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Stephen L. Carter
Stephen.Carter@chicagounbound.edu

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Racial Harassment as Discrimination: A Cautious Endorsement of the Anti-Oppression Principle

Stephen L. Carter†

You, too, will suffer under Pontius Pilate
And feel the rugged cut of rough hewn cross
Upon your surging shoulder—
They will spit in your face
And laugh . . .
They will nail you up twixt thieves
And gamble for your little garments.
—Frank Horne, from On Seeing Two Brown Boys in a Catholic Church

I will address racial harassment on college campuses and the growing and controversial efforts to regulate it. As the First Amendment issues involved in regulation have been extensively canvassed elsewhere, I will consider instead whether one might usefully think about harassment as discrimination—as some scholars have lately suggested—and whether, if harassment is so envisioned, it might run afoul of the Equal Protection Clause of the Fourteenth Amendment. I will use the problem of harassment to illuminate three approaches to Fourteenth Amendment jurisprudence, discussing the strengths and weaknesses of each and explaining which approach seems to be most sensible, and why.

I will suggest that for an originalist, what I call the anti-oppression principle might well be the most coherent model for

† William Nelson Cromwell Professor of Law, Yale University. I have had the benefit of research assistance by Beth Deane and Yasmin Cader.


* See, for example, Charles Lawrence's view in Lawrence & Gunther, 24 Stan Lawyer at 40; Matsuda, 87 Mich L Rev 2320; Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 Nw U L Rev 343 (1991); Strossen, 1990 Duke L J 484.
resolving equal protection claims. Then, reading doctrine through the glass of this principle, I conclude (tentatively, I admit) that although much of what is termed racial harassment is permissible, if horrible, a Fourteenth Amendment action ought to lie if a state school refuses to protect its students of color from harassment that has analogues in forms of torment from which white students are protected—a situation that might be more common than it first appears.

As the title of this Article suggests, however, my conclusion is so far a tentative one. The reason for my caution relates to my approach to constitutional interpretation. I prefer models of constitutional interpretation resting on the text, structure, and history of the document itself; I suppose one would have to say that I am an originalist.4 At this point, however, my historical understanding of the framing of the Fourteenth Amendment rests entirely on a study of a handful of secondary sources. In a longer work now in progress, I will mine the primary sources; for the purposes of this Article, let it suffice to say that my statements about the history should be taken as the very preliminary notions that I intend.

I. RACIAL HARASSMENT ON COLLEGE CAMPUSES

A. Racial Harassment Codes

The end of segregation and the subsequent rise of affirmative action has brought onto the campuses of the nation’s most prestigious colleges and universities unprecedented numbers of students

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It might possibly be argued that strategies other than originalism are legitimate in interpreting the relatively broad constitutional language of the Fourteenth Amendment and other provisions designed to protect fundamental rights. My own controversial caveat has been that non-originalist judicial decisions are entitled to less presumptive authority, and certainly to less precedential value, than originalist decisions. See, for example, Stephen L. Carter, The Dissent of the Governors, 63 Tulane L Rev 1325, 1347-59 (1989). My current thought is that originalism still seems to be the best available approach to legitimating constitutional decisionmaking, even under the relatively broad language of such open-ended provisions as the Equal Protection Clause.
who are not white. From the 1970s into the early 1980s, in a statistic that received relatively little formal attention, black high school graduates at every socioeconomic level enrolled in college at rates higher than white graduates of similar socio-economic status.\(^6\) In recent years, the black enrollment rate has declined slightly,\(^6\) but the fact remains that the leading campuses are no longer the bastions of whiteness that they were just a few short decades ago.

To be sure, many critics have argued that the enrollment figures are inflated by affirmative action, that many of the black and other students of color, because of inferior academic preparation, do not belong at the colleges where they are now studying. It is certainly true that the black dropout rate is somewhat higher than the white dropout rate.\(^7\) Moreover, at schools where the matter has been studied, the median performance of black students frequently lags behind the median performance of white students.\(^8\) Such arguments as these, however, represent the esoterica of the policy debate on the wisdom of affirmative action. Elsewhere, sometimes to my regret, I have plunged into those murky waters. In this paper, I want to speak about reality.

One half of the reality that I have in mind is that students of color in large numbers are on the campuses to stay. Many students of color would be admitted to the nation’s elite institutions without racial preferences. As to the rest, the schools themselves show no signs of abandoning their special admission programs and are


\(^{7}\) See id at 338-46.

\(^{8}\) As of 1980, 56 percent of the white students who began four-year college programs directly out of high school, as compared to 31 percent of the black students, completed their degrees in less than six years. Chester E. Finn, Jr., The Campus: ‘An Island of Repression in a Sea of Freedom’, Commentary 17, 22 (Sept 1989), analyzing figures from the United States Department of Education. In other words, 44 percent of the white students and 69 percent of the black students failed to finish within five and a half years. Another sensitive measure of college completion is the “persistence rate,” the percentage of students enrolled in college in one October who enroll again the following October. As of 1986, the persistence rate of white students was 81.9 percent while the persistence rate of black students was 72.7 percent. National Center for Education Statistics, 2 The Condition of Education 1990 (Postsecondary Education) 28 (1990). This difference becomes much greater when the rates are cumulated over four years; applying my own calculations to this data, only 55 percent of white students and 38 percent of black students would return for a fourth year, and, at the end, only 45 percent of white students and 27 percent of black students would be left. It is widely assumed, although the data are incomplete, that the persistence rate breaks down into a relatively high dropout rate for black students at predominantly white schools and a relatively low dropout rate for black students at traditionally black schools.

\(^{*}\) See, for example, John H. Bunzel, Affirmative-Action Admissions: How it ‘Works’ at UC Berkeley, 93 Pub Int 111, 122 (Fall 1989).
even under pressure to expand them. The second half of the reality
is that there are on every campus those who are irritated, not to
say infuriated, by this state of affairs. There are white students
(and, I would guess, some faculty members too) who think that
there are too many black ones, and I suppose there are some who
think that one black student is too many. And there are other
white students who might or might not have any particular objec-
tion to the presence of black students, but decide that as long as
black folks are there, they might as well be made the butt of racist
jokes, or the targets of racist letters, or the subjects of racist
threats.

In the past decade, reports of racially charged incidents on
college campuses have increased sharply. Some of the incidents
are, in the general order of racism, relatively minor: the defacing of
posters, for example, with racial caricatures, or the telling of racist
jokes on campus radio stations. Some are much more serious. Yale
Law School, where I teach, has lately been the scene of an ugly
episode in which racist letters, couched in vaguely threatening
terms, were addressed to ten black students. And some incidents
rise to the level of physical intimidation and destruction of prop-
erty, as when students in Ku Klux Klan hoods invade the dormi-
tory rooms of black students, or when student dormitory rooms are
“trashed” and festooned with racist slogans. By using the term
“racial harassment,” I mean to sweep into my discussion all forms
of disparagement or intimidation of individuals from traditionally
disadvantaged racial groups. By adopting so broad a definition of
my subject, I do not mean to endorse the use of similarly broad
language in the many codes that have sprung up on college cam-
puses to control harassment.

