

THE THIRD RECONSTRUCTION:
AN ALTERNATIVE TO RACE CONSCIOUSNESS
AND COLORBLINDNESS IN POST-SLAVERY AMERICA

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We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

—*United States Constitution (1787)*¹

[We urge upon United States citizens] the obligations of justice, humanity, and benevolence toward our Africa brethren, whether in bondage or free.

—*Minutes of Proceeding of a Convention of
Delegates from the Abolition Societies (1794)*²

Today . . . the Court would still have to turn the clock *forward* to reach the goals and the constitutional conceptions of the fathers of the Fourteenth Amendment [Those constitutional conceptions] impart substantive significance to the “equal protection” clause and extend the national power of protection to all men denied their natural and human rights by state inaction, as well as by state action.

—*Jacobus tenBroek (1965)*³

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1. U.S. CONST. pmbl.
2. Zachariah Poulson, Minutes of the Proceedings of a Convention of Delegates from the Abolition Societies established in different parts of the Unites States (1794).
3. JACOBUS TENBROEK, EQUAL UNDER LAW 26 (First Collier Books 1965) (1951) (emphasis added).

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I. INTRODUCTION

At least since the 1980s, the Supreme Court has endorsed both an intentional harm focus and a colorblind remedy doctrine, which together have severely limited the utility of the Fourteenth Amendment as a transformative tool for America's disadvantaged racial groups.⁴ In direct contrast, critics have long supported unintentional harm models and race conscious remedial approaches, which permit the Court to recognize the historical and cultural implications of race and acknowledge the systemic and often unintentional, but nonetheless harmful, nature of most racial injury today.⁵ The race conscious approaches permit racially explicit remedies such as affirmative action to more readily withstand constitutional challenge.⁶

Neither of these two approaches is adequate to the task of guiding contemporary racial reform law and policy. The colorblind approach is most seriously flawed by its virtual denial of the persisting differential impact of race and its historical and cultural meanings.⁷ In addition, colorblind consti-

4. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Scalia, J., concurring); *City of Richmond v. J.A. Croson Co.*, 408 U.S. 469 (1989); *Minnick v. Cal. Dep't of Corr.*, 452 U.S. 105 (1981) (Stewart, J., dissenting). This view has led to a climate of judicial and political hostility to race-conscious remedial programs such as affirmative action in higher education. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); see also CAL. CONST. art. 1, § 31 (codifying California's Proposition 209, effective Aug. 28, 1997, and ending affirmative action in California's public institutions).

5. Some have proposed doing so by relaxing the standard for judicial review in equal protection claims where race is used to benefit traditionally disadvantaged racial groups. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223-39 (1977); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991). Others urge that the Supreme Court should apply the strict scrutiny test with a greater sensitivity to the historical and cultural meanings attached to race in America. See, e.g., Charles Lawrence, *The Id, The Ego, and the Equal Protection Clause: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

6. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Gotanda, *supra* note 5, at 2 (Gotanda defines "colorblind constitutionalism" as "a collection of legal themes functioning as a racial ideology"); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; and more recently, GLENN C. LOURY, *AN ANATOMY OF RACIAL INEQUALITY* (2002); Charles R. Lawrence III, *Essay: Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).

7. See, e.g., Gotanda, *supra* note 5, at 34; see also Crenshaw, *supra* note 6, at 1346-47.

tutionalism erroneously suggests a moral and consequential equivalence between various uses of race in decision-making. Taken together, these and other problematic aspects of colorblind constitutionalism render such approaches, without more, morally unacceptable and unjust. On the other hand, race conscious approaches, though superior to colorblind approaches from the standpoint of corrective justice, rely all too heavily on the fiction of "race," inevitably enhancing its sociopolitical significance and perpetuating racialization.⁸

A fully reconstructed America must necessarily commit to redressing the myriad present-day harms that result from the legacy and contemporaneous manifestations of racist thought and policy. Indeed, a truly humane society would, out of compassion, demand nothing less. At the same time, however, such a society would actively seek to undermine the dynamics by which we maintain and recreate the fiction of race and its implications each day. Neither colorblind nor color-conscious approaches address this difficult dilemma with a commitment to compassionate corrective justice. Hence, neither provides an adequate vision for a fully reconstructed America. An alternative to these approaches is thus necessary to guide political and judicial approaches to racial harm and remedies today.

What would such an alternative approach look like? This Article represents the preliminary efforts of my own struggle to answer this tough question. I begin close to the origin of the efforts of the law to remedy racial oppression in America in the anti-slavery movement,⁹ and with the chal-

8. For a liberal argument to this effect, see generally Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33 (2001). On this limited point, I must confess narrow agreement with many conservatives with whose analyses I otherwise disagree. See, e.g., TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION* (1996).

Others have noted aspects of this dilemma in race law, critically evaluating the efficacy of "sameness" arguments (for example, appeals to "colorblind approaches") versus "difference" arguments (which include race-conscious approaches). See, e.g., Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1927 (2000) (arguing that neither sameness nor difference rationales have succeeded in enabling racial justice); see also LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 21, 67-222 (2002) (arguing for the concept of "political race" as a compromise position which proposes cross-racial coalitions of people interested in dialogue on race as a part of a social justice agenda that is aimed at transforming democracy).

This Article reorients the debate around the dignity interests common to all human beings, offering humanity consciousness as an ultimate alternative. See *infra* Parts III-IV.

