

THE COLOR-BLIND COURT

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In the remarkable race cases of 1995, four Justices—Clarence Thomas, Antonin Scalia, William Rehnquist, and Anthony Kennedy—committed themselves to the principle that government can almost never classify citizens on the basis of race. They paved the way for the judicial invalidation of most forms of affirmative action by insisting that all racial preferences are presumptively unconstitutional unless narrowly designed as a remedy for past discrimination. They signaled their readiness to declare the Voting Rights Act unconstitutional by declaring that the Fourteenth Amendment forbids states from using race as the “predominant purpose” in drawing electoral districts.¹ They made clear their impatience with court-ordered desegregation plans, the most tangible legacy of *Brown v. Board of Education*.² The ideal of a color-blind Constitution is close to securing five votes on the Supreme Court for the first time since it was considered and rejected during Reconstruction.

In cases where they found it politically convenient, the conservative Justices were obsessively attentive to constitutional history. They exalted the understanding of the Anti-Federalists over the Federalists, of Lincoln over Calhoun. But in the race cases, there is a conspicuous silence. Discussions of the original meaning of the Reconstruction amendments—from which the conservatives claim to derive the principle that the Constitution is color-blind—are nowhere to be found. And no wonder. An examination of the historical evidence suggests that the original intentions of the radical Republicans in 1865 are flamboyantly inconsistent with the color-blind jurisprudence of the conservative Justices in 1995. In this Essay, I will very briefly and broadly sketch the outlines of an originalist approach to the Four-

* Legal affairs editor, *The New Republic*. This Essay is based on a talk delivered at the Washington College of Law.

1. *Miller v. Johnson*, 115 S. Ct. 2475, 2481 (1995) (holding that Georgia’s congressional redistricting plan violates Equal Protection Clause).

2. 347 U.S. 483 (1954).

teenth and Fifteenth Amendments, and will suggest that if the conservative Justices were coherent originalists, they would have voted for judicial restraint rather than judicial activism in the race cases of 1995.

As liberal and conservative legal historians of Reconstruction have argued, the Fourteenth Amendment was not intended to forbid all racial discrimination in all circumstances, but instead to guarantee to all citizens a limited set of absolute civil rights.³ These rights were unclear at the margins, but not in broad relief. They were widely understood to include the common law rights guaranteed in the Civil Rights Act of 1866,⁴ such as the right to make and enforce contracts,⁵ the right to sue and be sued,⁶ and the right to inherit property,⁷ as well as (and this is more controversial) the rights guaranteed in the first eight amendments to the Constitution.⁸ They were crisply distinguished, however, in the nineteenth century locution, from two other sets of rights—political rights and social rights. The Framers of the Fourteenth Amendment said repeatedly that the Amendment was intended to protect civil rights, but not political or social rights.

The Reconstruction distinction between political rights and social rights suggests that a principle of color-blindness, if derived from the original understanding of the Fourteenth Amendment, would be far narrower than modern conservatives like to suggest. Consider the relevant passage from Justice Harlan's dissent in *Plessy v. Ferguson*,⁹ which modern conservatives like to quote selectively:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among

3. Compare EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869 (1990) with Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

4. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981-2000h-6 (1994)).

5. *Id.*

6. *Id.*

7. *Id.*

8. See Amar, *supra* note 3, at 1196 (discussing Justice Black's view that Fourteenth Amendment made first eight amendments applicable to states).

9. 163 U.S. 537 (1896).

citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.¹⁰

Harlan's complicated dissent is subject to many readings, but a *per se* rule against intentional discrimination in all circumstances is not one of them. The simultaneous ode to the civil equality and social inferiority of the freedmen was representative of the views of other moderate Republicans, including President Lincoln, who struck a similar note in the 1858 presidential debates.¹¹ Notably, Justice Harlan's careful insistence that "in respect of *civil* rights all citizens are equal before the law"¹² is hard to reconcile with a broad guarantee of political or social equality. Voting was not regarded as a fundamental right of citizenship in an era in which women were considered citizens invested with basic civil rights, such as the right to make contracts, but were denied the right to vote.¹³ To the extent that Justice Harlan is arguing for a color-blind constitution, it is in respect to civil rights alone, which were understood far more narrowly in the nineteenth century than they are today.

