependent Children. WILSON, *supra* note 210, at 26-27; *see also* AULETTA, *supra* note 209, at 38-39. Between 1970 and 1984, the number of female-headed households with one or more of their children present in the home increased 77% in the United States. This translates to even more severe poverty, as the median income of black female-headed families was only \$7,999 (as compared to \$21,840 for black two-parent families and \$27,286 for all two-parent families). WILSON, *supra* note 210, at 26-27. Further, "of the roughly 3.6 million families that reported incomes of less than \$5,000 [in 1983], 57 percent were headed by women." *Id.* at 27 (citing U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 146, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND INDIVIDUALS IN THE UNITED STATES, 1983 (1985)). Unemployment figures are devastating, especially for black males. Between 1960 and 1984, black males' participation in the civilian labor force declined substantially (particularly for 16-17 year-olds): for 16-17 year-olds, the rate dropped from 45.6% to 27.0%; for 18-19 year-olds, from 71.2% to 55.4%; for 20-24 year-olds, from 90.4% to 77.2%; and for 25-34 year-olds, from 96.2% to 88.2%. *Id.* at 42. Wilson further reports that

the percentage of black male youth who are employed has sharply and steadily declined since 1955, whereas among white males it has increased only slightly for all categories. The fact that only 58 percent of all black young adult males, 34 percent of all black males aged eighteen to nineteen, and 16 percent of those aged sixteen to seventeen were employed in 1984 reveals a problem of joblessness for young black men that has reached catastrophic proportions.

Id. at 43. More recent data report that

[by] the summer of 1988, 45.3 percent of New York city residents over the age of sixteen could not be counted as labor force participants because of poverty, lack of skills, drug use, apathy or other problems. Similar circumstances were reported in Detroit and Baltimore, while the ratio of unaccountables for the nation as a whole was 34.5 percent.

PHILLIPS, *supra* note 225, at 20 (citing *45 Percent of New Yorkers Are Outside Labor Force*, N.Y. TIMES, Aug. 3, 1988, at A1).

Despite an overall decline in urban populations across America and in its largest cities, the number of persons (overwhelmingly minority) living in urban poverty areas has skyrocketed.³⁵¹ Other researchers have documented a persistent pattern of residential segregation along racial lines.³⁵²

Wilson cites a complex combination of factors contributing to the emergence of an American underclass—factors mostly beyond its control:

[H]istorical discrimination and a migration to large metropolises that kept the urban minority population relatively young created a problem of weak labor force attachment among urban blacks and, especially since 1970, made them particularly vulnerable to the industrial and geographic changes in the economy. The shift from goods-producing to service-producing industries, the increasing polarization of the labor market into low-wage and high-wage sectors, innovations in technology, the relocation of manufacturing industries out of central cities, and periodic recessions have forced up the rate of black joblessness . . . despite the passage of antidiscrimination legislation and the creation of affirmative action programs. The rise in joblessness has in turn helped trigger an increase in the concentrations of poor people, a growing number of poor single-parent families, and an increase in welfare dependency.³⁵³

These problems have become concentrated in the ghetto, where the underclass suffers from “joblessness reinforced by growing social isolation.”³⁵⁴ Out-migration of working-class and middle-class black families has “removed an important social buffer that once deflected the full impact of the kind of prolonged high levels of joblessness in these neighborhoods that has stemmed from uneven economic growth and periodic recessions.”³⁵⁵ Wilson explains that these

351. For example, although the total urban population in the United States declined by 5% between 1970 and 1980, the number of persons living in urban poverty areas *increased* by more than 20%. In the five largest American cities during this period, despite an overall 9% decrease the population living in poverty areas increased by 40%, by 69% in high poverty areas, and by a breathtaking 161% in extreme poverty areas. WILSON, *supra* note 210, at 46. The five cities are New York, Chicago, Philadelphia, Detroit, and Los Angeles. A high poverty area is defined as having a poverty rate of at least 30%, and an extreme poverty area has a poverty rate of at least 40%. *Id.* The poor black population in extreme poverty areas soared by 164%. *Id.*

352. Douglas Massey & Mitchell L. Eggers, *The Ecology of Inequality: Minorities and the Concentration of Poverty*, 5 AM. J. Soc. 1153 (1990).

353. Wilson, *supra* note 210, at 594 (summarizing his conclusions).

354. *Id.* at 595.

355. *Id.* at 594. *But see* Massey & Eggers, *supra* note 352 (disputing the conclusion that black middle class “flight” from the inner city caused concentration of urban poverty). One analysis of the Massey and Eggers study concludes “the article does not really undermine the

concentration effects, reflected, for example, in the residents' self-limiting social dispositions, are created by inadequate access to jobs and job networks, the lack of involvement in quality schools, the unavailability of suitable [steadily employed] marriage partners, and lack of exposure to informal "mainstream" social networks and conventional role models.³⁵⁶

Wilson's work has prompted renewed scholarly attention to the underclass issue. Recent research leads to two conclusions. First, the "culture of poverty" hypothesis of the neoconservatives is empirically suspect. Studies refute the contention that government assistance undermines willingness to work, and "do not support the claim of widespread shiftlessness among inner-city parents."³⁵⁷ To the contrary, recent research "lends support to . . . Wilson's claim . . . that many of the problems of the inner city are the direct result of the loss of jobs in the local labor markets."³⁵⁸ Thus, "full employment is a powerful weapon against poverty"; and the poor will work if given a meaningful opportunity.³⁵⁹ Second, although some writers have challenged aspects of Wil-

[black exodus] theory. Massey and Eggers do not measure the degree of interclass social and cultural interaction among African-Americans or disprove the exodus theory in any other way." Brooks, *supra* note 349, at 13.

356. Wilson, *supra* note 210, at 595.

357. Marta Tienda & Haya Stier, *Joblessness and Shiftlessness: Labor Force Activity in Chicago's Inner City*, in THE URBAN UNDERCLASS, *supra* note 348, at 135, 151: "Most of the evidence showed that willingness to work was the norm in Chicago's inner city. We gathered only limited evidence on discouragement, but the large share of unemployed parents who reported wanting a job suggests that discouragement may be pervasive in Chicago's inner-city neighborhoods." *Id.* at 151-52. See generally Peterson, *supra* note 348, at 14-15 (summarizing studies rebutting Charles Murray's thesis, including the proposition that welfare programs such as AFDC provide an incentive for "welfare motherhood"). See also Wilson, *supra* note 209, at 605 ("The problem for poor blacks is not one of a culture of poverty or of being so devastated by racism that they have lost the will to work; rather, the problem is that our economy is not organized to sustain tight labor market situations, and, therefore, gains that minorities experience in a favorable economic climate are often wiped out when the economy turns sour.").

358. Richard B. Freeman, *Employment of Earnings of Disadvantaged Young Men in a Labor Shortage Economy*, in THE URBAN UNDERCLASS, *supra* note 348, at 103, 119 (documenting "strong link between area unemployment and the economic position of black youths").

359. Paul Osterman, *Gains from Growth?: The Impact of Full Employment on Poverty in Boston*, in THE URBAN UNDERCLASS, *supra* note 348, at 122, 127. Osterman concludes:

Full employment does in fact deliver many of the benefits its advocates have promised. Poverty rates fell substantially in Boston, and *it is very clear that the poor did respond to economic opportunity when it was offered*. The sharp drop in the incidence of poverty and the high percentage of the poor who are working undercuts the idea that an active government social policy is debilitating.

Id. at 130 (emphasis added).

son's account of the underclass dynamic,³⁶⁰ several recent studies, including subsequent work by Wilson himself, substantiate the existence of a socially and economically marginal and severely isolated urban subpopulation, which Wilson currently describes as the "ghetto poor."³⁶¹ This refined sociological focus on the most extremely disadvantaged and isolated class, and the support it provides for the existence of an underclass dynamic, reinforces the relevance of underclass conditions to the caste-abolition principle.

Other writers emphasize stigmatic factors to account for the emergence of the underclass. Some studies focus on the lingering effects of slavery, American apartheid, and societal discrimination.³⁶² This history of subordination and its consequences (in the form of chronic poverty and unemployment, welfare dependency, and crime) has exacted its psychological toll, especially on black males. It has been suggested, for example, that this impact partly accounts for the high rate of intraracial

360. See, e.g., Christopher Jencks, *Is the American Underclass Growing?*, in *THE URBAN UNDERCLASS*, *supra* note 348, at 28. Jencks asserts that the underclass concept must be refined to be useful, because according to his research "while economic conditions began to deteriorate for less skilled workers in the 1970s, most of the other problems that led Americans to start talking about an underclass followed different trajectories." *Id.* at 93-94. Jencks concludes that the problems of male joblessness and unwed parenthood have worsened, problems of welfare dependency and violence have levelled off, problems of academic performance (graduation rates and basic skills test performance) have lessened, and problems of teenage pregnancy and poverty have lessened. *Id.* at 94-95. Jencks' conclusions, however, have only limited relevance to Wilson's hypothesis because they are based on national samples and do not focus on conditions in the inner city. See Peterson, *supra* note 347 at 22.

361. William Wilson, *Public Policy Research and the Truly Disadvantaged*, in *THE URBAN UNDERCLASS* *supra* note 348, at 460; Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States, 1970-1980*, in *THE URBAN UNDERCLASS*, *supra* note 348, at 235; Freeman, *supra* note 358; Osterman, *supra* note 359; Tienda & Stier, *supra* note 357; Peterson, *supra* note 348.