Some of these incidents will seem disturbingly familiar to vet-
erans of the fight to integrate education. Physical intimidation in
particular was thought to have been banished from campuses years
ago. Other forms of racial harassment—such as the telling of racist
jokes and the conducting of so-called “slave auctions” by fraterni-
ties—have been with us always, but have become increasingly con-
troversial. What all of the incidents have in common is that they

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* Rather than footnote all incidents separately, I will simply note that my examples are
drawn from news accounts, personal knowledge, and the very fine compendia in Jon Wiener,
Reagan’s Children: Racial Hatred on Campus, 248 Nation 260 (Feb 27, 1989), and Steve
France, Hate Goes to College, 76 ABA J 44 (July 1990).

** Harassment on other grounds, such as sex, religion, or sexual preference, is not the
subject of this Article, for reasons that will become clear.
make our college campuses considerably less hospitable than they should be for students of color who would prefer to be left alone to do their work.

Many universities have responded to the surge in incidents of harassment by adopting disciplinary rules that punish it. The codes come in a bewildering variety. Some of the codes are very narrowly drawn to control destruction of property or acts of physical abuse. Some that have been proposed would evidently forbid racist jokes and name-calling as well. Others include rules that are broad enough, often by design, to prohibit, or at least to chill, discussion of such questions as whether students admitted through affirmative action programs are as well prepared for their studies as students admitted through more traditional criteria.11 So far there is no sign of judicial sympathy to those anti-harassment codes challenged in court on First Amendment grounds.12

It is not difficult to understand the motivation behind the twin movements—one intellectual and the other political—to treat all incidents of harassment as acts of racial discrimination. If they are treated as acts rather than messages, conduct rather than speech, then they can be conceived as outside the protections of the First Amendment and therefore subject to regulation. Moreover, whether construed as acts or as speech, incidents of harassment are clearly, and even designedly, discriminatory: they do not affect all students equally. They are targeted against particular groups selected because of race, and sometimes even against particular students, selected for the same reason. Although many of us might prefer the image of tough, silent, cool-headed students of color, letting all racial slurs roll off their backs, the reality is somewhat different: students of color are human. Words can wound, and racist words often do. The consequence of this unhappy truth is that incidents of racial harassment can create an atmosphere in which many students of color will find learning difficult.

Of course, admitting this much is not the same as admitting the desirability of legislation against racial harassment as such, and I might as well confess my biases: I worry about the various codes that seek to regulate harassment, both because of their ef-

11 For general discussions of the content of the various codes, see France, 76 ABA J 44; Strossen, 1990 Duke L J 484 (cited in note 2); Wiener, 248 Nation 260.
12 See, for example, Doe v University of Michigan, 721 F Supp 852 (E D Mich 1989). A similar lawsuit against the University of Connecticut was settled when the school agreed to limit its regulation to the “fighting words” restrictions approved in Doe. Marilyn Soltis, Sensitivity Training 101, 76 ABA J 47 (July 1990).
fects on the open debate that is so important to the process of education and because of the message that they send to students of color about where one goes for assistance when things get psychiatrically bad—that is, to the nearest white institutional authority.\textsuperscript{13}

I hasten to add that it is not my purpose to dismiss concern over all racist comments intended to intimidate; I am sensitive both to the pain that they cause and to the genuine obstacles that they place in the way of learning. But I wonder why one would want to insist that the obstacles are the result of the racism rather than of the intimidation. Plainly, a school has the right, and perhaps the moral responsibility, to guard its students against genuine racist intimidation. But the intimidation, not the racism itself, is the principal evil that the school ought to regulate.

B. Constitutional Implications

Which brings us back to law.

Of the First Amendment difficulties little need be said. The free speech arguments have been widely canvassed, both in the literature and before the courts.\textsuperscript{14} While some think that nearly every code should survive First Amendment scrutiny, and some think none should, an emergent consensus suggests that concrete threats or acts of intimidation directed toward particular individuals are proper objects of regulation, whereas more general statements, even if offensive or racist, are not.\textsuperscript{15} I tend to agree with this view, as a statement of positive constitutional law, and although I would like to think that terms such as "intimidation" and "harassment" will be narrowly construed, I do not consider it an exercise of a protected right of any sort to trash a student's dorm room while wearing Klan-style hoods and chanting, "Nigger, die!" or to paint a student's door red and write thereupon "Nigger bitch, this is your blood"—the second example being an episode through which one of my students suffered during her undergraduate years. At the same time, I remain at a loss to understand why some special code dealing with racism is needed to deal with such incidents

\textsuperscript{13} For a detailed discussion of the reasons for my worry; for my rejection of the provocative but unpersuasive argument that rules of this kind empower the subordinated; and for my rejection of the related suggestion that since equality is prior to speech, one can (and sometimes should) limit speech in the name of equality, see Stephen L. Carter, Reflections of an Affirmative Action Baby ch 8 (Basic Books, 1991).

\textsuperscript{14} See, for example, Lawrence & Gunther, 24 Stan Lawyer 4; Matsuda, 87 Mich L Rev 2320; and Strossen, 1990 Duke L J 484 (all cited in note 2).

\textsuperscript{15} See Doe, 721 F Supp at 882. Many universities that have been considering anti-harassment legislation have recently pared them to fit this rule.
as these, which would seem on their face to violate any number of
laws, as well as nearly any sensible campus disciplinary code.

Still, this paper is not principally about the Free Speech
Clause of the First Amendment; it is about the Equal Protection
Clause of the Fourteenth (which means, at least since the Supreme
Court's intellectually tantalizing, legally implausible, and morally
inevitable decision in Bolling v Sharpe,10 that it is also about the
Due Process Clause of the Fifth). And so I would like to consider a
matter that is very much a part of the current debate, that is,
whether, given what I have said about the effects of racial haras-
ment, a public school's failure to prevent incidents such as those
that I have described might in itself amount to a violation of the
Equal Protection Clause.

In order to pursue this possibility, I will sketch three ap-
proaches to adjudication under the Fourteenth Amendment. (I add
in passing that I make no claim that my tripartite division by itself
adds anything to the literature.) I will use the resolution of the
problem of harassment under each of the three approaches to illu-
minate their weaknesses and strengths, and, I hope, ultimately to
offer a preliminary justification for the choice of one of the three as
the preferred approach.