If Justice Harlan's vision of limited absolute equality with respect to civil rights is narrower than the broad color-blind position of the modern conservatives, it is more expansive than the racially asymmetrical position of some modern liberals. In a provocative reinterpretation of Justice Harlan's dissent, Professor Alexander Aleinikoff of the University of Michigan argues that Harlan was not attacking the use of racial classifications, but a social system based on white supremacy.¹⁴ According to Aleinikoff's reading of Justice Harlan, what was offensive about the law requiring segregated railway cars in *Plessy v.*

10. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

11. CREATED EQUAL: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 117 (Paul M. Angle ed., 1958) (chronicling debates over slavery occasioned by *Dred Scott* decision).

12. *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting) (emphasis added).

13. See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 103 YALE L.J. 1073, 1084 (1994) (discussing arguments of various women's rights activists during suffrage movement of late 19th century that women with basic civil rights should have right to vote).

14. See generally T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Anti-racism, and Citizenship*, 1992 U. ILL. L. REV. 961 (arguing that Justice Harlan's dissent "neither purported to be an interpretation of the Equal Protection Clause . . . nor [an argument] for color-blindness as that term is understood today").

Ferguson was not that it classified citizens on the basis of race, but that its purpose and effect were to "maintain a race-based caste system in which whites subjugated blacks."¹⁵ As Aleinkioff interprets Justice Harlan's dissent, the dissent argued that the Civil War Amendments protected the rights of citizens from unreasonable burdens; that the state must identify a legitimate purpose whenever it regulated those rights; and that white supremacy was an impermissible purpose—"There is no caste here."¹⁶ The Louisiana statute at issue in *Plessy*, therefore, was an unconstitutional regulation of "the personal freedom of citizens."¹⁷

A less historically sophisticated version of the anti-caste principle appears in *Regents of University of California v. Bakke*.¹⁸ Justices Brennan, White, Marshall, and Blackmun argued that the Fourteenth Amendment was not intended to prohibit racial classifications in all circumstances, but only when the classifications promote racial castes.¹⁹ The Justices argued that "[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."²⁰

In other words, the Constitution forbids racial classifications only when they "stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism."²¹ Virtually all racial preferences designed to help blacks are permissible, according to this view, because they are not based on stigmatizing prejudice for whites, but instead on a desire to remedy the effects of discrimination in society as a whole.

As historical support for the anti-caste position, Justice Thurgood Marshall relied on a brief by the NAACP Legal Defense and Education Fund,²² later published by Eric Schnapper in the *Virginia Law Review*.²³ Schnapper argued that the same Congress that passed the Reconstruction amendments "adopted a series of social welfare

15. *Id.* at 969.

16. *Id.* at 970.

17. *Id.*

18. 438 U.S. 265 (1978).

19. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 328 (1978).

20. *Id.* at 325.

21. *Id.* at 357-58.

22. *Id.* at 398 (Marshall, J., dissenting).

23. See generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (discussing affirmative action programs passed by Congress at time of Fourteenth Amendment that were "open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed opinions that such racially exclusive measures were unfair to whites").

programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that racially exclusive measures were unfair to whites."²⁴

Although provocative, Schnapper's brief is a work of advocacy, and it has been convincingly rebutted. As Professors Herman Belz²⁵ and Paul Moreno²⁶ have argued, concerns about favoritism for blacks, and a commitment to the principle of no "discrimination based on color,"²⁷ persuaded the Reconstruction Congress to extend the protections of the Freedmen's Bureau on a color-blind basis, protecting white refugees who had been driven from their land as well as black freedmen. Beginning with the Freedmen's Bureau Act of 1865,²⁸ subsequent freedmen's acts referred to "refugees and freedmen," because a majority of Republicans believed that continuing to use race, "even for the purpose of preventing discrimination, was inconsistent with equality before the law."²⁹

In debates over the Fourteenth Amendment, the Republicans frequently emphasized that they believed all persons, white as well as black, should have the same civil rights, rejecting any notion that the Amendment was intended to protect racial minorities alone.³⁰ Many supporters recalled Southern efforts to suppress abolitionist literature during the 1830s and 1840s.³¹ Their paradigmatic case involved the

24. *Id.* at 754.

25. See HERMAN BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866*, at vii (1976) (reviewing patterns of race relations and civil rights in United States and their assumption of "essentially modern form during civil war and reconstruction").

26. See Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. OF S. HISTORY 271, 271-72 (1995) (discussing tension between scholars who argue that Reconstruction amendments were meant to be color-blind and those who believe amendments envisioned "benign" racial classifications for purpose of achieving equality of citizenship).

27. *See id.* at 273.

28. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 508 (codified as amended at 42 U.S.C. §§ 1981-1983 (1994)).