362. As one writer recently observed, at least part of the underclass dynamic was foreseen more than two decades ago:

In its 1968 report on the causes of America's race riots, the National Advisory Commission on Civil Disorders, better known as the Kerner Commission, cited some of the lingering effects of slavery and Jim Crow: acute unemployment, high underemployment, shabby housing, second-rate education, poor municipal services, inadequate welfare assistance, and, of course, racism. Significantly, the Commission said that "segregation and poverty converge on the young to destroy opportunity and enforce failure. Crime, addiction, dependency on welfare, and bitterness and resentment against society in general and white society in particular are the result."

Brooks, *supra* note 349, at 7 (quoting NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 5 (1968)). Brooks argues that the successes of some African-Americans evidence exceptional triumph over the extreme adversity of discrimination, not the absence of discrimination's debilitating effects, and he asserts that the experience of other ethnic minorities in America tell us little about the unique experience of African-Americans, with its roots in slavery. *Id.* at 7-8.

violence among young black men.³⁶³

In sum, America has developed a large and growing class of persons who are desperately poor and chronically unemployed, who are increasingly alienated from mainstream American society, and whose prospects for substantial improvement in their social and economic condition are becoming ever more remote.³⁶⁴ As described above, “[t]he rates of crime [especially violent crime], drug addiction, out-of-wedlock births, female-headed families, and welfare dependency have risen dramatically in the last several years, and they reflect a noticeably uneven distribution by race.”³⁶⁵

While the plight of the black underclass in urban ghettos is decidedly acute, the problems of severe poverty are by no means confined to the cities or to blacks. Unemployment, extreme poverty, and homelessness are becoming increasingly common features of the rural landscape as well.³⁶⁶ Most recently, the largest increases in poverty have been among whites³⁶⁷ and Hispanics.³⁶⁸ Black poverty, however, has remained steady at the highest level.³⁶⁹ And poverty on the whole in America is increasing sharply after several years of moderate decline.³⁷⁰

This emergence of an American underclass threatens the perpetuation of a caste society. Overwhelming conditions of poverty, joblessness, and powerlessness lock the “ghetto poor” into their chronically disadvantaged circumstances. The following section discusses the role of ine-

363. *Id.* at 8-11.

364. While perhaps invisible to many American policy makers, the social dislocation of these people is sufficiently obvious to foreign observers to provoke the conservative periodical *The Economist* to criticize America's abject failure to address the problem. *See supra* note 203.

365. WILSON, *supra* note 210, at 20. For example, black unemployment in 1990 was twice that for whites, 43% of black children are born into poverty, and approximately one-third of African-Americans live in poverty. *America's Blacks: A World Apart*, ECONOMIST, Mar. 30, 1991, at 17. The average life expectancy of a white person born today exceeds that of a black person by more than five years. Larry Lipman, *Study: White, Black Life Spans Vary*, ARK. GAZETTE, Apr. 9, 1991, at A3 (citing Health & Human Services Report). Black males have significantly higher rates of heart disease, stroke, and cancer; and homicide is the leading cause of death for black males between the ages of 15 and 34. *Id.* And African-Americans display the highest levels of poverty concentration. Massey & Eggers, *supra* note 352, at 1174.

366. PHILLIPS, *supra* note 225, at 199-201.

367. The poverty rate for whites rose from 10% in 1989 to 10.7% in 1990. Jason DeParle, *Poverty Rate Rose Sharply Last Year as Incomes Slipped*, N.Y. TIMES, Sept. 27, 1991, at A1 (reporting U.S. Census Bureau data).

368. The rate for Hispanics increased from 26.2% to 28.1%. *Id.*

369. The black poverty rate for 1990 was 31.9%. *Id.*

370. It rose to 13.5% in 1990 from 12.8% the previous year. *Id.* Even sharper increases are anticipated for 1991. An additional 2.1 million Americans fell below the poverty line following an increase in unemployment from 5.3% to 5.5%. Unemployment for 1991 is expected to hit 6.7%. *Id.*

quality of educational opportunity in creating and sustaining the underclass's caste status.

B. Relation Between Equality of Educational Opportunity and the Caste-Abolition Principle

1. *Dual School Systems as Determinants of Class*

A society's class structure is defined in significant part through its educational system.³⁷¹ James Coleman has compared the nineteenth-century development of universal education in free (white) public schools in the United States with England's dual school system, and has concluded that denial of educational opportunity is an incident of a caste society, even absent the chattel incident of slavery:

[T]he character of educational opportunity reflected the class structure. In the United States, the public schools quickly became the common school, attended by representatives of all classes; these schools provided a common educational experience for most American children—excluding only those upper-class children in private schools, those poor who went to no schools, and Indians and Southern blacks who were without schools. In England, however, the class system directly manifested itself through the schools. The state-supported, or “board schools” as they were called, became the schools of the laboring classes with a sharply different curriculum from those voluntary schools which served the upper and middle classes. [Coleman then describes the “striking duration of influence” of a dual school system.]

.....
This comparison of England and the United States shows clearly the impact of the class structure in society upon the concept of educational opportunity in that society. In nineteenth-century England, the idea of *equality* of educational opportunity was hardly considered; the system was designed to provide *differential* educational opportunity appropriate to one's station in life. In the United States as well, the absence of educational opportunity for blacks in the South arose from the caste and feudal structure of the largely rural society.³⁷²

371. The underlying pattern of school differences is deep and structural. Wherever one looks, there are strong and disconcerting relationships between race, income, and every aspect of schooling. The relationships are so powerful that they enable reliable prediction of the school's test scores without any information at all about the educational program in the school or the school district. . . . In metropolitan America the schools that are poor are almost always minority schools.

Gary Orfield, *Race, Income, and Educational Inequality*, in COUNCIL OF CHIEF STATE SCHOOL OFFICERS, *SCHOOL SUCCESS FOR STUDENTS AT RISK* 45, 52 (1988) [hereinafter *SCHOOL SUCCESS*].

372. JAMES COLEMAN, *EQUALITY AND ACHIEVEMENT IN EDUCATION* 19 (1990).

As was the case under slavery, grossly unequal access to educational opportunity remains an especially powerful force confining the underclass to its caste status in the United States today. Even the Supreme Court acknowledges that education is a *sine qua non* of virtually every important dimension for participation in society, including access to honest and satisfying employment, socialization through acquisition of prevailing civic and cultural values, development of analytical ability and learning skills, and participation in the democratic process.³⁷³ Extreme deprivation of equal educational opportunity offends the Constitution under the caste-abolition principle not because there is an implied “fundamental” right to an education, but because denial of educational opportunity perpetuates the “caste and feudal structure” that the Civil War Amendments sought to abolish. *Brown* addressed one inescapable manifestation of such a caste system: segregation by race. But *Brown*, based in part on the stigmatic harm of racial segregation, was never clearly grounded in a complete articulation of the caste-abolition principle. That principle certainly embraces racial (and gender) discrimination; but it also requires consideration of socioeconomic context (which could include non-race-based deprivations and those that do not arise from any overt, intentional legislative act) in a way that *Brown*’s progeny (especially *Milliken*) eschewed.³⁷⁴

2. *Underclass Schools*

There are at least two perspectives from which to consider whether certain sectors of today’s school-age population are exposed to the risk of caste-creating gross disadvantages in educational opportunity. One approach is technocratic and quantitative. It looks at public inputs such as per-pupil expenditures; the effect of nonpublic inputs such as parents’ socioeconomic status, family stability and support; and student motivation and aptitude. This approach also examines outputs such as student achievement on tests measuring basic academic skills, and graduation rates.³⁷⁵ Another approach is narrative and qualitative. It considers how things really look from “the bottom.” The narrative approach is uniquely appropriate to the problem of caste because it conveys the se-

373. See *supra* note 98 and accompanying quotation from *Brown I*; see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (citing *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)) (objectives of public education include “inculcation of fundamental values necessary to the maintenance of democratic political system”).

374. See *supra* notes 97-122 and accompanying text (school desegregation cases).

375. See generally COLEMAN, *supra* note 372, at 24-25.

verity of the problem in a way that numbers cannot.³⁷⁶ Either approach reveals school conditions that invoke the caste-abolition principle.

a. The Experts' Views

Although experts debate the extent and causes of the underclass problem,³⁷⁷ "[t]here is no disagreement . . . that disadvantaged youth concentrated in our inner cities represent the most imperiled portion of our growing population of at-risk students."³⁷⁸ Thus, "[o]ur most acute problems are found in our big cities and, especially, in inner-city ghetto schools."³⁷⁹ The literature reveals a range of explanations for those problems. One study of poverty's impact on schools predicts that the underclass process of concentration of poverty and erosion of community will have a substantial adverse impact on education: "Among the possible consequences for education are a deterioration of the ability of families and neighborhoods to supervise children and support the schools, growing race and class isolation in inner-city schools, and a decline in the financial resources available to big-city school districts."³⁸⁰

Factors³⁸¹ include inequality in allocation of economic resources,³⁸² discriminatory "tracking" and disciplinary policies;³⁸³ and "environmental" effects such as family, peer pressure, and out-of-school activities.³⁸⁴

376. As Kozol observes, "[t]he voices of children, frankly, had been missing from the whole discussion." KOZOL, *supra* note 3, at 5. For discussion of narrative's role in legal scholarship, see *supra* notes 243-44 and accompanying text.

377. See *supra* note 349-70 and accompanying text.

378. William L. Boyd, *What Makes Ghetto Schools Succeed or Fail?*, 92 TCHRS. C. REC. 331, 332 (1991).

379. *Id.* at 331.

380. Kathryn M. Neckerman & William J. Wilson, *Schools and Poor Communities*, in SCHOOL SUCCESS, *supra* note 371, at 25.