9. There is much evidence of organized resistance to racialized oppression that predates the period typically associated with the Anti-Slavery Movement (1830-'64). John R. McKivigan, *Series Introduction to 1 HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT: A BIBLIOGRAPHY OF SCHOLARLY ARTICLES* vii, vii-xii (John R. McKivigan ed., 1999) [hereinafter *HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT*]; Much of the resistance of that period was undertaken by African-Americans, including such notable figures as Frederick Douglass, Martin R. Delaney, and Sojourner Truth, among legions of other, less well-known blacks, whites, and others. See generally Katherine DuPre Lumpkin, "The General Plan was Freedom": A Negro Secret Order on the Underground Railroad, in 4 *HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT* 79, 79-93; Charles H. Wesley, *The Participation of Negroes in Anti-Slavery Political Parties*, in 3 *HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT* 160; see also ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* 192-93 (1970) (describing black anti-slavery petitions and other efforts in Massachusetts); TENBROEK, *supra* note 3.

lenges that that movement presented to prevailing interpretations of the Constitution of the late nineteenth century. I focus on the debate over the definition of humanity, upon which every related legal issue ultimately, even if tacitly, turns. I then discuss the implications of this underlying debate for modern-day understanding of the appropriate reach of the Fourteenth Amendment. Drawing on the most compelling insights of colorblind and race conscious approaches leads me to a paradoxical approach which *simultaneously* focuses on *both* the centrality of race and race-mediated oppression in shaping the world we know *and* the paramount importance of our essential commonality as human beings. If race and racial bias remain salient in American law and politics, and there is no question that they do, we have a duty under the Constitution to take aggressive steps to minimize their harmful effects on people's lives. If, however, we are ever to reconstruct society as undivided and unbiased along the lines of race, we must minimize our reliance on the concept of race in ordering our sociopolitical lives.

The concept of universal human dignity, elaborated upon by an understanding of the destabilizing implications of racialization for what it means to be human, is a more appropriate foundational value for interpreting the Constitution generally, and the Fourteenth Amendment specifically. In envisioning the goals and analyzing the reach of Fourteenth Amendment law, I argue for an approach that places a *post*-racialized notion of human dignity at the center of both the identification of wrongs and the evaluation of proposed remedies.¹⁰

To begin the work of mapping out this new approach, this Article sketches a framework for elaborating upon this proposition within constitutional law. I explore here the possible bases for an alternative theory of social justice, one oriented around a heightened consciousness of our common humanity, and an unwavering commitment to law and social policy aimed at uplifting all members of society. Specifically, I argue that the Constitution generally, and the Reconstruction Amendments¹¹ especially, should be viewed as primarily aimed at protecting the most significant of the privi-

10. See *infra* Part IV. By "post-racialized" human dignity, I mean that conception of humanity which views human beings in a way that is not merely non-racial, in the sense of "not recognizing race," but is post-racial, in the sense of being specifically informed by an understanding of the role of race-ing as a means of undermining our recognition of our common humanity, and of the reinterpretation of the notion of human dignity as enriched by our understanding of the role of race, but no longer undermined by it.

As discussed at Subsection IV.B.1, perhaps the most controversial aspect of my proposal is the call to "end racialization" and, toward that end, to minimize our reliance on race and racial identity politics. An elaborate consideration of this proposal will be the subject of a subsequent article. However, it should be noted that this call to "end racialization" continues the path broken in a previous work in which I argue emphatically for African-American reparations, but suggest the ultimate imperative of "a critique of the very idea of race, a social construct given official consequence by law." Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 913-16 (1993).

11. By "Reconstruction Amendments" I refer to the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

leges denied those enslaved under the system whose demise enabled the provisions' drafting: basic human dignity. I propose that the Reconstruction Amendments be re-envisioned as the starting point for a jurisprudence of justice founded upon the concept of universal, *post*-racialized human dignity.¹² Among other reforms, this approach calls for a reinterpretation of the Privileges or Immunities Clause of the Fourteenth Amendment as a guarantee of substantive privileges of citizenship necessary to the promotion and protection of human dignity.

Elaboration of this thesis will require a series of articles, each focusing on different aspects of the project of translating the proposed approach into concrete doctrinal strategies. The first in the series must set forth a new vision of a reconstructed America, and outline a legal framework by which such a transformation might rest on the language, spirit, and intent of the Reconstruction Amendments. That is this Article's primary aim. In a second I will analyze in greater detail the argument that the Fourteenth Amendment's Privileges or Immunities Clause must be reinterpreted as a guarantee of substantive privileges essential to human dignity. A third will consider the reinterpretation of the Equal Protection Clause, and a fourth, the reinterpretation of the Due Process Clause. Finally, a fifth article in the series will consider the use of the Thirteenth and Fifteenth Amendments in conjunction with the Fourteenth Amendment in furtherance of the objectives of a theory of social justice governed by the concept of post-racialized human dignity.

Accordingly, this Article lays the groundwork for the development of this broader approach and suggests a methodology by which humanizing doctrines might begin to take shape under American constitutional law. Again, the primary aim here is to set forth a post-racialized, reconstructed vision of humanity and make the case for its support under the Constitution. In Part II, I discuss some of the problems with the prevailing contemporary approach to the jurisprudence of racial justice—which relies primarily on the Fourteenth Amendment's Equal Protection Clause to redress allegations of racial harm—problems which I trace to the inadequacies in the prevailing “racial equality,” “intentional wrong,” and “colorblind” approaches.¹³ As an

12. Other scholars have called for an explicit recognition of human dignity as an implicit or intrinsic value under the U.S. Constitution. *See, e.g.*, THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter CONSTITUTION OF RIGHTS]. This Article is unique in its fuller exploration of the connection between the ideal of human dignity and the concept of race and in its outline of a specific set of original concepts and methodology by which human dignity as a value may be applied to the legal analysis of race-related cases through a process incorporating what I call “post-racialized human dignity,” the perspective of “humanity consciousness,” and the objective of “neo-humanization.” Thus, among other contributions, this Article implicitly responds to the critique that critical race theorists “would ‘deconstruct’ this imperfect [liberal] tradition, but offer[] nothing in its place.” Jeffrey J. Pyle, Note, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 816 (1999). Here, I deconstruct prevailing Fourteenth Amendment doctrine as inadequate, but propose “in its place,” as part of an emerging alternative jurisprudence I call humanity consciousness, a new way of thinking about the goals of the Fourteenth Amendment, and suggest an expanded use of the Privileges or Immunities Clause that might prove more useful.