29. BELZ, *supra* note 25, at 149-50.

30. See BERNARD SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 196* (1970) (quoting Rep. William Higby as stating that "laws must be made equal; that they must be administered equally upon all classes, without regard to color or race"); Steven A. Bank, *Anti-miscegenation Laws and the Law of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 303 (1995) (discussing Republican use of "law of symmetry" during Reconstruction Amendment debates to justify color-blind Civil Rights proposals); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheez for Mr. Herbert Spencer's Social Statistics*, 88 MICH. L. REV. 1366, 1369 (1990) (reviewing WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988) ("Republican proponents of the Fourteenth Amendment all agree that race was not a legitimate reason to treat people differently with respect to their civil rights.")).

31. See Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-1837*, 89 NW. U. L. REV. 785, 798 (1995) (discussing southern states' laws criminalizing teaching slaves to read as effort to "vaccinate" blacks against "infection by enforced

indignities suffered by a white dignitary, Samuel Hoar, who had been dispatched as an emissary from Massachusetts to challenge the black seamen laws which forbade free black sailors from the North from disembarking in southern ports, for fear they would lead slave revolts.³² Hoar's constitutional theory was that the free blacks were citizens of Massachusetts, and that the black seamen laws violated their privileges and immunities of state citizenship³³ under Article IV, Section 2, the Comity Clause.³⁴ His visit to Charleston, however, stirred up wild antipathy among the proud Southerners: local authorities refused to protect him from threats of violence, and after the state legislature called for his expulsion, he left without prosecuting his suit.³⁵ The expulsion of Hoar became a cause celebre in the North, and during debates over the Fourteenth Amendment, Republicans repeatedly invoked the Hoar incident as an example of why it was necessary to give Congress and the courts the power to enforce the privileges and immunities of citizenship for all citizens, white as well as black. It is hard, therefore, to argue that the amendment was aimed exclusively at intentional racial discrimination against blacks.

Even painting with a very broad brush, I think it is fair to say that the stark positions of modern conservative and liberal Justices—radical color-blindness on the one hand and an asymmetrical caste principle on the other—are hard to reconcile with the historical understanding of the Fourteenth Amendment. Where does that leave a justice who

literacy"); Stephen P. Halbrook, *Personal Security, Personal Liberty, and "the Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 343 (1995) (comparing references in congressional debates that were race-neutral to references specifically seeking to protect or establish civil rights of blacks); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1134 (1994) (discussing 1830s outlawing of abolitionists' literature in response to Nat Turner's uprising of 1831 in which 70 whites were killed).

32. See Seth F. Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 938 (1993) (discussing effect of Samuel Hoar's experiences on Fourteenth Amendment debates).

33. See HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 578-82 (1872). Upon returning from an unsuccessful trip to South Carolina to procure right of free black Massachusetts sailors to disembark at Charleston, Hoar remarked in a report to Congress: "Has the U.S. Constitution the least practical validity in South Carolina? South Carolina claims she trumps the Massachusetts courts which find these [black] men free." *Id.*

34. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens of the several States.").

35. See Paul Finkelman, *The Constitution and the Intention of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 389 (1989) (noting that Hoar spent only single night in Charleston before "officials told him they could not guarantee his safety . . . [T]he South Carolina legislature . . . asked the governor to expel him from the state, declaring that Hoar was an 'emissary sent . . . with avowed purpose of interfering with South Carolina's institutions and disturbing her peace'" (quoting South Carolina Resolution to Dec. 5, 1844, reprinted in STATE DOCUMENTS ON FEDERAL RELATIONS 238 (H. Ames ed., 1970))).

wants to examine the historical evidence scrupulously, and apply it to modern controversies about affirmative action and voting rights?

The voting rights question, I think, is the easier of the two. If there was one principle that most of the members of the Reconstruction Congress agreed on, it was that the Fourteenth Amendment was limited to civil rights; it did not include political rights, and therefore did not impose a color-blind rule on the suffrage. When Senator Jacob Howard of Michigan introduced the Amendment in the Senate on behalf of the Joint Committee on Reconstruction, he pointed to the corresponding language in Article IV to explain why it was obvious to everyone that the privileges or immunities of citizens could not include voting. Clearly a tourist from Massachusetts could not arrive in South Carolina and expect to vote in South Carolina elections. Moreover, the Committee Report accompanying the Fourteenth Amendment explicitly stated that it would not affect state authority over voting rights.³⁶

A specific originalist like Justice Clarence Thomas, therefore, should presumably reach the same conclusion as Justice John M. Harlan, who reviewed the historical evidence exhaustively in *Reynolds v. Sims*,³⁷ and reached the following conclusion:

I think it demonstrable that the Fourteenth Amendment does not impose this political tenet [of one man one vote] on the States or authorize this Court to do so State legislative apportionments, as such, are wholly free of constitutional limitations, save as may be imposed by the Republican Form of Government Clause³⁸

What about the Fifteenth Amendment, which forbids the state and federal government from denying or abridging the right to vote on the basis of race?³⁹ Once again, it provides little comfort for a specific originalist. There were a range of positions during the Fifteenth Amendment debates. Radical Republicans wanted to guarantee universal suffrage, outlawing all literacy tests, poll taxes,

36. CONG. GLOBE, 39th Cong., 1st Sess. 2755 (1866). The report stated:

The committee were of the opinion that the states are not yet prepared to sanction so fundamental a change as would be the concession of the right to suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three-fourths of the states of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.

Id.

37. 377 U.S. 533 (1964).

38. *Reynolds v. Sims*, 377 U.S. 533, 589-91 (1964).

39. U.S. CONST. amend. XV § 1.

and discriminatory qualifications for holding public office.⁴⁰ Both the House⁴¹ and Senate,⁴² at different times, passed versions of an amendment proposed by Senator Henry Wilson of Massachusetts, which provided that "[n]o discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed."⁴³

The Universal Suffrage amendment, however, was eventually rejected by the conference committee, because there was no majority in the Fortieth Congress to abolish literacy tests, property requirements, and the like. Instead, the language eventually adopted was based on the idea of impartial and qualified, rather than universal and unqualified, suffrage. The drafters not only intended to leave untouched voting qualifications that had a discriminatory impact, such as literacy tests, they also intended not to disturb qualifications that were explicitly designed to disenfranchise blacks.⁴⁴ The only new requirement of the Amendment, which looks nothing like a broad prohibition of race-conscious districting, was that any qualification for voting had to apply equally, in theory, to all races. This is hardly enough to sustain Justice Kennedy's theory that race may not be used as the "predominant purpose in districting."⁴⁵

The affirmative action question is much more complicated. How should a principled originalist come out in *Adarand Constructors, Inc. v. Peña*?⁴⁶ Under the Reconstruction conception of limited absolute equality, government has to extend to all citizens the same civil rights

40. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 259 (1995) (discussing early drafts of Fifteenth Amendment proscribing poll taxes and literacy tests which southern states had used to dilute effect of race-neutral voting provisions).

41. The Senate passed the amendment 31-27, with 8 absentees on Feb. 9, 1869. S. Res. 186, CONG. GLOBE, 40th Cong., 3d Sess. 1040 (1869).

42. John Bingham proposed a similar amendment in the House on Feb. 20, 1869. Senate Resolution 8 passed 92-70, with 60 members not voting. CONG. GLOBE, 40th Cong., 3d Sess. 1428 (1869).

43. CONG. GLOBE, 40th Cong., 3d Sess. 1035 (1869) (Sen. Wilson); CONG. GLOBE, 40th Cong., 3d Sess. 1035 (1869) (Rep. Bingham); see William Gillette, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 59, 69 (1965) (discussing Senator Wilson's plan to abolish discrimination or qualification for voting or holding of office based on race).

44. See MALTZ, *supra* note 3, at 157 (highlighting determination of Republican part of 39th Congress to not come across to voters as party of black suffrage).

45. Miller v. Johnson, 115 S. Ct. 2475, 2481 (1995).

46. 115 S. Ct. 2097 (1995).

it extends to white citizens.⁴⁷ The central question, therefore, is whether the right to work on federally funded highway projects should be considered a civil right, as the Reconstruction Republicans would have defined it. Professor John Harrison of the University of Virginia has argued it is not such a civil right.⁴⁸

If we regard services provided by general taxation as privileges of citizens, we must then ask whether eligibility to be among those who provide the services also constitutes a privilege. Although answering this question is not easy, my thought is that the taxpayer's money purchases the service, not the opportunity for employment.⁴⁹

Harrison, however, has the courage of his originalist convictions: he concludes that if the right to work on highways is not a protected privilege or immunity or civil right, then government is free to discriminate against black citizens as well as in favor of them when distributing the benefit.⁵⁰ This is an outcome that no conservative Justice would be willing to countenance.

If the principle of limited absolute equality is hard to apply in a coherent way, are there other principles that might be extracted from the Reconstruction Amendments and translated more successfully? One possibility, suggested by Justice Thomas in his *Adarand* concurrence, is the prohibition on stigmatizing caste legislation. According to Justice Thomas,

there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. . . . So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.⁵¹

47. See MALTZ, *supra* note 3, at 4. Maltz argues:

Republicans were committed to the idea that all men were equally entitled to a limited set of natural rights. Blacks were entitled to these rights not because racial discrimination was wrong; instead their claim was based on . . . a theory of "limited absolute liability"—that all men, whatever their condition or attributes were entitled to a certain minimum level of rights.