381. Neckerman and Wilson present an overview of the literature documenting the effects of a number of factors, including the tendency of educationally disadvantaged parents to "pass on" educational disadvantage to their children; "[c]lass- or ethnicity-related differences in patterns of language acquisition"; teenage pregnancy and delinquency; expectations of future discrimination in the job market; school and class size and teacher credentials; tracking; "[c]lass or ethnic tension between middle-class teachers and lower-class parents"; and "teachers' preconceived notions about poor children's capacity to learn . . ." *Id.* at 35.

382. *Id.*

383. JEANNIE OAKES, *MULTIPLYING THE INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS, AND TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE*, RAND PUB. NO. R-3928-NSF (1991).

384. See COLEMAN, *supra* note 372. For a meta-analysis of the research on the correlation between socioeconomic status (SES) and educational achievement, see Karl R. White, *The Relation Between Socioeconomic Status and Academic Achievement*, 91 PSYCHOL. BULL. 461 (1982). White concludes that SES is strongly correlated with academic achievement under aggregated units of analysis, but only weakly correlated when the student is used as the unit of analysis. He also finds that family characteristics, such as home atmosphere, are substantially correlated with academic achievement.

Gross disparities exist in many states (as a consequence of state educational finance schemes) between the per-pupil resources devoted to poor inner-city children and their more affluent suburban counterparts.³⁸⁵ James Coleman has argued that because liberty principles constrain the extent of regulatory impact on private family conditions that affect academic achievement, reform ought to focus on maximizing the equalizing force of public, in-school influences on achievement.³⁸⁶ One review of the literature found, not surprisingly, that the amount and quality of instruction (which may be in part a function of school resources) correlates positively with achievement.³⁸⁷

Recent research has found a pervasive pattern of "tracking," in which "high-ability students at low-socioeconomic status, high minority [inner-city] schools may actually have fewer opportunities than low-ability students who attend more advantaged schools."³⁸⁸ Another study found that "[a]s black incomes and education increase, black students gain greater access to gifted classes," providing support for the "underclass thesis" as an explanation for inequality in the delivery of educational services.³⁸⁹ That study also found a significant correlation between black poverty and the imposition of school discipline (in the form of suspension).³⁹⁰ As one writer observed, "[t]he difficulties of schools in teaching poor, minority children and the negative effects of labeling and teacher expectations have been well documented."³⁹¹

The environmental effect theory seeks to take into account a variety of variables. Studies have found a correlation between academic achievement and students' financial status and home environment.³⁹² Other mediators of achievement by at-risk, poor, minority students include pa-

385. See *infra* notes 431-39 and accompanying text.

386. COLEMAN, *supra* note 372, at 31-62.

387. Herbert J. Walberg, *Improving the Productivity of America's Schools*, EDUC. LEADERSHIP, May 1984, at 19, 23-24. This effect becomes more pronounced when this factor is combined with other mediators. *Id.*

388. OAKES, *supra* note 383, at vii.

389. Kenneth J. Meier et al., *The Politics of Bureaucratic Discretion: Educational Access as an Urban Service*, 35 J. AM. POL. SCI. 153, 168 (1991).

390. *Id.* at 171.

391. Arthur J. Reynolds, *Early Schooling of Children at Risk*, 28 AM. EDUC. RES. J. 393, 413 (1991) (citing James P. Comer, *Effective Schools: Why They Rarely Exist for At-risk Elementary-School and Adolescent Students*, in SCHOOL SUCCESS, *supra* note 371, at 72-88); see also James P. Comer, *Educating Poor Minority Children*, 259 SCI. AM. 42 (1988).

392. One study found that, when school resources are held constant, much of the variance in second-grade reading and mathematics could be attributed to non-school factors such as students' eligibility for free or reduced-price lunch (as a measure of public financial support), whether the students lived in a one- or two-parent household, whether the students left the school during the year (as a measure of stability), and the percentage of minority students. John Alspaugh, *Out-of-School Environmental Factors and Elementary-School Achievement in*

rental involvement (although the effects are inconsistent over time),³⁹³ school mobility;³⁹⁴ and motivation, attitude, and aptitude.³⁹⁵ Peer pressure, stressful social circumstances, the absence of positive role models, and cultural differences between the child's community and school experiences (especially linguistic differences) also may play important roles in educational performance.³⁹⁶

If, as seems indicated by the social science literature, educational disadvantage stems from a combination of forces—deficiencies in schools, families, and communities³⁹⁷—then the problem is large and likely to get worse. “Even conservative estimates put the proportion of educationally disadvantaged students at one third.”³⁹⁸ Demographic trends since 1984 indicate that “the size of the disadvantaged student population will assume unprecedented proportions in the coming [thirty] years.”³⁹⁹ First, educational disadvantage is in part a function of ethnic status; and the proportion of minorities (especially Hispanics) to whites is expected to increase dramatically so that by 2020 only one in two children will be white (as opposed to three in four today); today's majority may well become tomorrow's minority.⁴⁰⁰ Second, the number of children in poverty is expected to increase from 14.7 million to 20.1 million, or 37%.⁴⁰¹ Third, the number of single-parent families is projected to increase 30% (from 16.2 million to 21.1 million), and the number of children living with poorly educated mothers is expected to increase by 56% (from 13.6 million to 21.2 million).⁴⁰² The researchers making these projections conclude:

Mathematics and Reading, J. RES. & DEV. IN EDUC., Spring 1991, at 53; see also White, *supra* note 384, at 474.

393. Reynolds, *supra* note 391, at 414. *But see* Karl R. White, *Efficacy of Early Intervention*, 19 J. SPECIAL EDUC. 401 (1985-86) (meta-analysis of research results reported in literature does not support hypothesis that parental involvement improves efficacy of early intervention program for disadvantaged children).

394. Reynolds, *supra* note 391 at 415; Alspaugh, *supra* note 392, at 53.

395. Reynolds, *supra* note 391, at 413-14; Walberg, *supra* note 387, at 19.

396. *E.g.*, Boyd, *supra* note 378, at 347-49; Charles Whitaker, *Do Black Males Need Special Schools?*, EBONY, Mar. 1991, at 17; Shirley Brice Heath, *Oral and Literate Traditions Among Black Americans Living in Poverty*, 44 AM. PSYCHOL. 367 (1989).

397. This is the definition of educational disadvantage adopted by some researchers. *E.g.*, Aaron M. Pallas et al., *The Changing Nature of the Disadvantaged Population: Current Dimensions and Future Trends*, EDUC. RES. June-July 1989, at 16.

398. *Id.* at 18. This estimate is based on examination of background indicators and National Assessment of Educational Progress reading test scores.

399. *Id.* at 21.

400. *Id.* at 19.

401. *Id.* Indeed, that prediction appears to be rapidly materializing as the poverty rate for children rose from 19.6% in 1989 to 20.6% in 1990. DeParle, *supra* note 367.

402. Pallas et al., *supra* note 397, at 19-20.

Failure to anticipate the coming changes in the composition of the student population and to plan appropriate responses will leave us not with the same educational problems we face today, but with problems so severe and widespread as to threaten our economic welfare and even our social and political stability.⁴⁰³

According to a recent report of the Children's Defense Fund, child poverty has both widened and deepened since the 1970s, and its characteristics are changing. Almost 5 million American children live in families with annual incomes at half the poverty level (less than \$6,338).⁴⁰⁴ Although blacks make up the largest ethnic group in proportion to their share of the population, poverty is spreading to other ethnic groups as well, with two out of three poor children being white, Latino, Asian, or Native American.⁴⁰⁵ Further, this poverty is not confined to the central city, to welfare recipients, or to female-headed households. A higher percentage of poor children live outside the inner city in families whose largest source of income is wages rather than welfare, and two in five live in families with the father present.⁴⁰⁶ Finally, and most tragically, the most rapidly growing segment of the poor child population is under six years old—the most “vulnerable to developmental delay and damage caused by inadequate nutrition or health care or poor living conditions.”⁴⁰⁷ The report concludes that if the recession and recovery patterns of the 1980s are duplicated in the 1990s, the child poverty rate will top 22.8% by the year 2000.⁴⁰⁸

b. Narratives

In his recent book, *Savage Inequalities*, Jonathan Kozol sets forth the results of his personal investigation of schools in thirty disadvantaged neighborhoods across the country, including New York City, Chicago, East St. Louis, Camden, Washington, D.C., and San Antonio. What he found was a pervasive pattern of deeply segregated, glaringly inferior school systems where “social policy has been turned back almost one hundred years.”⁴⁰⁹

403. *Id.* at 21.

404. CHILDREN'S DEFENSE FUND REPORT, CHILD POVERTY IN AMERICA 2 (1991).

405. *Id.*

406. *Id.*

407. *Id.* at 7.

408. *Id.* at 6.

409. What seems unmistakable, but, oddly enough, is rarely said in public settings nowadays, is that the nation, for all practice and intent, has turned its back upon the moral implications, if not yet the legal ramifications, of the *Brown* decision. The struggle being waged today, where there is any struggle being waged at all, is closer to the one that was addressed in 1896 in *Plessy v. Ferguson*

A selection of Kozol's observations illustrates the shocking caste conditions facing underclass children in ghetto schools. East St. Louis is a compelling example. First, the conditions children endure in that community—which Kozol characterizes as “[m]etaphors of caste”⁴¹⁰—in some respects resemble those in the Third World.⁴¹¹ Because of inadequate sewage systems, raw sewage periodically floods neighborhoods in East St. Louis, and the city is also afflicted with “disturbing quantities of arsenic, mercury and lead—as well as steroids dumped in previous years by stockyards in the area.”⁴¹² Those conditions—along with air pollution from local industry, poverty, inadequate education, violent crime, substandard housing, inadequate health care, and joblessness—are responsible for the producing “some of the sickest children in America.”⁴¹³

As Kozol observes, these problems “spill over into public schools.”⁴¹⁴ For example, raw sewage has flooded East St. Louis schools, including food preparation areas. Massive layoffs have decimated the teaching staff. School facilities are crumbling, and equipment and basic texts are lacking.⁴¹⁵ The children's reactions are revealing.⁴¹⁶ Referring to the students' annual ritual of reading Dr. King's “I have a dream”

....