13. The following analysis and argument depart from a strictly formalist discussion of constitutional

exemplary context within which to consider these issues, I focus on the problem of racial disparities in public education and the virtually bygone desegregation remedy. In Part III, I probe beneath the notion of “race” to reveal the denial of universal human dignity that is at its core, and call for a revised understanding of humanity that recognizes the role that the concept of race has played, over the past few centuries, in the multilateral debasement of the human being. I introduce and elaborate upon a role for the principle of post-racial human dignity. This new approach to race law is skeptical of the continuing efficacy of the racial equality jurisprudence that dominated the latter half of the twentieth century, yet rejects the colorblind thesis as wholly inadequate to address the manifest race-based inequities of our time. I introduce the concept of “humanity consciousness” as an alternative to both “race consciousness” and “colorblind constitutionalism” and posit neo-humanization as the goal of the third major phase in the reconstruction of America, i.e., the Third Reconstruction.¹⁴

Central to the vision of a reconstructed America presented here is the assumption that race should be rejected as the primary basis for ordering our sociopolitical thought and action, as a means of bringing about a post-racialist, humanized society. At the same time, however, I posit the necessity, during the period of transition from a racialized to a post-racialized society, of incorporating into constitutional law the means of effectively addressing present-day consequences of racialization which present an even greater affront to the principle of universal human dignity. Thus, I propose a dual race-and-humanity conscious approach that would permit the use of race to remedy the effects of minority oppression and white privilege for as long as necessary, but would do so in a way that promotes an overall humanity-conscious approach.¹⁵ I conclude Part IV by suggesting that a reinterpretation of the Fourteenth Amendment, with post-racial human dignity as the guiding principle, should be among the first steps taken toward reforming American law to incorporate the concept of neo-humanization as a legal norm.

To provide a glimpse of the possibilities that such a reinterpretation would create, I discuss at various times throughout this Article an important recent decision in a seminal line of desegregation cases, *Belk v. Charlotte-Mecklenburg Board of Education*¹⁶ (the latest decision in a line formerly known as *Swann v. Charlotte-Mecklenburg Board of Education*¹⁷). In the end, I speculate that the developments proposed here could well lead to

law in a number of readily apparent ways. The substance and form of my analysis are influenced by insights from such disciplines as traditional, contemporary, and post-modern social theory, sociology, social psychology, and critical race theory. I thus present a discussion of the Fourteenth Amendment that sees law as primarily a socio-political product and as a product which impacts real lives in the real world, a supremely relevant product.

14. Noted historians and race law scholars have referred to the American Civil Rights Movement of the 1950s and 1960s as the Second Reconstruction. See *infra* note 20.

15. See *infra* Part IV.C.

16. 269 F.3d 305 (4th Cir. 2001).

17. 431 F.2d 138 (4th Cir. 1970).

transformations at the level necessary for change to become manifest in the reconstruction of our educational systems and other fundamental aspects of our material world: transformations, that is, at the level of each human mind and heart.

II. RECONSTRUCTING AMERICAN HUMANITY: THE ABOLITIONISTS' VISION AS CODIFIED IN THE RECONSTRUCTION AMENDMENTS

A. Some Preliminary Jurisprudential Assumptions

The following argument relies on a few important assumptions. The first is the assumption that legal rules have consequences that reach far beyond their intended application from the standpoint of legal analysis. Legal rules play an important part in shaping concrete and metaphysical aspects of the world that we know. Thus, the impact of equal protection doctrine on the meta-narrative of race in America is more than merely symbolic. The Supreme Court's pronouncements on race are presumptively to be followed by lower courts, and together these opinions and their consequences influence the representations of race in federal and state social policies, in the media, in literature, and in the arts.¹⁸ As Justice Brennan noted from the bench, every decision of the court has "ripples" which impact society and social processes.¹⁹

Perhaps in no other area is this basic sociological insight more demonstrably true than in the area of race law. In a very real sense, the history of American civil rights law is the history of America's socio-legal construction, deconstruction, and reconstruction of what it means to be a constitutionally protected human being. In the aftermath of the war required to preserve the Union itself, the architects of the First Reconstruction²⁰ took on

18. See Crenshaw, *supra* note 6, at 373-74. Crenshaw states that:

Laws and customs helped create "races" out of a broad range of human traits. In the process of creating races, the categories came to be filled with meaning—Blacks were characterized one way, whites another. Whites became associated with normatively positive characteristics; Blacks became associated with the subordinate, even aberrational characteristics.

Id.

19. See Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145, 222 (1984). It is also true, of course, that legal rules are shaped by the world in which they arise. Hence, as realists and critical scholars have long helped us see, rules and society are mutually constitutive and reinforcing; that is, law is "both agent and object" of society's normative impulses. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1986); see also Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1522-26, 1537-40 (1991) (describing the founders of critical legal studies as seeing law "as a form of human activity in which political conflicts were worked out in ways that contributed to the stability of the social order ("legitimation") in part by constituting personality and social institutions in ways that came to seem natural[, and] . . . occurred on all levels."). For purposes of this Article, I will focus on the role of the law as agent of social construction, and ignore for now the mutuality between law and society (or culture) in this process. I put the question as follows: Assuming the law can and does play some role in constructing society, how can we craft law that reflects our best efforts at shaping society *justly*? ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at xxvii (1988).

20. "Reconstruction" refers to the period in American socio-political history commonly associated

the task of reforming the Constitution to provide federal protection for newly "freed" Americans. The law they made not only created a new world in which the centuries-old institution of slavery was virtually impossible,²¹ but perhaps more importantly, marked the beginning of the reshaping of American thinking about the very nature of humanity through the powerful symbolism and mechanisms of the law.²² Thus, the continuing evolution of what it means to be a human being, and refinement of the state's obligations to human beings subject to its laws, are among the most significant of the unstated objectives of the reconstruction of post-slavery America, and the law itself will play a central role.

It must be recognized that that project, the reconstruction of post-slavery America, is an ongoing one in which the Reconstruction Amendments have been the most formidable constitutional tools. This brings us to the consideration of a second major assumption implicit in the following: In interpreting the Reconstruction Amendments, there are no better guides than the writings of the abolitionists, whose broad visions gave rise to the constitutional law principles that were ultimately codified in the Reconstruction Amendments.²³ The radical abolitionists' ideology, which gave birth to the

with that label, roughly spanning the years from 1865 to 1877. In light of subsequent use of the term "reconstruction" to denote major reform waves in American racial remedies history, it could be called the First Reconstruction. See, e.g., MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA 1945-2000* (1991); Leslie Espinoza & Angela P. Harris, *Afterword to Embracing the Tar-Baby-LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1600 (1997) (referring to the Second Reconstruction in a consistent manner). Some scholars have used the term "reconstruction jurisprudence" to describe that work of critical race theorists which is aimed at rethinking race in this post-reform era with a view toward scholarship as "integrally linked to social change." See Gotanda, *supra* note 5, at 62. I put my efforts in writing this Article squarely in that camp.