II. THREE MODELS OF FOURTEENTH AMENDMENT ADJUDICATION

The first of the three models—one, I might add, that possesses
a considerable amount of political currency—is the color-blindness
model. The color-blindness model takes its name from the first
Justice Harlan's dissenting opinion in Plessy v Ferguson, wherein
he wrote: "Our Constitution is color-blind, and neither knows nor
tolerates classes among citizens."17 Thus the principle embodies a
clear and forceful vision of what is meant by the guarantee of
equal protection: the government may not, in the absence of the
most compelling of interests, take account of race. Under the color-
blindness model, the reason that the Supreme Court was right to
strike down anti-miscegenation statutes in Loving v Virginia18 was
the one offered by Justice Stewart in his concurring opinion: "it is
simply not possible for a state law to be valid under our Constitu-

17 163 US 537, 559 (1896) (Harlan dissenting) (overruled by Brown v Board of Educ.,
347 US 483 (1954)).
18 388 US 1 (1967).
tion which makes the criminality of an act depend upon the race of the actor."¹⁰

I call the second model of equal protection the *antidiscrimination* principle, borrowing Paul Brest's term.²⁰ Like the color-blindness principle, the antidiscrimination model generally forbids racial classifications by the government. But there are important differences between the two, both in theory and in practice. First, the antidiscrimination model is premised not on the assumption that racial classifications are themselves bad, but on the assumption that purposeful use of race in a harmful way is bad. The result is that the antidiscrimination principle, unlike the color-blindness principle, will sometimes allow racial classifications to stand on the ground that they are "benign." Second, the antidiscrimination principle is concerned, in a way that the color-blindness principle is not, with the substantive results of government decisions that on their face appear to accord with color blindness. The antidiscrimination principle might, for example, be suspicious of racial differences in passage rates on employment tests in a way that the color-blindness principle would not.

The color-blindness principle and the antidiscrimination principle dominate academic commentary and, more important, legal and political praxis. Their broad areas of overlap make them largely interchangeable when one is trying to explain what is wrong with a gross immorality such as racial segregation: Perhaps it is wrong because the government should not take account of color; or perhaps it is wrong because the government should not do harm on account of color. Both of these are morally and politically plausible justifications for *Brown v Board of Educ.*²¹ and a scholar or political figure offering either one would fall well within the mainstream of legal conversation.

The two visions of the world part company rather sharply when one considers affirmative action. In all but the most extreme instances of remedy for wrong-doing, color-blindness must forbid racial preferences for their necessary race-consciousness. The antidiscrimination principle, however, will sometimes accept "benign" racial preferences, basically on the somewhat controversial

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¹⁰ Id at 13 (Stewart concurring), quoting *McLaughlin v Florida*, 379 US 184, 198 (1964) (Stewart concurring).

²⁰ See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv L Rev 1 (1976). Although I borrow Brest's term, what I describe is not what he proposes. In particular, fidelity to the original understanding is not his aim.

ground that they are not harmful. Perhaps a little less obviously, the competing principles might also part company in such subtle and difficult cases as McCleskey v. Kemp,22 wherein the Supreme Court sustained Georgia’s capital sentencing system against a statistical claim of racial discrimination. Color-blindness demands much more than a dry statistical record before it is willing to presume that the state has taken race into account, which is surely what Justice Powell had in mind when he wrote for the McCleskey majority that the Court would not assume that what was unexplained was necessarily invidious.23 The antidiscrimination principle, on the other hand, is more sensitive to context; not surprisingly, it is therefore suspicious of such sharp statistical disparities, particularly in an area like capital sentencing, where throughout our history law and race have been inseparably intertwined like some sinister double helix.24

Both principles have much to recommend them. The color-blindness principle represents a clear, unambiguous moral judgment with an indisputable rhetorical appeal, whereas the morality underlying the antidiscrimination principle is sufficiently complex that it sometimes seems contrived. As a principle, and as a vision of the American future, color-blindness possesses a neo-romantic charm that plays well on the stump. It would be foolish, of course, to assert that color-blindness mirrors much about American reality, and I do not suppose that anyone suggests that it does; the idea behind it is to require the government to surrender color-consciousness in the hope of teaching the virtues of color-blindness to a public too often inclined to think in racialist terms.

The antidiscrimination principle is difficult to reduce to a high-sounding slogan, and efforts to do so often end up backfiring. For example, when adherents of the antidiscrimination principle describe affirmative action, they sometimes refer to it as “benign” discrimination. But that is a turn of a phrase that has no analytical significance, for the matter is very much one of perspective. Every preference—even the preference involved in racial segregation—is

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23 Id at 313.
designed to be benign toward the preferred group. The groups excluded from the benefits of a "benign" racial classification are unlikely to see it as at all benign. To those who are excluded, it is just discrimination, and all discrimination is harmful to somebody. Yet for all its ethical complexity, the antidiscrimination principle often makes better sense of what Randall Kennedy has called the "chameleonlike ability of prejudice to adapt unobtrusively to new surroundings." Color-blindness, says Kennedy, is trapped in a vision of old victories.

The third approach to equal protection has in recent years enjoyed a degree of academic support, but has yet to gain a foothold in the courts. This approach, which is sometimes called the anti-subordination principle, but which I prefer to call the anti-oppression principle, interprets equal protection as directed not against particular racial classifications as such, but against systematic structures of racial oppression, of which racial classifications are essential building blocks. Under the anti-oppression principle, the reason that Plessy was wrong and Brown right has little to do with the fact that the color-blindness principle makes relevant—the state's purposeful use of race in both cases—and much more to do with the social contexts in which the cases arose. The problem was not simply, as the antidiscrimination principle would have it, that the state was using racial classifications to do harm. The problem, rather, was that the state was using its harmful classifications as part of a larger system of racial subjugation.

This is a difference that matters, and the most obvious place where it matters is affirmative action. As a general proposition (I discuss some exceptions below), it is not possible to make a coherent case that racial preferences are part of a system of subjugation of the white race. As for racial segregation simpliciter, the anti-oppression principle solves it easily, for what else does an extensive system of segregation represent if not the subjugation of one race to another?

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26 For a provocative discussion of this point, see Thomas Sowell, Preferential Policies: An International Perspective (Morrow, 1990).
26 Id.
26 The classic discussion of affirmative action in this context is Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil & Pub Affairs 107 (1976). Incidentally, in a neat historical irony, a number of left or nationalist critics argued in the 1960s and early 1970s that racial preferences were a fraud precisely because they were part of a system of subjugation of the black race. See, for example, Robert L. Allen, Black Awakening in Capitalist America (Doubleday, 1969).
The anti-oppression principle is not without its analytical risks and difficulties. For one thing, the closer that black and white move to relative social and economic equality in the United States, the less the force with which the principle will restrain acts of discrimination, and groups that are not subjugated might receive no protection at all. Moreover, a precise definition of oppressive racial classification is difficult. The distinction between the claim that a racial classification does harm and the claim that a racial classification is part of a system of subjugation (or, as much contemporary literature has it, subordination) is that discovering the second requires a far greater sensitivity to context. The reviewing court must look beyond the narrow facts of the case, always a risky thing to ask of a judge, and use common knowledge about the nature of American society. Theorists who support an anti-oppression principle as central to the Equal Protection Clause seem to think that the matter of who is subjugated to whom is always self-evident, perhaps because through most of American history, the matter has generally been quite clear. In fact, that very historical consistency makes the anti-oppression principle probably the most historically coherent among the competing theories of equal protection jurisprudence: Sometimes, the simplicity of a rule's operation in a specific context is good evidence that the rule is intended for that context.