In many cities, what is termed “restructuring” struck me as very little more than moving around the same old furniture within the house of poverty. The perceived objective was a more “efficient” ghetto school or one with greater “input” from the ghetto parents or more “choices” for the ghetto children. The fact of ghetto education as a permanent part of American reality appeared to be accepted.

Liberal critics of the Reagan era sometimes note that social policy in the United States, to the extent that it concerns black children and poor children, has been turned back several decades. But this assertion, which is accurate as a description of some setbacks in the areas of housing, health, and welfare, is not adequate to speak about the present-day reality in public education. In public schooling, social policy has been turned back almost one hundred years.

KOZOL, *supra* note 3, at 4.

410. *Id.* at 10. Another metaphor of caste is the symbolic excision of the city from public consciousness—Kozol reports that East St. Louis was omitted from Illinois maps several years ago and the regional phone directory did not list residences or business in East St. Louis. *Id.* at 18.

411. Indeed, the Daughters of Charity, who serve the Third World, maintain a mission in the city. *Id.* at 11.

412. *Id.* at 10-11.

413. *Id.* at 20.

414. *Id.* at 23.

415. When asked what he would do with sufficient funds, one principal did not invoke fashionable terms like “restructuring” or “teacher competency,” but instead “[h]is focus is on the bare necessities: typewriters [not word processors], windows, books, a renovated building.” *Id.* at 33.

416. One student at South Bronx's Morris High—a school that offers its kids gaping holes in the floors and ceiling, a steady shower of plaster and peeling paint, and a waterfall that runs down six flights of stairs after heavy rainfall—expressed the following incisive perception of the caste dynamic:

speech, one fourteen-year-old student said, “We have a school in East St. Louis named for Dr. King. The school is full of sewer water and the doors are locked with chains. Every student in that school is black. It’s like a terrible joke on history.”⁴¹⁷ Another student’s trenchant inquiry exposes the shortcoming in the Supreme Court’s equality paradigm and illustrates the problem of caste. She wanted to know whether the children in her school are “getting what we’d get in a nice section of St. Louis.” When Kozol explained that she went to school in a different state and city, she pointedly asked, “*Are we citizens of East St. Louis or America?*”⁴¹⁸

East St. Louis is by no means an isolated example, but rather reflects a pattern replicated in other central-city school districts. As one Chicago alderman observed, “[n]obody in his right mind would send [his] kids to public school.”⁴¹⁹ Kozol recites some illuminating figures: “On an average morning in Chicago, 5,700 children in 190 classrooms come to school to find they have no teacher.”⁴²⁰ Non-achievement is the norm: The city’s overall drop-out rate has been estimated to approach 60%, and in some schools reaches 86%.⁴²¹ Of the 6,700 students entering ninth grade in Chicago’s eighteen most poverty-stricken high schools, only 300 both

See, the parents of rich children have the money to get into better schools. Then, after a while, they begin to say, “Well, I have this. Why not keep it for my children?” In other words, it locks them into the idea of always having something more. After that, these things—the extra things they have—are seen like an *inheritance*. They feel it’s theirs and they don’t understand why we should question it.

See, that’s where the trouble starts. They get used to what they have. They think it’s theirs by rights because they had it from the start. So it leaves those children with a legacy of greed.

Id. at 105.

417. *Id.* at 35.

418. *Id.* at 30 (emphasis added). Kozol reiterates her question. First, he observes that, like the members of the Antebellum caste, “[e]very child, every mother, in this city is, to a degree, in the position of a supplicant for someone else’s help . . . in much the way that African and Latin American nations beg for grants from agencies like AID.” Second, he poses the question that the caste-abolition principle would translate into a constitutional claim:

These are Americans. Why do we reduce them to this beggary—and why, particularly, in public education? Why not spend on children here at least what we would be investing in their education if they lived within a wealthy district like Winnetka, Illinois, or Cherry Hill, New Jersey . . . ? . . . What do Americans believe about equality?

Id. at 41 (emphasis added).

419. *Id.* at 53.

420. *Id.* at 52. During one period, nearly 18,000 students went without teachers two days a week; and in some schools textbooks are hopelessly inadequate or lacking altogether. *Id.* at 53-54.

421. *Id.* at 58. Kozol notes that this exorbitant dropout rate has become a planning parameter for school administrators: “If over 200,000 of Chicago’s total student population of 440,000 did not disappear during their secondary years, it is not clear who would teach them.” *Id.* at 54.

graduate and are able to read at the national average.⁴²² The course of study available to those students who manage to survive in inner-city schools often is tracked toward dead-end, entry-level jobs in the service sector.⁴²³

Kozol's visit to New York's schools revealed equally distressing conditions: "Denial of 'the means of competition' is perhaps the single most consistent outcome of the education offered to poor children in the schools of our large cities; and nowhere is this pattern of denial more explicit or more absolute than in the public schools of New York City."⁴²⁴ In New York, as elsewhere, the children most in need get the least capable teachers, the poorest equipment (if any), the worst facilities, the largest classes, almost complete racial segregation, and the worst health care (if any).⁴²⁵ Consignment of poor minority children into lower tracks, even in suburban schools, is common. The staggering deprivation of these children, and the consequently greater needs they bring with them to their grossly inferior schools, is reflected in the infant mortality rates: Congressman Bill Bradley has stated that "[a] child's chances of surviving to age five are better in Bangladesh than in East Harlem."⁴²⁶

422. *Id.* at 58-59. Wilson also reports evidence of a "shockingly high degree of educational retardation in the inner city": for example, out of 25,500 black and Hispanic students enrolled in the ninth grade in 1980 in Chicago's segregated inner-city schools, 16,000 or 63% did not graduate; and only 2,000 (7.8% of the total) of the 9,000 who did graduate could read at or above the national average. WILSON, *supra* note 210, at 57-58. These data do not specify how many students left school because they moved out of the neighborhood in which the counted school was located. But even conservative assumptions would leave a disastrously high non-achievement rate.

423. Kozol notes that "[t]he evolution of two parallel curricula, one for urban and one for suburban schools, has also underlined the differences in what is felt to be appropriate to different kinds of children and to socially distinct communities." KOZOL, *supra* note 3, at 75.

424. *Id.* at 83. Grace Torres, grade K-1, has the following insightful parable to tell about New York's treatment of its children:

The Angry Bird

The bird wanted some food. But the bad birds ate all of the food. The bird got away and she flew to another country. The birds in the other country shared the food with her.

So she stayed there and never went back to New York.

Gloria Strickland & Lois Holzman, *Developing Poor and Minority Children as Leaders with the Barbara Taylor School Educational Model*, 58 J. NEGRO EDUC. 383, 383 (1989).

425. Kozol describes one inner-city school he visited that is housed in a windowless former skating rink, where the temperature ranges from 56 degrees in the winter to 90 degrees in the summer. Thirteen hundred students crowd a school with a "capacity" of 900. Kozol watched as, in a single room measuring 25 by 50 feet, "52 people in two classes do their best to teach and learn." KOZOL, *supra* note 3, at 90.

426. *Id.* at 115-16. Kozol goes on to explain that many infants who do survive bear a lifetime injury:

The disparities between affluent public schools and conditions in the inner city are extreme, and the message of caste status communicated by those differences is not lost on the children.⁴²⁷ Kozol's narrative contrasts the conditions in Chicago's ghetto schools with, for example, the wealthy suburban school of New Trier. Ninety-three percent of New Trier's students go on to four-year colleges, many to elite institutions such as Harvard, Yale, Brown, or Princeton. New Trier sits on an inviting campus of twenty-seven landscaped acres; contains the latest in lab and computer equipment; and boasts seven gyms, a fencing room, dance studios, a wrestling room, an Olympic pool, and an FCC-licensed TV station. The curriculum is enriched, offering in addition to the excellent core academic program, music, drama, art, modern and classical languages, literature, aeronautics, criminal justice, and philosophy. Ample and highly competent personnel allow average class sizes of twenty-four (fifteen for slow learners) and personal advising by a faculty member for each student (at a ratio of about one faculty member for two dozen students). And only 1.3% of the students are black.⁴²⁸

For Kozol, who has seen both sides, "[i]t is impossible to read this without thinking of Goudy [Elementary School, not even one of Chicago's worst], where there are no science labs, no music or art classes and

In the South Bronx, says the author of a recent study by the nonprofit United Hospital Fund of New York City, 531 infants out of 1,000 require neonatal hospitalization—a remarkable statistic that portends high rates of retardation and brain damage. In Riverdale, by contrast, only 69 infants in 1,000 call for such attention.

Id. at 116. Notes a South Bronx physician,

like the often costly salvage programs of teen-age remediation for the children we have first denied the opportunity for health care, then for preschool, then for equal education, these special wards for damaged infants are provisions of obligatory mercy which are needed only as a consequence of our refusal to provide initial justice.

Id. at 117. Pervasive class- (and thus largely race-) based inequality thus affects health care as well as education. Inner-city hospitals have been reported to lack microscopes to study cultures and samples, gauze and syringes to collect blood samples, sutures, and even penicillin.