21. It is probably impossible to capture in words the magnitude of the change in American society portended by the abolition of slavery. Emerson's observations give a bit of the impression left on one witness: "We have seen slavery disappear like a painted scene in a theater. We have seen the old oligarchs tumbled out of their powerful chairs into poverty, exile & shame. Those who were their victims occupy their places & dictate their fate." RALPH WALDO EMERSON, *SELECTED WRITINGS* 179 (William H. Gilman ed., 1965).

22. Both the constitutional and moral debates over slavery can be reduced to a debate over a single premise: Were slaves to be treated as human beings, or were they less than that, and hence, suitable for treatment as property under the law?

[L]argely the constitutional struggle was a battle of premise. Once the constitutional starting point on either side was accepted, almost all else followed automatically. If slaves were things, chattels, property, then the purpose of government, the right to protection, the idea of equality, the due process and just compensation clauses of the Fifth Amendment—all were applicable to their owners as citizens or as persons and were designed to continue the servitude by safeguarding ownership. If the slaves were human beings, individuals with minds and souls, persons, then the just compensation clause was wholly irrelevant to the forcible termination of their slavery; their liberty was protected by the due process clause; and they were in the class of persons whose equal need for protection and equal possession of inalienable rights gave rise to government [itself].

TENBROEK *supra* note 3, at 56.

23. In this, I join with those constitutional law scholars who have accorded "increasing importance . . . to the moral, political, and constitutional arguments forged by the abolitionists in the antebellum period as the crucial hermeneutic background for the proper interpretation of the Reconstruction Amendments." David A.J. Richards, *Abolitionist Feminism, Moral Slavery, and the Constitution: "On the Same Platform of Human Rights"*, 18 CARDOZO L. REV. 767, 769 (1996) (citing DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amend-*

idea reinterpreting the Constitution as a means of transforming America from a slave-holding nation to a humanity-upholding nation for the betterment of *all*, stands as the most authoritative point of reference in evaluating the civil rights law that has subsequently developed.²⁴ In light of their central role in creating the constitutional doctrine that gave rise to the Reconstruction Amendments, the abolitionists' constitutional theory and their visions of universal humanity should serve as important normative sources for divining justice in post-slavery America.

Accordingly, in the balance of this Part, I reflect on the abolitionists' ideals regarding the role of the law in the reconstruction of America. I do so not as an argument for an originalist interpretation of the Reconstruction Amendments, but for a number of other important reasons. First, the abolitionists provide historical support for the claim that the problem of race in America has always been seen, by many who have looked carefully with both head and heart,²⁵ as a manifestation of the failure of the Constitution to endorse the notion of universal human dignity. Second, far from being merely ghosts from the distant past, the abolitionists, who, through their writings are as alive as ever, should be viewed as partners in the ongoing project to reconstruct America in the wake of slavery. This project, then as now, requires the continuing reinterpretation of seminal legal concepts to facilitate the transformation of the American sociopolitical landscape. Thus, I see the abolitionists as important sources of jurisprudential guidance for the development of the humanity-centered vision of American law and soci-

ment, 101 YALE L.J. 1193 (1992); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299 (1993)).

24. By radical abolitionists, I refer to those on the extreme left of the anti-slavery movement in the United States in the middle third of the nineteenth century. The historical record confirms that it was the ideology of the radical abolitionists that was ultimately articulated as a constitutional theory and codified in the Fourteenth Amendment. See TENBROEK, *supra* note 3, at 89 ("[T]he doctrines of this band of radical extremists of the antislavery movement, is to be seen [in] the main body of the constitutional concepts and clauses that later appeared in the Fourteenth Amendment."). Historians have recently underscored the centrality of American abolitionism to a wide range of American reform movements, and noted the continuing reluctance of the abolitionists in the ongoing campaign for race-related justice in America. See McKivigan, *Series Introduction* to 1 HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT, *supra* note 9, at vii (citing early nineteenth century abolitionists as models for later reformers).

An additional, implicit predisposition of mine is also both philosophical and normative, and should be stated. Given that the law plays a role in shaping the world we know, it should, I believe, aim to support the noblest instincts of humankind, including compassion for those who suffer in our midst. I am thankfully not alone in this take on the role of the law. See, e.g., ROBIN WEST, CARING FOR JUSTICE 1-7 (1997); see also ERICH FROMM, THE SANE SOCIETY 361-63 (1955). I consider this view to be consistent with what I describe as non-theological (though not anti-theistic) humanism of the sort elaborated by Professor Fromm in so much of his interdisciplinary work. See, e.g., ERICH FROMM, TO HAVE OR TO BE, at xxii (1976); see also ERICH FROMM, THE ART OF LOVING (1957) [hereinafter FROMM, ART OF LOVING]; Erich Fromm, *Introduction* to SOCIALIST HUMANISM: AN INTERNATIONAL SYMPOSIUM, at vii-xiii (Erich Fromm ed., 1965). Though some might see similarities between my predispositions and those of cultural feminists such as West, Fromm's work stands as a reflection of the notion that only women or feminists are predisposed to privilege compassion and to value interrelatedness.

25. See Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1168-87 (1999) (describing the moral philosophy of antebellum intellectuals and jurists).

ety outlined here, a vision that departs dramatically from that animating law and shaping society today.