Although, as I have already explained, I have not sufficiently plumbed the depths of the relevant history, my preliminary judgment is that the color-blindness principle and the antidiscrimination principle, for all of their plain ethical appeal, both suffer from a defect that is fatal to any theory of adjudication: neither one is adequately related to the text, structure and history of the Equal Protection Clause. The antidiscrimination principle, with its emphasis on government harm through the use of racial classification,

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29 Although for half a century black income has been increasing relative to white income, the rate of that increase has lately slowed. See Jaynes & Williams, A Common Destiny at 287-89 (cited in note 5). When the statistics are disaggregated, one discovers that the difference is largely explained by the fact that black households are concentrated more heavily on the bottom rungs of the economic ladder. The reason this disaggregation matters is that the civil rights era has seen increasing income stratification in the black community: there has been a substantial and rapid income convergence between black and white in the middle class and in the professions. See Reynolds Farley, Blacks and Whites: Narrowing the Gap? 82-171 (Harvard U Press, 1984). This trend might render the anti-oppression principle irrelevant unless it is redrawn along lines of class rather than race.

30 I give a more detailed discussion of my reasons for this judgment in a separate paper currently in progress, tentatively entitled Equal Protection and Racial Oppression: A Reinterpretation of Strauder v. West Virginia.
is at least somewhat similar to the original meaning of the Clause. The color-blindness principle, in contrast, bears as little relation to the original understanding on equal protection as the general police power that the Commerce Clause has become bears to the original understanding on congressional authority. Thus my conclusion—still, I emphasize, a preliminary one—is that only the anti-oppression principle is closely related to the purpose of the Clause as originally conceived.

III. THE INTERPRETIVE PRINCIPLES IN THEORY AND PRACTICE

A. The Views of the Framers

As I have already mentioned, my reading of the history—and, therefore, my endorsement of the anti-oppression principle—is built up from the secondary sources, and recent books by William Nelson and Earl Maltz have been particularly helpful. I should point out, however, that not all originalists take the same view of the history of the Fourteenth Amendment that I do. In particular, a significant number of originalists have concluded that the command of the Fourteenth Amendment was intended to be color-blindness. But one should always be mindful of H. Jefferson Powell's rules for originalists, particularly the rule that advises a sensible wariness when originalists consistently “discover” history that accords with their political preferences. Indeed, one of the marvelous and sad things about “doing” originalism is that it is possible for the careless originalist to indulge just as much interpretive freedom as the careful non-originalist; put otherwise, originalism constrains only if the originalist is careful. Moreover, even an originalist can be careless on purpose; every good Supreme Court brief is finally originalist in character, because originalism, whatever the weaknesses perceived by its academic critics, re-
mains the chosen rhetorical method of the entire judiciary. The courts write their constitutional opinions as though originalism is a principal concern, and every Justice currently sitting on the Supreme Court has adopted the rhetoric of originalism in constitutional reasoning.

One advantage that originalism has over its competitors is that when the originalist is manipulative, when the historical record that originalism demands is tortured or twisted or otherwise abused, or when the originalist simply makes a mistake, it is usually not a difficult matter for an originalist critic to point to the fault. I speak here not of error in the inferences drawn from history, but of error in the statement of the history itself.

Consider, for example, an article by William Bradford Reynolds proposing an originalist justification for the color-blindness principle. Reynolds makes his case with force and clarity, discussing several quotations from the debates on the passage of the Fourteenth Amendment. But the quotations, unless lifted entirely from their context, do not actually lend much support to the color-blindness principle as a statement of original intent. For example, Reynolds quotes Senator Jacob H. Howard: “[I]n respect to all civil rights, there is to be hereafter no distinction between the white race and the black race.” Next he quotes the words of Thaddeus Stevens: “[N]o distinction would be tolerated in this purified Republic but what arose from merit and conduct.” And Stevens said more:

[T]he law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man.

One who is seriously interested in unearthing the original understanding, however, must be careful to read these words in their historical context rather than impose ours on them. The reference by Howard to “civil rights,” for example, is in the context of the time clearly a reference to rights before the law, the way that an

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4 William Bradford Reynolds, An Equal Opportunity Scorecard, 21 Ga L Rev 1007 (1987). At the time that he wrote the article, Reynolds was the head of the Civil Rights Division of the U.S. Department of Justice.
44 Id at 1010.
45 Id at 1010-11.
47 Id at 1011 (emphasis in original).
individual is treated by legal institutions such as courts. Stevens’s reference to criminal laws should be taken quite literally, for the goal of the Fourteenth Amendment, as well as of the Civil Rights Act of 1866 (not to be confused with the Civil Rights Bill of 1866) that the Amendment was expected to constitutionalize, was the destruction of the Black Codes, which largely created a legal system aimed at disabling black people—the former slaves—by limiting their rights as juridical persons. Very little in the rather sparse debates over the Fourteenth Amendment, or in the somewhat richer debates over the Civil Rights Act, suggests any intention to create full equality in the sense of enjoying equal access to facilities, accommodations, schooling, and the like. Given the widespread public support for segregation at the time, there is every reason to think that the Amendment, like the Act, would never have passed had the understanding been otherwise. Every serious scholarly investigation of the history reflects this conclusion, and it is difficult to see how anyone could read the larger history of the era and come away supposing that the original understanding had been so broad.

Besides, the Fourteenth Amendment, like all constitutional provisions, was the work of a coalition, and different members of the coalition had different goals. If one studies, for example, the ratification process—the process through which the Amendment became law—one will find many supporters calling for an end to segregation, even an end to anti-miscegenation laws, but many others assuring worried fellow-citizens that the Amendment would not touch segregated institutions. The coalition therefore would

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38 Rather than burden this Article (and the reader) with copious citations in support of my generalizations about the original understanding, let me suggest instead that the interested reader peruse two very fine recent books about the history of the Fourteenth Amendment and the original Civil Rights Acts, books that have influenced my thoughts significantly, although I do not want to claim that my conclusions are identical to theirs. The books are Maltz, *Civil Rights* (cited in note 31), and Nelson, *The Fourteenth Amendment* (cited in note 31). A very fine discussion of some of the same history, told from the point of view of the freed slaves rather than the legislature, is Vincent Harding, *There Is A River: The Black Struggle for Freedom in America* (Harcourt Brace Jovanovich, 1981), especially chapters 14, 15, and 16.