Id.

48. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992) (arguing that Privileges or Immunities Clause is equality-based protection).

49. *Id.* at 1463-64.

50. *Id.* at 1391.

51. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring).

At first, this proposition seems implausible. Surely Thomas does not mean to say that there are no moral or constitutional differences between the malicious discrimination that led to slavery and the benign discrimination that can lead, say, to an appointment to the Supreme Court. But, on reflection, Thomas' point seems provocative. It is possible to argue that, regardless of its motivation, affirmative action can stigmatize and degrade minorities just as slavery did, because racial classifications of any kind promote racial castes. Perhaps not all affirmative action is stigmatizing; but anything short of an absolute ban would not adequately distinguish between racial classifications that produce stigma and those that do not. Because so much is stigmatizing, all must be banned.

There is no doubt that caste was a recurring theme in the debates over the Civil War Amendments, especially in the speeches of Charles Sumner.⁵² Sumner proposed a joint resolution, which Congress declined to pass, declaring that "there shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers"; but all persons shall be equal before the law, whether in the court room or at the ballot box.⁵³ When Senator Joshua Hill, a Georgia Republican, insisted during debates over the Civil Rights Bill of 1871⁵⁴ that separate accommodations were acceptable as long as they were equal,⁵⁵ Sumner insisted that separate accommodations were inherently unequal. Sumner stated that "[t]he Senator does not seem to see that any rule excluding a man on account of his color is an indignity, an insult, and a wrong; and he makes himself on this floor the representative of indignity, of insult, and of wrong to the colored race."⁵⁶ Focussing on the social meaning of segregation, Sumner anticipated Chief Justice Earl Warren's argument in *Brown* that segregation was likely to affect black students differently than whites. Sumner argued: "Separation implies one thing for a white person and another thing for a colored person; but equality is where all have the same alike."⁵⁷

The problem with Justice Thomas' (implicit) emphasis on the stigma of caste is that the social meaning of affirmative action is

52. See Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. REV. 401, 420 (1994) (describing Charles Sumner's experience as plaintiff attorney for black student who challenged requirements of attending segregated school and Sumner's role two decades later in leading radical Republican forces in Reconstruction Congress).

53. *Id.* (explaining that although Sumner's Resolution failed, his efforts left wording of Fourteenth Amendment as race-neutral as original Constitution).

54. H.R. 380, CONG. GLOBE, 42d Cong., 2d Sess. 237 (1871).

55. CONG. GLOBE, 42d Cong., 2d Sess. 237-49 (1871).

56. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871) (statement of Sen. Sumner).

57. CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872) (statement of Sen. Sumner).

highly contested in contemporary politics. Some beneficiaries of affirmative action may feel stigmatized, but others do not; and when the social meaning of a political practice is contested, rather than settled, principles of interpretive humility and judicial restraint suggest that courts should remain agnostic about political judgments made within the terms of contested discourse; and should accord legislation on the subject greater deference rather than less.⁵⁸ In other words, Justice Thomas may or may not be correct, as a policy matter, that the most efficient way of avoiding stigma is to ban affirmative action in all circumstances; but it is odd for a self-styled strict constructionist to impose this contested social judgment on the political branches, rather than letting the political debate take its course.

The act of historical translation is never easy; but the evidence suggests that if the conservative Justices had made an honest attempt to respect the intentions of the Reconstruction Republicans in the race cases of 1995, they would have voted for judicial restraint rather than judicial activism. Instead of declaring that the Constitution is color-blind in all circumstances, they would have concluded that the Fourteenth Amendment neither imposes limits on race-conscious districting nor does it, in all circumstances at least, forbid set-asides for minority contractors. In his notorious opinion striking down the Public Accommodations Act of 1875,⁵⁹ Justice Bradley declared:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.⁶⁰

If the historic moment has arrived at last, the wrong heralds have trumpeted its arrival. Once again, unelected judges have usurped a political and moral decision that belongs to the Congress of the United States. As Justice Scalia argued in the last abortion case, the courts "should get out of this area, where they have no right to be, and where they do neither themselves nor the country any good by remaining."⁶¹

58. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 439 (1995) (addressing judicial role in changing interpretive contexts).

59. Ch. 114, 18 Stat. 335 (1875).

60. *The Civil Rights Cases*, 109 U.S. 3, 31 (1883).

61. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting).