*B. The Abolitionists' Vision of Post-Racial
Humanity under Law*

The American anti-slavery movement ranks among the greatest intellectual and social reform movements in the history of humankind. Ordinary men and women convinced of the magnitude of the crime against humanity embodied in slavery and endorsed by the Constitution, determined to undo it, and ultimately shaped their winning appeals in terms of Constitutional obligations. These men and women we refer to simply as “the abolitionists.”²⁶

The abolitionists, and perhaps the most radical among them, were convinced that the origin and purposes of government under social contract theory imposed affirmative obligations to protect people subject thereto.²⁷ Their first and foremost concern was not only that the Constitution’s broad purposes be reflected in the law generally, but that it also specifically guide the federal government in fashioning an approach to the treatment of freed men and women.²⁸ In crafting their constitutional theory, the abolitionists interpreted the Preamble’s statement that the Constitution was “ordain[ed]” “to establish justice” as imposing on the federal government an affirmative obligation that extended to all persons under its provision.²⁹ That obligation applied to those enslaved, and required that the government “make just” the relationship between master and slave by providing the slave with protection under the law equal to that available to whites.³⁰ With this reinvisioned Constitution as their guide throughout the movement, the abolitionists asserted a universalist notion of humanity which successfully challenged, debated, and revised the definition of humanity prevalent at that time. The twin transformative ideas asserted by the abolitionists—(1) the notion of universal humanity, and (2) the notion that dignified human existence must be characterized by particular *substantive* conditions—gave the anti-slavery

26. See generally PATRICIA BRADLEY, *SLAVERY, PROPAGANDA, AND THE AMERICAN REVOLUTION* 155 (1998); HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* 209-10 (1998); McKivigan, *Series Introduction* to 1 *HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT*, *supra* note 9, at vii (stating that abolitionists were the first group to bring racial issues into the public’s consciousness). Of course, factions that range from radically progressive to conservative characterized the abolitionist movement, and even the most progressive among them would be considered anachronistic conservatives today. Nevertheless, for the boldness of their perspectives when measured from the standpoint of their own era, and for their fearless reconceptualization of the Constitution in the interest of social justice, they stand as intellectual avatars. Though beyond my ability to adequately do so in this Article, the work of the progenitors of abolitionist constitutionalism should be reconsidered, and its authors raised to their rightful position of esteem in our legal pantheon.

27. See, e.g., TENBROEK, *supra* note 3, at 88-89. Again, I rely on tenBroek as suggestive of historical reports on the work of abolitionists that may serve as sources of inspirational guidance as we continue to elaborate Reconstruction Jurisprudence.

28. *Id.* at 44-45.

29. *Id.* at 48.

30. *Id.*

movement, and its twentieth century anti-segregationist progeny, their unflinchingly compelling moral character.³¹

The social and legal contexts in which these transformative ideas were originally presented were complicated, varied, and ill-suited to broad generalization.³² However, it is clear that, in service of a particularly exploitive (and hence, very successful) economic system, a caste of enslaved men and women were denied the basic rights, privileges, and protections characteristic of membership in a civilized society.³³ This denial of substantive and procedural rights and privileges was perpetrated primarily under the auspices of various state governments, but it was the sanction of those denials by the federal government under the Constitution that concerned the abolitionists.³⁴

Over the course of the nineteenth century, it became increasingly clear to critical observers that the Constitution's sanction of slavery translated into the daily experience of degradation, humiliation, rape, maiming, torture, and murder of millions of human beings, and all of this under a political system ostensibly aimed at "establishing justice" and securing "the blessings of liberty" to all.³⁵ It was the wholesale incompatibility between the natural law based principles expressed in the Constitution and the Declaration of Independence and the practices of slavery that fueled the abolitionists' outrage over the system and lent political legitimacy, social urgency, and moral superiority to their cause.³⁶

31. See, e.g., David Brion Davis, *The Emergence of Immediatism in British and American Antislavery Thought*, in 1 HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT, *supra* note 9, at 1, 20-22. It would, however, be a mistake to view the anti-slavery movement as being motivated solely by moral considerations. Clearly, political and economic concerns were of critical relevance as well. See, e.g., W.E.B. DUBOIS, *The Suppression of the African Slave-Trade to the United States of America 1638-1810*, in WRITINGS 194 (Library of America 1986).

32. See McKivigan, *Series Introduction* to 1 HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT, *supra* note 9, at vii (describing the abolition movement as "exceptionally diverse: it was religious and secular, moral and political, ethical and legalistic, philosophical and self-interested, Northern and Southern"); see also, e.g., IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 224 (1998).

33. See BERLIN, *supra* note 32 at 1-10.

34. See TENBROEK, *supra* note 3, at 33-40.

35. See, e.g., ROBERT D. RICHARDSON, JR., *EMERSON: THE MIND ON FIRE* 268-70 (1995) (describing evolving commitment to the antislavery movement of Ralph Waldo Emerson and his wife, Lidian Emerson); HENRY DAVID THOREAU, *Slavery in Massachusetts*, in *WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU* 663, 668 (Brooks Atkinson ed., 1937) (comparing the enslavement of men to the act of making "a man into a sausage"); see also JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A MULTIRACIAL AMERICA* 112-14 (2000) (quoting an article detailing the first-hand account of the experiences of Lavinia Bell, an escaped slave, and the article's reception in Canada as "a brief account of the sufferings of a poor negro woman, caused by the brutality of a master, which for hideous malignity and fiendish cruelty were beyond the imagination").

36. For example, Ralph Waldo Emerson, commenting on the passage of Massachusetts' Fugitive Slave Act, exemplified the impact of the contradiction posed by slavery in the minds of thoughtful observers:

We shall never feel well again until that destable law is nullified in Massachusetts & until the Government is assured that once for all it cannot & shall not be executed here. All I have, and all I can do shall be given & done in opposition to the execution of the law. . . . I am surprised that lawyers can be so blind as to suffer the law to be discredited. The law rests not only in the instinct of all people, but, according to the maxims of Blackstone & the jurists, on equity,

The denial of full citizenship and dignified treatment to blacks was rationalized, explained, and justified under the law, both explicitly and implicitly, by a socially and culturally constructed theory of race.³⁷ This theory posited race as an objective fact, and the white race as inherently and biologically superior to all others.³⁸ Indeed, the theory of white superiority and widespread commitment to the practices of racialization based thereon were important to the maintenance of the institution of slavery, and later segregation, in light of the Nation's stated founding principles of universal equality for men.³⁹ As has been explained elsewhere,⁴⁰ the modern notion of race and the ideology of white superiority were seventeenth and eighteenth century cultural constructs designed to answer these otherwise unacceptable contradictions between principle and practice in a way that would permit continued super-exploitation of blacks under the emerging capitalist system.⁴¹ Against the background of the theories of biologically-determined race and white superiority, social Darwinism and the theory of natural selection came along in the nineteenth century to lend an aura of scientific legitimacy to racialist assumptions and hunches prevalent among eighteenth century leaders.⁴² Perhaps even more devastating for its lasting implications, these latter theories served not only to absolve official society of its sense of moral or legal responsibility for the consequences of state-sponsored slavery and racial subordination, but also to call into continuing question the causal

and it is the cardinal maxim that a statute contrary to natural right is illegal, is in itself null & void.