40 Nelson, *Fourteenth Amendment* at 133-35. These assurances were repeated a few years later when Congress adopted the Civil Rights Act of 1875, the last major Reconstruction legislation before the Republicans lost their majority, which was expressly premised on the enforcement power under Section Five of the Amendment. Id at 135-36.
not have survived had the Amendment's drafters manifested a clear intent to undo segregation. Non-color-blindness worked both ways: in the wake of the enactment of the Fourteenth Amendment, Congress adopted race-conscious measures designed to help only black people—not white ones. Most notable among these was the Freedmen's Bureau. As proponents of the color-blindness principle have argued, the Congress probably saw itself largely as aiding a class defined by status rather than race—freed slaves. It is also true, however, that the opponents of such legislation used its race-conscious nature as an argument against it. The principal secondary sources seem to agree on at least this much: No unambiguous support exists for the idea that the Amendment was intended to be color-blind, and there is only thin support for the claim that any but a few of its proponents imagined that it would of its own force eliminate segregated institutions, including schools. Fairly clear support apparently exists for the opposite of both propositions. The claim of an original understanding of color-blindness, it seems, simply does not stand up very well to the history and is very likely wrong.

B. The Anti-Oppression Principle and Desegregation

The truth, for better or for worse, seems to be that we will never know precisely what the authors of the Fourteenth Amendment, or those who ratified it, thought about segregation. But then, to imagine that all of the Amendment's supporters shared a single understanding is a fantasy of the sort that drives all too much of the law-office history that the debate has generated. What we can say with some assurance, however, is that the Amendment's supporters at least shared an understanding that racial oppression was wrong and that in the new, post-war structure of governance, it was the federal government's responsibility to protect the newly-minted citizens of the United States against racial predations by the governments to which the people had formerly owed their allegiance, the states themselves. In this connection, it is likely that the Congress that framed the Fourteenth Amendment understood Stevens's point about differing treatment under the criminal law

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42 See Bickel, 69 Harv L Rev 1; Berger, Government by Judiciary; Nelson, Fourteenth Amendment at 133-36.
43 The phrase "law-office history" was coined by Alfred H. Kelley. See Alfred H. Kelley, Clio and the Court: An Illicit Love Affair, 1965 S Ct Rev 119, 122.
quite literally. The framers were not concerned with abstract equality in the modern sense, but with a concrete system of oppression, one that systematically treated black people worse than white people for the sole purpose of keeping them in thrall. Slavery had given way to the so-called Black Codes, and the Fourteenth Amendment was intended to address the fresh problems that unequal treatment spawned.

The Amendment was thus not drafted to reach unequal treatment per se, but to reach (or, perhaps, to allow the Congress to reach) inequality that was systematized into oppression. In this sense Robert Bork has the matter exactly right when he explains that an originalist should endorse *Brown* in spite of, rather than because of, the side of the original understanding that so many originalists prefer to deny—the explicit assurances that school segregation would not be touched." The reason that so many of the founders evidently doubted that their Amendment would end segregation was not, if one reads the history with care, that they bore hostility toward the freed slaves; the reason was simply that as then practiced and understood, segregation itself was not viewed as a part of the system of oppression that the Amendment was designed to undermine. This is a point, oddly enough, that the *Plessy* Court understood, even if it got its facts mixed up. In *Plessy v Ferguson*, the majority explained that any harm resulting from segregation resulted from the perceptions of the segregatees.4\textsuperscript{6} Even though the *Plessy* Court was wrong in its conclusion, it was right in concluding that not all racial distinctions that the state might make are unconstitutional. What it missed was the reason: The ones that matter are the ones that oppress.

The color-blindness principle would say that the *Plessy* Court's methodology was illegitimate, because all racial distinctions are wrong. The antidiscrimination principle would say that this methodology was correct, even if badly applied in *Plessy* itself, and that only classifications that are harmful are wrong. The anti-oppression principle says that one cannot judge the legitimacy of a racial classification in the abstract, but must study its role in the systematic oppression of a subordinated racial group. It is this point, and not his passing reference to color-blindness, that Justice Harlan correctly emphasized in his stirring dissent:

\footnote{44 See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 82 (Free Press, 1990).}
The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent Amendments to the Constitution.46

Brutal and irritating aggressions on account of race are wrong; this much of the original understanding is unambiguous. Those who wrote the Amendment might not have thought that segregation could rise to the level of such an aggression, but they were wrong, which is why Bork is right about Brown. The error that Plessy made—an error that Brown repeated—was to suppose that the critical question was whether the classification's harm existed in some psychological sense. But this psychological vision of the nature of the harm with which the Equal Protection Clause is concerned seems very far from the original understanding. A far better view, surely, is that the Clause was designed to ameliorate the harm to a group—a people, if you like—resulting from systematic oppression on the basis of race. If Plessy was wrong, then, it was wrong because the Court did not understand or did not want to admit that segregation was part of a system of oppression; and in Brown, the Court could have written a stronger opinion, at least if one's lodestar is the original understanding, by saying what everyone understood—that racial segregation was (or had become) racially oppressive. Charles Black got this point exactly right in his article on The Lawfulness of the Segregation Decisions when he opined that, should anyone be so bold as solemnly to pose the question whether racial segregation is intended to oppress, we might exercise the sovereign prerogative of the philosopher, and laugh.47

C. The Anti-Oppression Principle in Practice

The two Supreme Court decisions that probably represent the best assessment of the original understanding of this point are Strauder v West Virginia,48 decided in 1879, and, in a very differ-

46 Id at 560 (Harlan dissenting).
48 100 US 303 (1879).
ent way, *City of Richmond v J.A. Croson Co.*, decided a bit more than a century later. Both decisions can be used to illustrate how an anti-oppression principle might function in practice.

1. Strauder v West Virginia.

*Strauder*, rendered less than two decades after the adoption of the Fourteenth Amendment, is a tremendously important decision, representing as it does the Supreme Court's clearest, most coherent, and, possibly, most accurate statement of the original understanding of the Equal Protection Clause. At the same time, it is among the most consistently miscited decisions that the Court has ever handed down. *Strauder* is frequently cited for the proposition that the Equal Protection Clause protects white and black alike. While it does stand for that principle, it does not do so in the way that is commonly supposed. In particular, one cannot sensibly read the majority opinion as resting on a model of color-blindness as that concept is understood today.