Id. at 116.

427. According to Israel, a student at Morris High, "[p]eople on the outside may think that we don't know what it is like for other students, but we *visit* other schools and we have eyes and we have brains. You cannot hide the differences." *Id.* at 104. His classmate Alexander observes,

You look around you at their school, although it's impolite to do that, and you take a deep breath at the sight of all those beautiful surroundings. Then you come back home and see that these are things you do not have. You think of the difference. Not at first. It takes a while to settle in.

Id.

428. *Id.* at 65-66. *Town & Country* magazine gushingly described New Trier's "temperate climate" as "aided by the homogeneity of its students," presumably because "[a]lmost all are of European extraction and harbor similar values." *Id.* (quoting *Let's Hear it for New Trier*, TOWN & COUNTRY, June 1986).

no playground—and where the two bathrooms [for 700 children], lacking toilet paper, fill the building with their stench.”⁴²⁹ A remedial class at Goudy contains 39 students. Teaching materials are decades out of date. Paper, crayons, and pencils must be rationed. The least competent teachers in the district are transferred there as a form of discipline.⁴³⁰

c. School Finance

One denominator here that is *not* common, of course, is money. The disparities in spending between the wealthiest and poorest school districts in many states are staggering. For example, more than 15 years after *Rodriguez*, per-student spending in Texas ranged from a low of \$2,112 to a high of \$19,333.⁴³¹ The 100 poorest districts in Texas spent an average of \$2,978 per student, while the 100 wealthiest districts spent an average of \$7,233.⁴³² On Long Island, spending per student ranges from \$17,435 in the richest district to \$7,305 in the poorest.⁴³³ This pattern is replicated in many states, under the prevalent forms of school financing that rely heavily on local property taxes and thus depend on the respective wealth of school districts. Such systems (including Texas's) have been successfully challenged on state constitutional grounds.⁴³⁴ The typical method of school finance allows affluent districts to “tax low and spend high while the property-poor districts must tax high merely to spend low.”⁴³⁵ Moreover, the disparity in spending is even greater than the raw numbers indicate, for those figures fail to reflect the enormous deficits in infrastructure that tend to absorb huge portions of already strained inner-city school budgets.

The Texas Supreme Court concluded, in view of the huge disparities in that state's school-financing scheme, that “[t]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student.”⁴³⁶ Recent scholarship has

429. *Id.* at 65.

430. *Id.* at 63-64. Similar comparisons could be made with the schools in New York and elsewhere. For example, class sizes in New York's inner-city schools reach into the 40s and 50s. Compare Kozol's description of Morris High with the public high school in Rye, New York. *Id.* at 124-26.

431. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) (*Edgewood I*).

432. *Id.* at 393.

433. *School Spending Suits in New York Area*, N.Y. TIMES, Oct. 9, 1991, at B9.

434. See *infra* notes 481-85 and accompanying text.

435. *Edgewood I*, 777 S.W.2d at 393.

436. *Id.* The court continued:

High-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out preven-

linked resource deprivation with, for example, educational outcomes in math and science:

While there is little evidence that the actual quantity of resources available to schools, teachers, and students has a direct effect on learning or willingness to persist in science and mathematics, resources are enablers. They provide the context in which schools and classrooms operate; they often define the outer limit of what is possible. For example, if a school has no science laboratory facilities, even the best-prepared teachers will be unable to engage students in laboratory work.⁴³⁷

That study found, for example, that students at high-minority, inner-city schools "had access to far fewer computers" than their affluent, white counterparts, "even when computers were available."⁴³⁸ The study concluded, not surprisingly, that "[s]tudents in high-poverty, high-minority, and inner-city schools, more than others, have resource constraints that affect the quality of their science and mathematics programs."⁴³⁹

C. Violation of the Caste-Abolition Principle

1. *Children of the Caste*

The Third World conditions facing children in America's inner-city schools ought to shock the conscience of any decent society as affluent as ours. The caste-abolition principle, however, is relativistic. No indicia of a caste system arise from poverty, lack of education, or joblessness in a society where everyone is poor, illiterate, and unemployed. But that is not the case in the United States. Ours is not a Third World country. The existence of such severely distressed communities here, and the maintenance of school systems so inadequate that they almost guarantee

tion programs. They are also better able to attract and retain experienced teachers and administrators.

Id.

437. OAKES, *supra* note 383, at 68.

438. "Schools with 90 percent or greater minority populations had an average of 1.76 computers per 100 students; schools with less than 90 percent minorities averaged about 2.70. Inner-city schools averaged 1.88; other urban schools, 2.48; suburban schools, 2.80; and rural schools, 2.86." *Id.* at 72-73 (footnotes omitted).

439. *Id.* at 75. A 1987 study of Chicago's high schools found

dramatic differences in graduation rates, in percentages taking college admissions tests, and in college test scores, and all of these were related to racial and economic differences. Racial differences between schools were very closely linked to economic differences. All schools with the highest ratings were middle class and almost entirely white, while those at the other extreme were virtually all minority and predominantly poor.

Orfield, *supra* note 371, at 54 (citing Jim Garrett, Metropolitan Chicago Public High Schools: Race, Poverty, and Educational Opportunity (June 1987) (Metropolitan Opportunity Project: Working Paper No. 5, University of Chicago)).

that children born into abject poverty will stay there, evidences the creation and perpetuation of a caste society.

The foregoing findings and narratives suggest that the possibility of any meaningful participation in "mainstream" American social and economic life will remain remote for underclass children. Assuming that adequate education is a necessary condition to such participation, a point that seems beyond dispute,⁴⁴⁰ and in view of the dramatic increase in child poverty and the demonstrated link between the social and economic conditions of the underclass and educational disadvantage, it seems clear that the two problems perpetuate one another. Children from the underclass are especially at risk when they enter school, largely as a consequence of their underclass status—which is often characterized by poverty, a distressed environment, a single-parent household, and cultural differences. This risk often translates into academic and disciplinary difficulty, which further frustrates their chances for economic advancement and contributes to the cycle of joblessness, dysfunctional behavior, and welfare dependency. Disadvantage thus begets disadvantage, locking the underclass into its caste status. According to Wilson, this process transpires within a context of social and economic isolation from the other American classes and from access to employment opportunity.⁴⁴¹ And this Article has attempted to show how prevailing constitutional paradigms contribute to that isolation.

America's urban poor children are subjected to the caste-creating and caste-perpetuating condition of "savage inequality" in their education. First, the squalor of many inner city schools is dehumanizing enough; but the point that these children simply do not count as human beings of comparable intrinsic worth is driven home by the sharp contrast between the educational experience society provides them and that offered to students in affluent school districts. Second, when even the brightest and most highly motivated student faces almost insuperable obstacles in ghetto schools, it is no wonder that most children either drop out or graduate with huge deficiencies in basic skills. And the prevalent form of school financing leaves their parents with little power as a practical matter to bring central-city schools anywhere close to achieving parity.⁴⁴² The conditions are so bad that for many children the result is no real education at all. Consequently, these children are effectively de-

440. See *supra* note 98 and accompanying text.

441. See *supra* notes 349-61 and accompanying text.

442. As the Supreme Court of Texas observed, "[p]roperty-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves." *Edgewood I*, 777 S.W.2d at 391, 393.

prived of the one real avenue out of the vicious cycle of poverty and despair that is theirs solely by accident of birth. They thus are effectively excluded from an opportunity to participate in the remainder of society. They are forced into the caste.

2. *Manageability of the Principle*

Although a finding of caste-creating and cast-perpetuating conditions rests in part on qualitative judgments about a combination of factors, the standard of extreme dehumanization, powerlessness, and exclusion is nevertheless a manageable one for courts. Although the caste-abolition principle is relativistic and seeks to identify a constellation of caste-creating factors, a determination whether a violation is occurring does not involve either of the two kinds of balancing that characterize much of the Supreme Court's constitutional jurisprudence.⁴⁴³ Under the categorical approach, the Court balances broad institutional concerns—separation of powers, for example—in determining the taxonomic scope of constitutional rights. Thus, as the Court stated in *Dandridge*, reluctance to intrude into the legislative domain and a sense of the judiciary's institutional limitations contributed to the Court's rejection of a claim to a fundamental right to minimum subsistence. This kind of balancing sometimes leads the Court to deny the existence of a right for fear of the judiciary's remedial impotence; as Professor Tribe put it, "reservations about remedies masquerade as questions about the existence of constitutional violations."⁴⁴⁴ The other kind of balancing is more ad hoc than definitional, and weighs competing governmental interests against claims of private right in determining whether the right has been violated in a particular case.⁴⁴⁵

The institutional concerns that motivate the Court to deny a right's existence at all, or to take a constrained view of a right's scope, need not preclude or sabotage a claim under the caste-abolition principle. For one thing, there is a rich historical record of caste conditions in America to serve as a frame of reference. Second, because the standard is comparative, it rests not on an individual judge's personal conception of the good life, but rather on the extent and impact of the disparities between groups. Third, as discussed above, the standard is not one of wholesale

443. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

444. TRIBE, *supra* note 10, at 1502-14.

445. For example, although the Supreme Court has recognized a prisoner's right to be free of unconsented administration of psychoactive medication, the Court also has upheld the forced administration of such drugs under a procedure that passed the Court's deferential balancing of penological concerns. *Washington v. Harper*, 494 U.S. 210 (1990).

distributive egalitarianism in which everyone must win a perfectly equal share of the pie. Instead, the caste-abolition principle prohibits conditions so extreme as to *exclude* a sector of the population from even entering the competition. Fourth, the fact-finding and decisional requirements of the caste-abolition principle are no more obstreperous than many others routinely confronting courts, such as the propriety of punitive damages,⁴⁴⁶ the existence of discriminatory intent,⁴⁴⁷ and the propriety of capital punishment in a particular case.⁴⁴⁸ Whether a Supreme Court more sensitive to, and better informed of, contemporary underclass conditions would have reached a different conclusion under the Court's fundamental rights/suspect class paradigm in *Rodriguez* is impossible to say. But there appears to be sufficient evidence in some communities to sustain a *prima facie* case of a violation of the caste-abolition principle, and *Plyler* demonstrates that a court can make analogous findings when presented with an adequate record. The remaining question concerning judicial manageability of the principle thus is one of remedy.