EMERSON, *supra* note 21, at 148-49.

37. WINTHROP D. JORDAN, *THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* 27-39, 50-54 (1974).

38. For an admirably engaging discussion of the rise in theories of race as a biological fact and the role of that thinking in the mid-nineteenth century political debate over the future of slavery, see LOUIS MENAND, *THE METAPHYSICAL CLUB* 97-116, 194-95, 209-10 (2001).

39. This is so even though, by the late nineteenth century, social Darwinism had come to stand, in the minds of some, for the notion that, even without the benefit of the legal subordination of blacks, whites would naturally always remain the superior race. See, e.g., MENAND *supra* note 38, at 194-95 (describing Huxley's views in this regard as a "theology for the postslavery era"); see also *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J. dissenting) (expressing the view that the white race, if it is true to its great heritage will remain the superior race for all time). Since that time, Darwinist thinking has served conveniently as either a justification of discriminatory policies, or as a means of absolving societies of responsibility for their consequences. In many cases, it has served both functions at once. Note also, of course, that women would not be treated as "equal" to men under the Constitution for some time to come. U.S. CONST. amend. XIX (codifying women's right to vote, ratified in 1920). The historical record suggests, however, some overlap among abolitionists and women's rights supporters, including, for example, the founding of the Equal Rights Association, just prior to the ratification of the Fifteenth Amendment, with the specific goal of universal suffrage. See, e.g., Sandy McEvoy, *An Integrated Chronology of the Abolitionist and Suffrage Movements 1773-1920*, at <http://www.rohan.sdsu.edu/~mcevoy/timeline.html> (last visited Nov. 17, 2002) (describing the founding of, for example, the Equal Rights Association, by leaders among both movements). Division among abolitionists and suffragists regarding the best strategy for advocating constitutional recognition of the rights of blacks versus those of women should not necessarily be taken as an indication of lack of mutual support among advocates for the different causes.

40. See TENBROEK *supra* note 3, at 48, 56.

41. See generally JORDAN, *supra* note 37, at 50-54.

42. See, e.g., Thomas Jefferson, *Notes on the State of Virginia*, cited in K. ANTHONY APPIAH & AMY GUTMAN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 45 (1996) (quoting Jefferson's unscientific hunches about the inferiority of blacks).

connection between these officially sanctioned subordinating practices and the experiences of racialized groups in America.⁴³

Though they often swooned amidst the onslaught of persuasive presentations in support of the science of race and its consequences,⁴⁴ the most progressive⁴⁵ among the abolitionists had substantially different views from those of the “Founding Fathers” on both the nature of humanity, and the role of government in protecting against its degradation.⁴⁶ The progressives saw blacks as human beings created by God like all others, deserving of the rights and privileges accorded other men.⁴⁷ Further, they saw the federal government as having an obligation to protect both blacks, and those whites and others forced to acquiesce to slavery against their moral will, from the degradations suffered by both groups, and indirectly by all members of civilized society, as a consequence of the law’s sanction of slavery.⁴⁸

43. See MENAND, *supra* note 38, at 194-95.

44. See, e.g., EMERSON, *supra* note 21, at 121-22. Emerson states:

When at last in a race a new principle appears an idea, that conserves it. Ideas only save races. If the black man is feeble & not important to the existing races, not on a par with the best race, the black man must serve & be sold & exterminated. But if the black man carries in his bosom an indispensable element of a new & coming civilization, for the sake of that element no wrong nor strength of circumstance can hurt him, he will survive and play his part.

Id.

45. Again, the abolitionists’ views on blacks and their role in a post-slavery society were varied, ranging from conservative to radical. See *supra* note 26 and accompanying text. I seek here to take the most progressive segment of the abolitionists as inspirational guides in this preliminary exercise, noting full well that though they may have been considered progressive or even radical for their time, most of their views on blacks, when considered against today’s understandings, do not appear progressive, and some may be viewed as racist.

46. See, e.g., APPIAH & GUTMAN, *supra* note 42, at 44-45; cf. BERLIN, *supra* note 32, at 220 (discussing Thomas Paine’s lamentation on the contradiction between slavery and the rebellion against colonial rule).

47. See, e.g., PEREA, *supra* note 35, at 104. Perea states:

[N]ow, when we scarcely had risen from our knees, from supplicating his aide and protection, in forming our government over a free people, a government formed pretendedly on the principles of liberty and for its preservation,—in that government, to have a provision not only putting it out of its power to restrain and prevent the slave-trade, but even encouraging that most infamous traffic, by giving the States power and influence in the Union, in proportion as they cruelly and wantonly sport with the rights of their fellow creatures, ought to be considered as a solemn mockery of, and insult to that God whose protection we had then implored, and could not fail to hold us up in detestation, and render us contemptible to every true friend of liberty in the world.

Id. (quoting Luther Martin, Maryland delegate to the Constitutional Convention of 1787).

48. See, e.g., EMERSON, *supra* note 21, at 149. Emerson states:

[In light of the] degradation & personal dishonour which now rests like miasma on every house in Massachusetts, the sentiment is entirely changed. No man can look his neighbor in the face . . . What is the Union to a man self-condemned, with all sense of self-respect & chance of fair fame cut off—with the names of conscience & religion become bitter ironies, & liberty the ghastly nothing which [supporters of slavery] mean by the word?

Id. There is no question that religious and other extra-legal moral convictions often informed these views among the more radical abolitionists. See, e.g., BERLIN, *supra* note 32, at 220-21 (describing an “evangelical upsurge” contemporaneous with the rise of revolutionary rhetoric, which “presumed all were equal in God’s eyes,” and “complemented and sometimes reinforced revolutionary idealism”). However, their views also indicated an appreciation of black and African humanity that slavery’s supporters found it in their social-psychological, political, and economic interests to deny. See DUBOIS, *supra* note 31, at 193-97.