In *Strauder*, the Justices set aside the murder conviction of a black defendant convicted by an all-white jury under a statute limiting jury service to white citizens. In an opinion by Justice Strong, the Court explained in some detail precisely what the Clause was intended to do and why the jury statute denied equal protection in the sense originally understood. (I must add that the reader will detect in the Court's language a certain racialist paternalism, but that was very much the spirit in which the Fourteenth Amendment was adopted.) The Amendment, wrote Justice Strong, shares with the other Reconstruction Amendments the "common purpose" of "securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." The opinion went on this way:

The true spirit and meaning of the Amendments... cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike,

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50 *Strauder*, 100 US at 306.
and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected.51

The reasoning thus far takes the language of "protection" quite literally, and this "protection" was plainly aimed at a people more than at individual persons: the fear of the framers of the Amendment, according to Justice Strong, was that the states might try to force back into subjection the race that the war had set free. Already, then, one has the sense of the protection of a racial group against subjugation. And there is much more:

The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.52

Here again, the Court was developing a clear model, one very different from the principles of color-blindness and antidiscrimination. The concern of the Amendment, the Justices were saying, was with what the states were likely to do "to those who are unable to protect themselves." And whatever one might think of the racialist paternalism in the Court's explanation for why black people were, in the wake of the Civil War, unable to protect themselves, the concern about efforts to bring the race back into subjugation is evident.

The Court continued in ringing language to explain exactly what, in light of the history, the Equal Protection Clause commands: "that the law in the States shall be the same for the black

51 Id.
52 Id.
as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States.” At first glance, this might seem to be the language of color-blindness, and if one wants to be ahistorical about the matter, perhaps it is. But the very sentence just quoted ends with a fascinating dependent clause: “and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color.” Indeed, the Justices continued, the Equal Protection Clause secures to them “the right to exemption from unfriendly legislation against them distinctively as colored.”

Now, if Strauder is really about color-blindness after all, just what is the significance of these additional comments? For the historically-minded reader, the answer is not particularly difficult. The Strauder Court, like the authors of the Amendment, envisioned a system in which civil and political rights must be made available to all citizens without regard to race; when the Court, or the framers, wrote about equality before the law, the intended meaning was probably equality in the exercise of what we might now think of as property and liberty interests—protection from unequal criminal laws, for example, and of the right to enter into contracts. If these basic liberties were denied, the Amendment’s authors reasoned, the freed race could never be lifted from its state of subjugation. So while the Amendment generally secured equal opportunity to exercise civil and political rights, the Court was constrained by its appreciation of the Amendment’s purposes to add the additional warning about “unfriendly legislation against them distinctively as colored”—the point being that such legislation might exist even apart from the areas in which the Amendment was understood as a guarantee of equality.

Any inconsistency between this vision of equality and the apparent expectation of the Framers that the Equal Protection Clause would not of its own force eliminate most segregation is more apparent than real. In our modern terms, racial segregation is of course understood as the very archetype of racially unfriendly legislation, but that was not a widely shared understanding during

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85 Id at 307.
86 Strauder, 100 US at 307.
87 Id at 308.
ANTI-OPPRESSION PRINCIPLE

Reconstruction or the years immediately following. Those who wrote the Amendment, even many of the most rabid abolitionists, saw racial segregation as a natural and rather mild concomitant of racial inferiority. They shared a rather romantic, but nevertheless racist, vision of two races, the intellectually and socially superior and the intellectually and socially inferior, living together in harmony, exercising the same rights before the law, but at the same time separated by the operation of law. When they spoke of "civil rights," they evidently had in mind the rights of juridical persons, the rights that one at the time would come into court in order to affirm: as a criminal defendant, a party to a contract, a witness at a trial.\(^7\) The literature seems to establish that the Republicans had no shared conception of a "civil right" to be free of segregation. They seemed to have had little or no inkling that racial segregation was or would soon be transformed into an instrument to maintain the racial subjugation that the Amendment was designed to prevent.

This brings us at last to the most tantalizing passage in \textit{Strauder}, one that is cited with some frequency for the proposition that white folk as well as black are protected by the Amendment—an accurate assessment, but an incomplete one. A better way of putting the point that the Court was making is that the Equal Protection Clause carries within its language the potential for protecting black and white alike. What Justice Strong wrote was this:

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be

\(^7\) See Nelson, \textit{Fourteenth Amendment} at 113-47. Although it is true that in the years just before the Civil War, and more intensively during the Reconstruction Era, the Republicans talked a good deal about natural law (what we might now consider fundamental rights), there seems to be no strong evidence that they considered these rights to possess any legal force, as against moral or political force; there is, however, a fair amount of evidence pointing the other way. Id at 113-47, 64-90; Maltz, \textit{Civil Rights} at 93-120 (cited in note 31).
passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.  

This paragraph has a little something for everyone in the debate over the best approach to interpretation of the Equal Protection Clause. Color-blindness theorists like to cite it because of the explicit statement that white people are protected; proponents of the antidiscrimination principle are enamored of the last sentence, which suggests that the Amendment bans discrimination that brands one race as inferior. Both groups are right, but both groups are missing the forest for the trees.

The most important sentence in the passage, the one that binds its differing strands together, is the one that begins, “If in those States where the colored people constitute a majority,” and goes on to speculate about the exclusion of white men from juries. This is the hypothetical that the Court uses to illustrate the possibility of discrimination against white men. In part, the hypothetical has an often overlooked political point: one of the most effective tools against universal adult male suffrage was manipulation of the fear of what vengeful black majorities might do in those Southern states where they had previously been enslaved. So one of the purposes of the language was plainly to reassure the worried whites, who really were at the time minorities in several states, and who had come in a curious reversal to look upon the federal constitution as an instrument of their oppression. The *Strauder* Court was urging them to worry less: The Constitution is for them, too, the Justices were saying.

But there is also an overlooked analytical point. Until one reaches this paragraph, all of the arguments in *Strauder* turn in some way on the oppressive system of slavery from which black people have so recently been liberated and on the fresh oppressions that might be visited on them if the courts are not vigilant in

* Strauder v West Virginia, 100 US 303, 308 (1879).
their protection. Now, suddenly, the Justices turn the tables and talk about white citizens. And the only example that the Court offers involves black majorities discriminating against white minorities. What ties this to the rest of the opinion, then, should be plain: if black people were in the majority, and were they as vengeful as many Southerners feared, the exclusion from jury service would be the least of the deprivations that white citizens could expect. In this, the Justices were playing to the same fears: the problem for white citizens faced with an angry black electorate might well be an entire system of subjugation, with a shorter pedigree, perhaps, than the oppression of black folk, but just as systematic in its effect. So the language about hypothetical black majorities actually serves to equalize the protection of white with the protection of black: if the time should come that whites must suffer the same systematic deprivation now affecting the former slaves, the Court is saying, then the Equal Protection Clause would protect their freedoms with equal vigor.

I would therefore summarize the Strauder dicta in this way: If the black race ever becomes dominant and exercises its power to prevent white people from serving on juries, says the Court, then the Amendment will prevent the practice. The image is one not of color-blindness, but of protection; the Clause is a shield with which the white minority can, in the hypothetical, fight off the predations of the tyrannical black majority. If one takes Justice Strong’s language as meaning what it says, the Court seems to have hit on what might be the most plausible construction of the history of the Fourteenth Amendment. Should black people oppress white people as white people have long oppressed black people, the Equal Protection Clause will allow the courts to intervene.