D. Remedies

The first question in addressing the issue of appropriate remedies under the caste-abolition principle is conceptual. What should inform a court's remedial considerations? It is here that a court should take into account the interests that the Supreme Court currently balances at the rights-recognition or liability-determination stage. A court's equitable powers are much better suited to that kind of balancing at the remedial stage than is the Court's current approach, which results in an incomplete conception of constitutional requirements and an aggravation of the caste problem.⁴⁴⁹

Under the caste-abolition principle, a finding that the caste-creating conditions of dehumanization, powerlessness, and exclusion are operative suffices to establish a violation, without the need to weigh competing governmental interests. This finding gives rise to an obligation on the part of the state to remedy the caste-creating condition. Judge Easterbrook recently argued the converse of the rights-versus-remedy problem: "Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements."⁴⁵⁰ According

446. *E.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991).

447. *E.g.*, *Hernandez v. New York*, 111 S. Ct. 1859 (1991).

448. *E.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972).

449. *See supra* notes 15-124 and accompanying text.

450. Frank H. Easterbrook, *Civil Rights and Remedies*, 14 Harv. J.L. & Pub. Pol'y 104 (1991).

to Judge Easterbrook, disputes over school desegregation decrees, for example, often really are concerned with the underlying conflict between individual versus group rights and the corresponding conflict between governmental neutrality toward race versus governmental obligation to achieve racial balance.⁴⁵¹ The caste-abolition principle seeks to hurdle that substantive gap by providing a clearer articulation of the underlying constitutional obligation, an articulation which avoids entanglement in the intractable debate over "color-blindness" and state action, as well as the enigma of intent.

Once the substantive underbrush is cleared away and the court has focused on the caste conditions that require remediation, it is free to engage its broad equitable powers to mandate an appropriate remedy. As stated above, that deliberation ought to include consideration of the legitimate concerns that the Supreme Court has misplaced at the rights-recognition stage, while ensuring accomplishment of meaningful remedial objectives. A principal concern is avoidance of the tendency toward judicial micromanagement that characterizes remedies in school desegregation cases.⁴⁵² Another is the preservation of federal-state comity that is threatened by such judicial intervention.⁴⁵³

The primary remedial question is whether to focus on educational results rather than resources. The so-called "excellence movement" in education, which grew out of American students' declining performance on achievement and aptitude tests, is one example of result-based reform.⁴⁵⁴ That movement has produced legislative adoption of minimum performance standards in most states, and the proposal by the President of the United States and the governors of all fifty states of a "Jeffersonian compact" to attain national performance goals for all schools.⁴⁵⁵ The problem with the excellence approach, according to James Leibman, is that "the imposition of higher standards on poor and minority children than they currently can satisfy, without a concomitant change in instructional environment, can only hurt those children."⁴⁵⁶ Politically popular

451. *Id.* at 104-05.

452. One account of an historically significant example of this struggle is Henry Woods & Beth Deere, *Reflections on the Little Rock School Case*, 44 ARK. L. REV. 971 (1991). For an argument that such concerns animated and justified the Court's conclusion in *Rodriguez*, see Robert W. Bennett, *The Burger Court and the Poor*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 46, 53-55 (Vincent Blasi ed., 1983).

453. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973).

454. For a description of the excellence movement and extensive citation to the literature, see Leibman, *supra* note 99, at 371-77.

455. *Id.* at 373-74.

456. *Id.* at 376. "The situation is exacerbated by the fact that many states have enacted minimum-standards legislation without providing remedial services to children who do not

because it does not directly mandate redistributive policies for educational reform, the excellence movement leaves disadvantaged children at an even greater disadvantage because performance standards "are used in fact to mark disproportionate numbers of poor and minority children as failures and thereby to deprive them of higher educational and employment opportunities."⁴⁵⁷ Absent some means to coerce provision of adequate resources for the attainment of performance standards, the excellence movement appears more likely to perpetuate caste conditions than to remedy them.⁴⁵⁸ Indeed, the existence of legislatively mandated academic performance standards, without provision for accomplishing them in poor and minority schools, itself evidences the caste-creating propensity of severely inadequate education.

Other, more aggressive result-based proposals conflict with concerns of separation of powers and federalism. For example, Denise Morgan argues that the Constitution creates a property right in a minimally adequate education, which is to be enforced through a remedial focus on

meet the standards on the first try, thus suggesting that the standards' primary purpose is exclusion, not diagnosis or resource allocation." *Id.*

457. *Id.* at 375 n.100. Gary Orfield concurs:

If the schools offered to the 29 percent of American families who live in central cities are consistently unequal to those provided the 48 percent of families who live in suburban areas and if the vast majority of nonwhite students continue to attend declining central city schools, then a major inequality will be compounded if state governments adopt policies [such as "excellence" reforms] that have the effect of penalizing central-city students for the inferior schools they attend without addressing any of the underlying causes of the inequalities or providing the additional help needed in such schools.

Orfield, *supra* note 371, at 55. *But see*, GENERAL ACCOUNTING OFFICE, EDUCATION REFORM: INITIAL EFFECTS IN FOUR SCHOOL DISTRICTS (1991) (concluding that, at least in the districts studied, school reforms in four urban districts had neither helped nor hurt the academic performance of educationally disadvantaged students).

458. Leibman proposes use of "the enactment into law of minimum educational-performance standards as a basis for inferring and enforcing a democratically legitimated obligation on the part of public authorities to distribute to children the educational means necessary to satisfy those standards." Leibman, *supra* note 99, at 378. His proposal has the distinct advantage of using the political outcome of the widely popular excellence movement as a majoritarian basis to legitimize a judicially enforced redistributive agenda, rather than relying on "judicially 'discovered' constitutional norms." *Id.* at 379. Nevertheless, I believe that there remains a place for discourse about the content of constitutional norms, even in the 1990s and especially at the federal level. *See infra* notes 486-90 and accompanying text. Moreover, the remedial impact of Leibman's proposal is contingent on the legislative or regulatory creation of performance standards to serve as a majoritarian expression of a remedial duty. In any event, the caste-abolition principle and Leibman's proposal are not mutually exclusive. The first derives from a constitutional obligation to remedy social conditions that degrade, exclude, or disempower a group of citizens. The second derives from an inferred statutory obligation to keep an implied legislative promise. It seems likely that the two categories of claimants will largely overlap.

educational outcomes rather than inputs.⁴⁵⁹ Although there are important differences between the substantive basis for the claim she describes and the caste-abolition principle,⁴⁶⁰ the similarities do allow a meaningful comparison of remedies.

The range and complexity of educational reforms currently in vogue, apart from the excellence movement, raise a risk of overreaching by a court that focuses on educational outcomes rather than public inputs. For example, James Comer, who has achieved enviable success in reforming disadvantaged schools in New Haven and elsewhere, has emphasized remedying the “sociocultural misalignment between home and school” by “fostering positive interaction between parents and school staff,” training staff in child development, establishing a bond between the child and the school, engaging parents in the educational process, and fostering a team approach to education that brings all participants—teachers, administrators, support personnel, parents, and children—into a cooperative group.⁴⁶¹

Other studies illustrate the complex factors involved in improving the school success of children at risk. One scholar has directed reform attention toward mediators such as cognitive readiness in kindergarten, and found that variables that can be altered by families and schools—such as pre-kindergarten experience, motivation, mobility, and parental involvement—have a demonstrable impact on early school outcomes.⁴⁶² Another has asserted that “[w]hat might be called the ‘alterable curriculum of the home’ is twice as predictive of academic learning as is family [socioeconomic status].”⁴⁶³ Another approach contends that at-risk children need more than teaching of basic skills, and offers a model that focuses on overcoming social barriers to development.⁴⁶⁴

Some proposals, such as multiculturalism, emphasize the role of culture in education. For example, one writer has criticized traditional schools’ inability “to recognize and take up the potentially positive interactive and adaptive verbal and interpretive habits learned by Black American children (as well as other non-mainstream groups), rural and

459. Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 H. BLACKLETTER J. 99 (1991).

460. One difference is that the caste-abolition principle has a potentially broader sweep and arguably could be extended to address other underclass conditions, such as chronic joblessness.