American society has never adequately reckoned with the full measure of the *society-wide* debasement wrought by the slavery compromises of the Constitution. The endorsement of slavery in the Constitution did not merely make a lie of its basic principles and reflect the Founders' own failure of vision. In addition, it made every American who wished to love his or her country complicit in the endorsement of white superiority at its origination. At its very founding, then, our country broke the spirit of its highest aspirations and made a mockery of American civilization and humanity itself. DuBois summarized the implications this way:

With the faith of the nation broken at the very outset, the system of slavery untouched, and twenty years' respite given to the slave-trade to feed and foster it, there began, with 1787 . . . a moral, political, and economic monstrosity, which makes the history of our dealing with slavery . . . so discreditable to a great people.⁴⁹

The reconstruction of the moral foundation of the United States was thus of longstanding and critical importance to the abolitionists. Of the myriad objectives that fueled the anti-slavery movement in its various incarnations, and supported the development of constitutional arguments in support thereof, three loomed primary. The first was that the broad rights and privileges that the Constitution and the constitutional government were aimed at securing and protecting must be made available to all, including enslaved and free blacks and others oppressed under the system, including among others the (mostly white) abolitionists.⁵⁰ Second was the concern that the law would be applied through a process that minimized the threat of personal injury, systemic exploitation, and other harms to all but, especially to blacks.⁵¹ Third was the concern that the law be made responsive to the needs of all citizens equally, regardless of race.⁵² This concern was not merely one of administrative access or process; of particular concern was that blacks were in need of the *protection* of the law against whites.⁵³ Taken together, these concerns ultimately led to the demand for the abolition of slavery altogether.⁵⁴ But even more important for our purposes today, these concerns also helped shape the language of the Reconstruction Amendments that were to codify the commitment of people to slavery's literal and spiritual abolition in America.

49. See DuBois, *supra* note 31, at 197.

50. *Id.* at 41-56. The suppression of minority viewpoints regarding slavery, and the oppression of its detractors, was serious and brutal business. Abolitionists were intimidated, threatened, and beaten to near death when speaking in the North; in the South and Midwest, whether black or white, one could be killed for advocating the end of slavery. See, e.g., RICHARDSON, *supra* note 35, at 268-69 (recounting the mob murder of Elijah Lovejoy, an abolitionist and newspaper man in Alton, Illinois).

51. RICHARDSON, *supra* note 35, at 89-90.

52. *Id.* at 87-88.

53. *Id.*

54. This was, of course, accomplished by the Thirteenth Amendment. U.S. CONST. amend. XIII.

C. Reconstructing the Reconstruction Amendments

The Reconstruction Congress⁵⁵ enacted three important amendments to the Constitution: the Thirteenth, which abolished slavery; the Fourteenth, which conveyed the substantive aspirations of its drafters; and the Fifteenth, which granted freedmen the right to vote. The centerpiece of the legislation enacted by the Reconstruction Congress for the advancement of formerly enslaved Americans was the Fourteenth Amendment.⁵⁶

As noted above, the abolitionists were primarily concerned with securing rights and privileges for all citizens, protecting those citizens from oppression, and ensuring a fair process to those facing state deprivations of life, liberty, or property.⁵⁷ The provisions of the Thirteenth, Fourteenth, and

55. "Reconstruction Congress" refers to the Congressional classes of 1866-1875. For a detailed legislative history, see *THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH AND 15TH AMENDMENTS* (Alfred Avins ed., 1967); *SUPPLEMENT TO THE RECONSTRUCTION AMENDMENTS' DEBATES: READERS' GUIDE* (Alfred Avins ed., 1967) [hereinafter *AMENDMENT DEBATE SUPPLEMENT*]. For more general history, see *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866* (1977); *PATRICIA ALLAN LUCIE, FREEDOM AND FEDERALISM: CONGRESS AND COURTS, 1861-1866* (1986).

56. The amendment was enacted to provide constitutional support for the Civil Rights Act of 1866, to ensure the citizenship rights of those born within United States, and to provide a means of drafting federal legislation for the protection of newly freed slaves in the wake of the institution of Black Codes and other repressive practices by the Southern states. The Fourteenth Amendment, in its entirety, provides as follows:

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

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

U.S. CONST. amend. XIV (emphasis added).

57. See *supra* notes 46-50 and accompanying text.

Fifteenth Amendments addressed these concerns, and the Supreme Court acknowledged the unified purpose of the Reconstruction Amendments, considered together:

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning.

. . . .
. . . [For] in the light of . . . events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him

We do not say that no one else but the negro can share in this protection. . . . But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all⁵⁸

The Fourteenth Amendment specifically reflected both the general concerns of the abolitionists and the unity of purpose of the Reconstruction Amendments. For example, these objectives and concerns correspond with the three directives of Section One of the Fourteenth Amendment. The Privileges or Immunities Clause embodied the radical abolitionists' goal of ensuring the broad natural rights that inspired the Declaration of Independence and the Constitution, and gave both documents their continuing moral force. The clause suggests an effort to ensure that, regardless of race, citizens are accorded privileges and immunities befitting their status as human beings in a free society.⁵⁹ The Due Process Clause captured the singular procedural interest in ensuring that the law be applied through a fair and deliberate process.⁶⁰ And the Equal Protection Clause embodied the abolitionists' interest in seeing to it that the law not only be equally available to blacks, but that the law's availability would serve to protect them from all manner of oppression whether by the government or by whites generally.⁶¹ The ultimate goal of the most progressive abolitionists was to remake the world so

58. *Slaughter-House Cases*, 83 U.S. 36, 67, 71-72 (1872).

59. *See, e.g.*, TENBROEK, *supra* note 3, at 123-28.

60. *Id.* at 120-23.

61. *Id.* at 117-19.

that differences between blacks and whites with regard to indicia of dignified treatment would be relics of the past in which black human beings were treated as sub-human under the law. Section One of the Fourteenth Amendment explicitly encapsulates the major contours of that goal.