2. City of Richmond v J.A. Croson Co.

This leads, of course, to affirmative action, which, if one takes the rhetoric of some of its most extreme critics as the example, is a modern example of racial oppression. I have very serious disagreements with affirmative action as currently practiced,** but the image of racial preferences as a tool for oppression strikes me as so much nonsense. Racial preferences are, to be sure, racialist in character—they draw racial distinctions, and they disadvantage some people on the basis of race—but in any sense that lends the word

** I set forth some of the reasons for my doubts in The Best Black and Other Tales, Reconstruction (Winter 1990). I provide more detail (and, I hope, more nuance) in my book Reflections (cited in note 13).
significant analytical power, they are no more racist than standar-
dized tests. If one’s image of equal protection is, as I have sug-
gested, a shield against systematic racial oppression, then affirma-
tive action simpliciter would seem a fairly easy case—an easy case,
that is, to uphold. In this way, ironically, the anti-oppression prin-
ciple makes sense of the so often ridiculed argument that racial
preferences are constitutional because they represent discrimina-
tion by a majority against itself. In the strict form, this was never
a terribly strong argument. Quite apart from the obvious public
choice theory problems, one can always find subgroups within the
putative majority, secret beneficiaries, and the like. But as a meta-
phor, the image of self-discrimination is suddenly quite striking.
White people, not black people, are in charge of the legislatures,
which means that whatever else one might say of affirmative ac-
tion, one cannot fairly say that it is designed as part of a plan for
oppression of the white race.

Which is where City of Richmond v J.A Croson Co. comes in. In
other cases, the Court, albeit by slender majorities, has sus-
tained racial preferences when the Congress imposed them. In
Croson, the Court refused to sustain a preference imposed by the
Richmond city council. The logical way of harmonizing the cases,
once one puts aside the far-fetched and, I think, contradictory
claim of judicial racism, is to suggest that Congress possesses a
special role in ensuring equality under Section 5 of the Fourteenth
Amendment, or perhaps that local governments desiring to estab-

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60 I draw a distinction between racism and racialism in Carter, 97 Yale L J 420 (cited in
note 24).
61 Although this argument has been frequently pressed, it was probably given its clear-
est scholarly explication by John Hart Ely in Democracy and Distrust ch 6 (Harvard U
Press, 1980).
62 This is not to say that affirmative action does no harm to white people, or that one
cannot discover hidden groupings among those on whom its costs disproportionately fall.
Some critics have argued that the costs fall most heavily on recent immigrants and other
ethnic sub-groups. William Julius Wilson has opined that the costs are most noticeable
among the white blue collar and working classes, who rarely have any say in whether the
programs are established. The professionals and bureaucrats who set up the programs, says
Wilson, were rarely threatened by them in the past, because the professional and govern-
ment sectors grew at such a phenomenal rate in the 1960s and 1970s that there was plenty
of room for everybody. William Julius Wilson, The Declining Significance of Race 110-11
(U of Chicago Press, 2d ed 1980). As I note elsewhere, however, that growth rate is reversing
in the 1980s and 1990s, which means that if Wilson’s thesis is correct, even many of those in
the white community who have in the past supported racial preferences are likely to turn
against them. Carter, Reflections at 2-3.
64 See, for example, Fullilove v Klutznick, 448 US 448 (1980) (prior to Croson); Metro
Broadcasting v FCC, 110 S Ct 2997 (1990) (subsequent to Croson).
lish affirmative action programs must first ensure that the factual record is strong.

These are sensible and lawyerly distinctions, and they might even be correct. But let me suggest a different explanation, an uneasy subtext that might be at work in *Croson*. When the Congress of the United States, or, for that matter, the Board of Regents of the University of California, establishes an affirmative action program, it does so as an institution controlled by people who are white. The Richmond city council, however, was in the control of people who are black and their political allies. So it is possible that a court, seeing this difference, could see *Croson* as *Strauder* revisited. Perhaps the Richmond city council, dominated by people who are not white, was in the position of the hypothetical black majority in *Strauder*—finally in charge, and ready to exact an oppressive and racist revenge on those who had so long held the black race in thrall. This is not, I think, a particularly compelling portrait of Richmond, or of any other part of today's America; even in cities that are, as they say, “run” by racial minorities, it is difficult to envision the circumstances that would allow the exercise of such awesome power. But it does not strike me as implausible to wonder whether a court might not see things this way. A court utterly blind to context might say, “Yes, in such-and-such a place, the political machinery is in the control of a black majority that is using it to oppress whites. And such a court might conclude that yes, affirmative action, for all of its many faults, is generally constitutional—but not when made part of a package of racial oppressions.

Richmond's rather modest set-aside program does not seem to fit this model, but the question posed in the abstract is still intriguing. Is it possible to imagine a community in which black people are so dominant that it is actually sensible to speak of the oppression of white people? In such a community, would affirmative action when done by a black agency be different than when done by a white one? In a nation supposedly premised on equality, one would suppose not, and in *this* nation, the effort to envision black people as oppressors quite boggles the mind. Still, a court that saw things this way would have to decide *Croson* as the Justices did. Sticking with the original understanding of the Constitution does not always lead us to where we want to be. This is what makes originalism, or any strategy that takes the Constitution seriously as

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** See *Croson*, 488 US at 495.
law, so frustrating, and, often, so frightening. But of course, originalists must take the history as we find it. We lack the freedom to pick and choose.

IV. THE ANTI-OPPRESSION PRINCIPLE AND RACIAL HARASSMENT

I now turn to the application of the Equal Protection Clause to the problem of racial harassment. Racial harassment of the sort that I have been discussing is not state action. It is the action of private individuals, and, as such, is not directly reachable by courts acting pursuant to our Constitution. The judgment of a state on whether to protect its citizens from harassment, however, plainly does involve state action. It is true that the Supreme Court has ruled that individuals generally lack standing to sue public officials for a purported failure to enforce laws designed for their protection, but this is terrible law and should not be followed. As Frank Easterbrook has pointed out, a failure to enforce a law harms those who in consequence are underprotected, so both the harm and the nexus requirements of standing are present. When one considers the matter of the Fourteenth Amendment, the argument for standing is particularly compelling. After all, both the Civil Rights Act of 1866 and the Equal Protection Clause itself were enacted against a background of consistent Southern refusals to use the criminal law to protect black citizens to the same degree as white ones. And once one concedes standing, the problem very nearly solves itself.

Or does it? One wants to be very careful to specify both the harm that is involved and the nature of the claim. An example of an under-enforcement that might run afoul of the Amendment would be a state's refusal to prosecute white students who trashed a black student's room, on the ground, say, that all that went on was a sophomoric prank. If the state ordinarily prosecuted students for destruction of property, this refusal would be actionable, assuming that the barrier of standing proved surmountable.