461. Comer, *supra* note 391, at 44.

462. Reynolds, *supra* note 391.

463. Walberg, *supra* note 387, at 25.

464. Those barriers include the “isms” (racism, sexism, classism, anti-Semitism, homophobia); forcing children to repress emotions rather than learning how to develop and to express them; and abuse (sexual, verbal, assaultive, and substance). Strickland & Holzman, *supra* note 424, at 385-86.

urban, within their families and on the streets.”⁴⁶⁵ Another team of writers decries the paucity of black teachers and emphasizes the role of the university in preparing teachers to cope with ghetto schools.⁴⁶⁶ And the perceived need to provide black male students (who appear to be especially at risk for educational failure) with positive role models and a sufficiently supportive environment has led to controversial experiments in special school programs for inner-city black male students.⁴⁶⁷

Any court that attempts to select from this smorgasbord of reforms will quickly find itself immersed in micromanagement and the nuances of pedagogical judgment. Performance- or outcome-oriented remediation of educational inequality thus raises serious concerns about judicial intrusion into pedagogical decision-making⁴⁶⁸ and respect for federal-state comity.⁴⁶⁹ Further, as mentioned above, given the demonstrable impact of private (especially family) inputs on educational outcomes, judicially coerced interventions that depend on educational results could raise countervailing privacy claims by parents.⁴⁷⁰

Focusing instead on the equalization of public inputs, specifically the funds allocated to public education, would avoid those difficulties. This method would require approximately equal allocation of funding to schools across the state. Such relief would be prospective only, and therefore would not violate the Supreme Court’s interpretation of the

465. Heath, *supra* note 396, at 370.

466. Leonard C. Beckum et al., *The Urban Landscape: Educating for the Twenty-First Century*, 58 J. NEGRO EDUC. 430 (1989). Others have offered teacher training programs designed to improve performance in urban schools. *E.g.*, H. Jerome Freiberg et al., *Turning Around At-Risk Schools Through Consistency Management*, 58 J. NEGRO EDUC. 372 (1989).

467. *E.g.*, Charles Whitaker, *Do Black Males Need Special Schools?*, EBONY, Mar. 1991, at 17; Brenda Gilchrist & Robert Musial, *Detroit Board Allows Girls into Academies, It Plans to Keep Fighting for All-Male Schools*, DET. FREE PRESS, Aug. 28, 1991, at 1A.

468. A common law expression of such concern is evident in the many cases refusing to recognize a tort claim for “educational malpractice.” *See generally* JOHN COLLIS, EDUCATIONAL MALPRACTICE (1990). This deference to pedagogical judgment does not ignore the numerous criticisms of the American system of educating the educators. *See, e.g.*, NATIONAL COMM’N FOR EXCELLENCE IN TEACHER EDUC., A CALL FOR CHANGE IN TEACHER EDUCATION (1985). Rather, the point is that such concerns may lie beyond the reach of viable constitutional principle. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978).

469. *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

470. *See supra* note 386 and accompanying text. Indeed, the precedential roots of the modern constitutional privacy right are traceable to two education cases: Meyer v. Nebraska, 262 U.S. 390 (1923); and Pierce v. Society of Sisters, 268 U.S. 510 (1925). The relationship between private inputs and educational results, however, might serve in part as a basis for a claim for job training and other social programs for parents under the caste-abolition principle. The caste-creating potential of chronic joblessness itself might also give rise to a such a claim by the parent (or childless adult) on his or her own behalf as well, apart from the instrumental relationship to the child’s education.

Eleventh Amendment's bar to suits for retroactive monetary relief.⁴⁷¹

To be sure, as the foregoing catalogue of reform proposals indicates, more money will not solve all the problems of the underclass in general or ghetto schools in particular. But perfect, or even approximate, social equality is not the test. Just because " 'equal opportunity across the board' will not automatically 'produce equality' in school performance[,] . . . 'one doesn't force a losing baseball team to play with seven men.' "⁴⁷² Equalization of funding would be a substantial step toward relieving the grossest inequalities, which are the immediate focus of the caste-abolition principle, but would not result in strict egalitarianism. As noted above, it would take far more than equal spending to bring ghetto schools into parity with wealthy suburban schools. The deficit has been too large for too long for equal allocation to produce complete catch-up now.⁴⁷³

A principal prudential advantage of this remedial approach is that it would leave the details of implementation to the public officials of each state. They would be free to choose how to fund that equalization, whether through the "Robin Hood" technique of redirecting funds from affluent to poverty-stricken schools, or through raising taxes, or some combination of the two.⁴⁷⁴ And the principle would not require entanglement in the internal management of inner-city school districts. School administrators would not be under the direct supervision of the courts, and their operational decisions would not be subject to ongoing judicial review. Inner-city residents who complain that their school districts are mismanaged would have to seek what relief they can within their districts where it currently is available—at the ballot box.⁴⁷⁵

The caste-abolition principle therefore would operate as a constitutional minimum with ample room for majoritarian decision-making. Thus, this remedial scheme would not violate the democratic principle of "no taxation without representation."⁴⁷⁶ Instead, it would constrain

471. As the Court observed in *Missouri v. Jenkins*, "the Eleventh Amendment does not bar federal courts from imposing on the States the costs of securing prospective compliance with a desegregation order, [*Milliken v. Bradley*, 433 U.S. 267, 290 (1977)], and does not afford local school boards . . . immunity from suit, [*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977)]." 110 S. Ct. 1651, 1665-66 n.20 (1990).

472. KOZOL, *supra* note 3, at 77.

473. In any event, no remedial measure should be whipsawed between a test that requires achievement of perfect results in terms of equality, and then condemns the operative constitutional principle as violative of libertarian norms.

474. For a description of the options available for restructuring school finance, see Robert L. Manteuffel, Comment, *The Quest for Efficiency: Public School Funding in Texas*, 43 Sw. L.J. 1119 (1990).

475. For a study of the relationship between electoral politics and bureaucratic responsiveness in school boards, see Meier, *supra* note 389.

476. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

majoritarian allocation of revenues. It would not mandate any particular level of educational achievement for students, nor would it demand any particular state-wide level of educational investment. The electorate would remain free to provide for their children just as much ignorance as desired,⁴⁷⁷ subject perhaps to some absolute minimum (as discussed below). But the one thing they clearly could not do is single out any group of children on any basis (racial, geographic, or socioeconomic), and allocate for them substantially fewer resources. Thus, reforms based on institutionalized reallocation of inequality, such as magnet schools and parental-choice plans, would not suffice.⁴⁷⁸

There is precedent for this kind of approach at both the federal and state level. The Supreme Court's recent decision in *Missouri v. Jenkins* recognizes extremely broad equitable powers in federal district courts to order remedial measures that require enormous public expenditures, to apportion the cost between state and local governmental entities, and to enjoin application of state constitutional provisions that interfere with the ability of school districts to raise revenue to fund such measures. Although the Court pretermitted the state's objection to the scope of the district court's order, the Supreme Court nevertheless reasoned that "the enforcement of a money judgment against the State did not violate prin-

477. California apparently chose, via Proposition 13, to take the low road after the California Supreme Court mandated equalization of per-pupil expenditures in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) and *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976): "The amount spent per pupil in each district has been nearly equalized, but by 1983, California had fallen from eighteenth to forty-fifth in the proportion of personal income spent on schools." Joseph T. Henke, *Financing Public Schools in California: The Aftermath of Serrano v. Priest and Proposition 13*, 21 U.S.F. L. REV. 1 (1986).

478. "The *Chicago Tribune* has called the magnet system, in effect, a 'private school system . . . operated in the public schools.' Very poor children, excluded from this system, says the *Tribune*, are 'even more isolated' as a consequence of the removal of more successful students from their midst." KOZOL, *supra* note 3, at 59. This assessment is buttressed by studies showing that an important mediator in student performance is placement with other, high-achieving students. See *supra* notes 381-96 and accompanying text. Kozol goes on to state that "[t]he magnet school system is, not surprisingly, highly attractive to the more sophisticated parents, disproportionately white and middle class, who have the ingenuity and, now and then, political connections to obtain admission for their children." KOZOL, *supra* note 3, at 59. By contrast,

[t]he poorest parents, often the product of inferior education, lack the information, access and the skills of navigation in an often hostile and intimidating situation to channel their children to the better schools, obtain the applications, and (perhaps a little more important) help them get ready for the necessary tests and then persuade their elementary schools to recommend them.

.....

[Thus, t]he system has the surface aspects of a meritocracy, but merit in this case is predetermined by conditions that are closely tied to class and race. While some defend it as "the survival of the fittest," it is more accurate to call it the survival of the children of the fittest—or of the most favored.

Id. at 60.

ciples of federalism because '[t]he District Court . . . neither attempted to restructure local governmental entities nor . . . mandat[ed] a particular method or structure of state or local financing.'⁴⁷⁹ The plan upheld in that case provided for an enormous \$200 million enhancement of most of the schools within the Kansas City, Missouri, School District to create a magnet school in every high school, every middle school, and half of the elementary schools. Justice Kennedy's description of some aspects of the program, which bear a striking resemblance to the kinds of enrichments offered at schools like New Trier, illustrates the extent of a federal court's power to address educational inequalities.⁴⁸⁰ Although federal-state comity may limit a federal court's ability directly to impose taxes to finance a remedial program, federal courts possess extensive equitable powers to correct constitutional wrongs—powers that include requiring large-scale redistributive efforts to equalize educational opportunity. Compared to the luxurious Kansas City order, the requirements of the equal-finance remedy under the caste-abolition principle appear modest.

At the state level, several courts have overturned school funding schemes on state constitutional grounds,⁴⁸¹ and more litigation is on the

479. 110 S. Ct. 1651, 1664-65 (1990) (quoting *Milliken v. Bradley*, 433 U.S. 267, 291 (1977)).

480. *Id.* 110 S. Ct. at 1668 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's observations deride what he seemed to perceive as extravagances. One cannot help but wonder whether he would have adopted a similar attitude had he been describing to a friend the enrichments offered in his own children's schools. This kind of classism and insensitivity has appeared in Supreme Court decisions recently with disturbing frequency. See Donald P. Judges, *Confirmation as Consciousness-raising: Lessons for the Supreme Court from the Clarence Thomas Confirmation Hearings*, 7 ST. JOHN'S J. LEGAL COMMENT (forthcoming 1992); Donald P. Judges, *Keeping the Faith?: The Lower Courts' Dubious Interpretation of Lynch v. Donnelly and Stare Decisis*, 24 U. WYO. LAND & WATER L. REV. 167, 186-87 (1989).