But that is the easy case. It is one thing to contend that under-enforcement of existing law can make out a claim under the Fourteenth Amendment; it is something else again to suppose that

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*See Linda R.S. v Richard D., 410 US 614 (1973).*


non-existence of a relevant law would bring about such a claim. This, I think, is the point Robert Bork had in mind when, in testimony in opposition to the Human Life Bill, he disputed Justice Blackmun’s assertion in *Roe v Wade* that a conclusion that a fetus was a juridical person would mean that a constitutional right to abortion could not be sustained. Human beings who clearly have been born are indeed juridical persons, Bork argued, but the Fourteenth Amendment’s guarantee that such persons not be deprived of life, liberty, or property without due process of law does not impose upon the states an obligation to adopt an optimal criminal law. Some states have death penalties, some do not; some impose mandatory sentences for violent offenses, some do not. It boggles the mind to imagine that the Constitution requires a particular set of criminal laws, lest the guarantees of the Fourteenth Amendment Due Process Clause be eroded.

On the other hand, racial harassment, at least when it takes the form of intimidation, is not an ordinary criminal offense—that is, it would not be considered an ordinary offense by those who wrote and ratified the Fourteenth Amendment. Although the great wave of anti-black violence was yet to come, harassment in the sense of physical intimidation, sometimes ending in torture or murder, was sufficiently common at the time of Reconstruction that the Congress could hardly have helped noticing its existence. Given the disparities in punishments meted out depending on the race of the victim and the race of the perpetrator, many of the Southern states were in effect operating special legal systems for the benefit of white people who committed crimes against black folk.

Although the possibility might at first seem farfetched, one could conceptualize a failure to enact adequate safeguards against harassment as the rough equivalent of punishing crimes against people who are black less harshly than crimes against people who are white. (I am aware that in *McCleskey*, the Supreme Court rejected an effort to show a violation of equal protection in such a distinction, but the Justices disputed only the sufficiency of the evidence, not the possibility of the claim.) However, if this is the way that one is to model a challenge to inadequate protection, then

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*410 US 113 (1973).*

*Id at 156-57.*

one should note what it excludes from state responsibility: harassment in the sense of unkind remarks, racist jokes, statements about intellect, and so forth. The reason that these are excluded, interestingly enough, has nothing to do with the First Amendment, although I suspect that the Free Speech Clause would also be an independent and adequate ground. They are excluded because they have no analogue in the form of an offense against which white people are protected.

Physical intimidation, however—threats of harm, whether express or implied, and of course actual harm as well—would seem to fall well within the ambit of the Fourteenth Amendment claim that I have described. After all, when someone is threatened on grounds other than race—when a neighbor says to another in more than jest, "Stop letting your leaves blow onto my lawn or I'll murder you"—one might reasonably expect the state to intervene before the threatened neighbor is forced to discover whether the words will come true. If a state arbitrarily or designedly refuses to investigate threats that have a racial basis—a common enough experience during the Jim Crow era—then it is drawing precisely the distinction that the Fourteenth Amendment was enacted in order to forbid.

To be sure, one might dismiss even explicitly threatening anonymous notes as "just words," and I would be the first to agree that the mere fact that words wound is not, without much more, reason enough to regulate them. Yet to suggest that words alone are involved in a threatening letter, especially one that rests on race, is to miss the point. There is an old film in which John Wayne admonishes the bad guys to keep looking over their shoulders, "because one day I'll be right there behind you"—or words to that effect. Threatening leaflets are like that too. Given the history of anti-black violence in America, it is absurd to imagine that many black people can easily say, "I don't believe that anybody would harm me just because I'm black." One might respond by pointing to the glaring statistic suggesting that black-on-black violence is far more common than white-on-black violence, and that is a disparity with which all who are concerned with racial justice must finally deal. I am envisioning, however, not a hypothetical exercise in evaluating all possible physical threats, but rather the rational response of a black person who has actually been threatened.

Consider once again some of the examples with which I opened the paper. A state's failure to guard against racist episodes that simply make the campus less pleasant for people of color—the
racist jokes on the campus radio, the slave auctions, the comments about racial inferiority, the caricatures on posters—would not amount to a denial of equal protection. They are, in the words of Frank Horne, no more than "the rugged cut of rough hewn cross" upon black students' surging shoulders, a cost of living in a white America not yet fully reconciled to their increasingly powerful presence.

At the other end, a state's failure to take action to prevent harassment that is clearly intended to create a fear of physical abuse, such as the Ku Klux Klan episodes, would be fully actionable as a Fourteenth Amendment violation under the anti-oppression principle, for this is what the founders wanted to avoid. In the case of the threatening letters received by the Yale Law School students, the critical factual inquiry for the reviewing court would be the intimidating purpose and effect. Basically, the more surely the letters were planned to frighten the black students who received them, the more certain the case under the Equal Protection Clause against a state choosing not to investigate. I am less sure of the outcome of these cases under the antidiscrimination principle, where so much turns on context; after McCleskey, I am fairly confident that the color-blindness principle would not provide a cause of action unless the plaintiff were able to show that the state failed to act because of rather than in spite of the racial nature of the attacks. But a refusal to entertain a Fourteenth Amendment action aimed at forcing a response to episodes of threatening harassment is an essentially political choice; it has nothing to do with the original understanding.

In summary, then, when racial harassment moves beyond words to deeds, or if the harassment involves words that carry a clear and unmistakable threat of deeds, the anti-oppression principle would in most instances consider a state's failure to protect its black students as exactly the literal denial of "equal protection" with which the literature teaches us that those who wrote and ratified the Fourteenth Amendment were most centrally concerned. In fact, for the framers of the Amendment, a state's decision to allow some of its citizens to harass and intimidate others because of race would have seemed a far clearer instance of prohibited racial oppression than most forms of segregation.

Having said this, I must emphasize that my historical conclusions remain tentative, for I have not yet mined the primary sources myself. I am, moreover, not entirely happy with the conclusions I have reached. My unhappiness, however, relates largely to matters of policy, not of law (I admit that I am the odd bird
who tries to separate the two). Elsewhere, I suggest that the energy spent on combatting racial harassment is principally a distraction from more important battles in the struggle for racial justice. I continue to believe this. So I would be more comfortable politically were I able to report a judgment that a state's failure to enact adequate protection against racial harassment does not, except in very extreme cases, violate the Equal Protection Clause. But my preliminary view, based on a reading of the secondary literature, is that so narrow a band of protection is not what the framers and ratifiers of the Clause intended. It is not the task of the constitutional theorist, and certainly not the task of the originalist, to offer only those constitutional views that cohere with his or her political views. A theorist does the greatest service to the idea of law by evidencing an open and explicit willingness to argue for, and be bound by, legal rules that vary from the theorist's personal preferences. For only then can those of us who read the Constitution for a living exemplify what we try to teach to others who want to punish flag burning or implement classroom prayer in the public schools: the text, structure, and history of the Constitution often do not yield the answers that we wish they would.

72 For a more detailed discussion, see Carter, Reflections ch 8 (cited in note 13).