481. *E.g.*, *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684 (Mont. 1989); *Seattle Sch. Dist. v. State*, 585 P.2d 71 (Wash. 1978); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (*Robinson I*); 306 A.2d 65 (N.J. 1973) (*Robinson II*); 335 A.2d 6 (N.J. 1975) (*Robinson III*); 351 A.2d 713 (N.J. 1975) (*Robinson IV*); *DuPree v. Alma Sch. Dist.*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).

The seminal article in the campaign for equality of educational opportunity at the state constitutional level is John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969). For a selection of commentary on the educational finance cases, see Manteuffel, *supra* note 474; William E. Sparkman & Michael P. Stephens, *Commentary: Texas School Finance System Unconstitutional*, 57 W. EDUC. L. REP. 333 (1990); Donald S. Yarab, Comment, *Edgewood Independent School District v. Kirby: An Education in School Finance Reform*, 40 CASE W. RES. L. REV.

way.⁴⁸² Many state constitutions contain some express provision for public education,⁴⁸³ and a common requirement is that the system be "efficient."⁴⁸⁴ Texas and New Jersey, for example, are now working to implement court-ordered equalization measures. Litigation in the state courts provides a valuable basis of experience for implementation of a federal constitutional remedy, and demonstrates that a finance-equalization remedy is both judicially conceivable and articulable.⁴⁸⁵

As promising as constitutional developments are at the state level,⁴⁸⁶ it nevertheless would be a mistake to rely completely on state constitutional remedies. First, and by far most importantly, federal constitutional imperatives simply cannot be ignored, whether because of substantive disagreement⁴⁸⁷ or in the interests of convenience.⁴⁸⁸ If the caste-abolition principle is a correct interpretation of the Civil War Amendments, and if gross inequalities in educational opportunity are caste-creating and -perpetuating conditions, then the Supremacy Clause commands relief as a matter of federal law, even if analogous relief is also available as a matter of state law. The presence in many state constitutions of protections for freedom of expression, for example, does not argue in favor of consigning the First Amendment to desuetude.

Second, despite the growing number of challenges to school finance schemes at the state level, children in states where no such challenges develop or succeed will remain at risk for the caste-creating effects of unequal educational opportunity.⁴⁸⁹ Furthermore, challenges at the state level are available only so long as state constitutions contain protections for education. Analogous reform efforts in the past have resulted in reac-

889 (1990); Hubsch, *supra* note 323; Jamie Plosia, Note, *Equal Educational Opportunity Revisited: Abbott v. Burke and the "Thorough and Efficient Law" in New Jersey*, 40 RUT. L. REV. 193 (1987); Henke, *supra* note 477.

482. Robert Suro, *Equality Plan on School Financing is Upsetting Rich and Poor in Texas*, N.Y. TIMES, Oct. 9, 1991, at B9, (lawsuits challenging school finance systems are pending in 22 states).

483. For a collection of citations, see Morgan, *supra* note 459.

484. For citations, see Yarab, *supra* note 481, at 889 n.4.

485. See, e.g., *Edgewood I*, 777 S.W.2d 391; *Edgewood II*, 804 S.W.2d 491.

486. Such developments are not confined to school finance. Some state courts, for example, have found a more vigorous protection for reproductive freedom in their constitutions than the one the Supreme Court seems to be losing in the federal Constitution. See, e.g., *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (construing privacy right in art. 1, § 23, of the Florida Constitution as extending protection to a greater range of privacy interests, and to a greater extent, than the United States Constitution—including a woman's right to make her own decisions concerning continuing pregnancy).

487. *Cooper v. Aaron*, 358 U.S. 1 (1958).

488. *INS v. Chadha*, 462 U.S. 919 (1983); *Reynolds v. Sims*, 377 U.S. 533 (1964).

489. For an overview of the obstacles such challenges face in many states, including judicial reluctance to interfere in legislative discretion, see Hubsch, *supra* note 323, at 115-27.

tionary amendments to state constitutions.⁴⁹⁰

Third, recognition of a federal constitutional caste-abolition principle, and its application to unequal funding of education, might become necessary to prevent a state's affluent and middle-class voters from forming a coalition powerful enough to abandon public education by wholesale reductions and tax cuts to instead rely *en masse* on private schools for their children. Although the starting place for the caste-abolition remedy would be equality of public school finance, the principle would preclude the creation of a caste system through systemic reliance on private education. If the net effect of either a dual funding system or a unitary but grossly inadequate funding scheme for public schools is to produce a dehumanized, powerless, and excluded class of undereducated children, then the caste-abolition principle would require remediation.⁴⁹¹ In the case of the effective shut-down response, the proper remedy presumably would be a judicially mandated minimum level of statewide public school expenditure. This approach would be more intrusive than an equalization order, and therefore should not be employed absent extraordinary circumstances.

Finally, unlike state constitutional claims, the caste-abolition principle raises the possibility of a claim against the federal government.⁴⁹² This is a question of substance, not remedy; and it is largely beyond the scope of this Article. I therefore will only mention a few considerations that ought to form the basis for further inquiry. Federal (as well as state) claims might be brought in the domains of job and job training programs, subsistence, health care, and shelter, as well as in education. Such claims would be grounded directly on the heavy contribution to the maintenance of the caste's subjugated status of chronic poverty, long-term unemployment, and inadequate health care, and homelessness, as well as indirectly on the demonstrable relationship between such non-school fac-

490. See *supra* notes 75-76 and accompanying text (discussing *Reitman v. Mulkey* and *James v. Valtierra*).

491. This "shut-down" context further illustrates the power of the caste-abolition principle's focus on conditions rather than intent. The principle thus avoids the problems presented by *Palmer v. Thompson*, 403 U.S. 217 (1971) (upholding facially neutral municipal decision, in the face of a court order to desegregate its public facilities, to close five swimming pools—ostensibly to avoid violence and economic loss), and *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (holding unconstitutional—as evidence of intent to avoid desegregation—the county's closing of its public schools and funding of discriminatory private schools). The principle also avoids the refined distinctions between *Mobile v. Bolden*, 446 U.S. 55 (1980) (upholding at-large voting system for lack of a showing of discriminatory intent), and *Rogers v. Lodge*, 458 U.S. 613 (1982) (invalidating similar at-large system based on record of historical circumstantial evidence of discriminatory intent).

492. The textual basis for such a claim, as in other contexts, would be the Due Process Clause of the Fifth Amendment. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

tors and educational achievement.⁴⁹³

Such claims, however, would have to reconcile recognition of an affirmative, judicially enforceable obligation to act with the deference-suggestive wording of the enabling clauses of the Civil War Amendments, providing that Congress "shall have the power" to enforce the substantive provisions "by appropriate legislation."⁴⁹⁴ Nevertheless, the Civil War and Reconstruction stand as dramatic examples of the federal government's recognition of its obligation to take heroic steps toward abolition of a caste society. As suggested above, the Civil War Amendments, with their enabling clauses, can be intelligibly understood as articulating a powerful demand on subsequent generations not to let such a deplorable state of social conditions develop and a call to future citizens to demand positive intervention from their governments, state and federal, when such a threat arises.⁴⁹⁵

Conclusion

These are innocent children, after all. They have done nothing wrong. They have committed no crime. They are too young to have offended us in any way at all. One searches for some way to understand why a society as rich and, frequently, as generous as ours would leave these children in their penury and squalor for so long—and with so little public indignation.⁴⁹⁶

The children who live in the caste status of the underclass will pass their entire lives largely in a blind spot in our constitutional vision. The Court and much of society deny those children's very existence as a constitutionally meaningful group, ignore the obvious ways in which government shapes their lives, and often address problems of social justice through means that leave them no better and sometimes worse off. This

493. See *supra* notes 381-96 and accompanying text.

494. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) (federal affirmative action program entitled to more deferential judicial review than state program); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (congressional power under Section 2 of the Thirteenth Amendment is as broad as it is under the Necessary and Proper Clause); *City of Rome v. United States*, 466 U.S. 156 (1980) (same with respect to Section 2 of the Fifteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (same with respect to legislation, enacted under Section 5 of the Fourteenth Amendment, prohibiting literacy tests as a condition on the franchise). *But see Oregon v. Mitchell*, 400 U.S. 112 (1970) (Congress lacks power under Section 5 of the Fourteenth Amendment to establish a minimum age of 18 years to vote in state and local elections); *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (applying strict "plain statement" rule to age discrimination legislation, enacted under Section 5 of the Fourteenth Amendment, and construed not to apply to state constitutional provision requiring mandatory retirement of most state court judges at age 70).

495. See *supra* notes 281-93 and accompanying text.

496. KOZOL, *supra* note 3, at 40.

result is justified in part by dire predictions of grave threats to the integrity of the republic posed by interpretive regimes under which the Constitution would demand even partial redress of those conditions.

This state of affairs ought to be cause for amazement and outrage. A legitimate, coherent, and manageable interpretive principle—the caste-abolition principle—is available to address one of the most devastating components of the underclass process. It would require straightforward, albeit forceful, steps to accomplish the simple, just, and socially responsible goal of providing *all* our children with a modicum of equal educational opportunity. Surely such a requirement poses less danger to the fabric of our society than the irretrievable and inexcusable waste of a substantial and growing part of our collective future.