Thus, the original purpose of the Reconstruction Amendments generally, and the Fourteenth Amendment specifically, was to bring the abolitionists' dreams of a more universalized notion of human dignity into legal and social reality by extending all of the rights accorded whites under the Constitution—long recognized as fully human—to blacks. That is, its purpose was to bring the formerly enslaved population in the United States within the folds of the rights, privileges, and protections afforded whites under the United States Constitution *and* to have that change in legal status be reflected in the lives of formerly enslaved people.⁶² It was to give newly freed men Constitutional support for their bids to be treated fully not only as "citizens" of the United States, but also as whole persons or human beings, and to ensure that such treatment would be manifest in the real world.⁶³

But it does not require extraordinary insight to conclude that the abolitionist theory that gave rise to the Reconstruction Amendments aimed to do even more. Recall that for many, the debasement of moral principle represented by the Constitution's sanction of slavery undermined the spiritual foundation of the new country: It broke the country's spirit. It follows, then, that the constitutional codification of our commitment to abolition would be seen as giving back what the slavery compromises took away: they were to mend the country's spirit. In short, the Reconstruction Amendments would be interpreted as embodying the spiritual and moral principles undermined by the original Constitution.

If this is at all plausible, then the interpretation of those amendments today should be informed by this purpose, as well. For example, seen in this light, the Fourteenth Amendment had important implicit purposes: (1) to reform the Constitution that was generally flawed at its inception by its implicit endorsement of the concept of "partial humanity" or "sub-humanity" to justify slavery; and (2) indirectly, to reform and redeem a society desecrated by its three hundred years of explicitly dehumanizing a segment of the American population and implicitly dehumanizing the whole. These objectives take the problem of race in society today not as *sui generis*, but as an important symptom of a deeper flaw in the value system of our constitutional government which impacts us all: its insufficient attention to, and inadequate protection of, basic human dignity for all.

62. *Id.* at 87-88.

63. *Id.*

D. The Third Reconstruction Defined

What would it take to reform not only the Constitution but also a society officially organized around the principle of rationalized dehumanization? First, it would require the enactment and enforcement of laws that would prohibit the continuation of the practices of dehumanization. A *truly* transformative approach, however, would not stop there. Instead, it would seek, insofar as possible, to reconstruct the principles and practices of society to undo the harm caused by the official sanction of abject denials of human dignity that was slavery. Beyond that, it would seek to discourage the continued explicit and implicit operation of these principles and practices. Thus, a truly transformative approach would, at every turn, seek to restore to a state of dignity *every* man, woman, and child impacted by the dehumanizing effects of slavery, and to see that restored dignity reflected, insofar as possible, in the lives of not only the formerly oppressed but the whole society. In short, such an approach would seek to raise *all* Americans to a state of dignity impossible to *all* Americans reared in a country whose core principles remain insufficiently reconstructed from the debilitations of our slave-holding past and our still racialized present. I would name the era in which we actively undertake efforts aimed at bringing about such a transformation, consistent with the highest moral aspirations of the abolitionists whose footprints have marked the way, as the Third Reconstruction.

Indeed, the historical record suggests that the framers of radical abolitionist constitutionalism, whose ideas would ultimately create the basis of Section One of the Fourteenth Amendment—men like Frederick Douglass,⁶⁴ Charles Olcott,⁶⁵ James Birney (a reformed ex-slaveholder himself),⁶⁶ and Alvan Stewart⁶⁷—looked toward a world which, in the century following the end of slavery, would be truly transformed. Most importantly, the record suggests that they and other well-known intellectuals of the day, such as Emerson and Thoreau, imagined a world in which, in the first instance, humanity would be highly valued, supported, and protected by the state.⁶⁸ Further, they might have imagined a world in which the theory of race had been debunked once and for all, and universal humanity and brotherly love would reign as the supreme values undergirding our Constitution, our communities, and our lives.⁶⁹

64. FREDERICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF (Signet 1st ed. 1968).

65. *Id.* at 43-45.

66. *Id.* at 296.

67. *Id.* at 66-72.

68. Indeed, one might argue that state recognition of, and protection for, the dignity of human life is arguably suggested by the phrase “blessings of liberty” in the Constitution’s Preamble. U.S. CONST. pmbl.

Emerson and Thoreau each famously insisted that a government that failed to provide adequate protection of basic dignity interests was worthy of no respect at all. *See* EMERSON, *supra* note 21, at 55; *see also* HENRY DAVID THOREAU, WALDEN AND OTHER WRITINGS 297-345 (1993).

69. Among the leading intellectuals of the pre-Civil War generation were those who saw beyond the fiction of race. For example, Emerson’s journal writings reflect his own evolution toward a tentative, but

Whatever the outer limits of the radical abolitionists' aspirations for a reconstructed America, the Reconstruction Amendments represented the Reconstruction Congress's best effort to provide Constitutional guidance through the reformation process.⁷⁰ Unfortunately, however, when considered in light of the vision of the abolitionists, it is apparent that the current Supreme Court's interpretation of the amendment with the most transformative potential, the Fourteenth Amendment, is hopelessly thin, immoral, and wrong. In making this argument, I refer to, but endeavor to rehash as little as possible, the copious literature of the last generation in legal scholarship that has been critical of Fourteenth Amendment doctrine.⁷¹ It may be that the fundamental errors described in most of those critiques reflect the failure of the courts to interpret the Fourteenth Amendment consistently with the reach of the provision as envisioned by its progenitors. That original vision affords at least as much attention to the substantive and affirmative requirements of the government in ensuring the treatment of former slaves as full human beings as to the procedural and negative requirements.⁷² In light of its intellectual history, the essential thrust of Section One of the Fourteenth Amendment should be to embody the norm of post-racial human dignity. Its interpretation must, to some important degree, further the project which lay behind its drafting: that of reconstructing what it means to be a human being in the eyes of the law, and ensuring that the doctrine constantly reaffirms that meaning (or at the very least does nothing to discourage it) through its framework of rules and the governmental policies and practices that result.

distinctly post-racial, view of humankind. Commenting on the impact of Fredrick Douglass and Toussaint L'Overture, Emerson enthused:

Here is the Anti-Slave. Here is Man, and if you have man, black or white is insignificance. Why at night all men are black. The intellect, that is miraculous, who has it has the talisman, his skin and bones are transparent, he is a statue of the living God, him I must love and serve

. . . .

EMERSON, *supra* note 21, at 122. Moreover, Emerson believed that race and color should be stripped of any legal significance in the post-slavery world. Among the two points he deemed essential to the reconstruction of America were the establishment "of the fact that the United States henceforward knows no color, no race, in its law, but legislates for all alike—one law for all men." *Id.* at 176.

70. Others have noted that, of the three affirmative directives to the states conveyed by the Fourteenth Amendment (via the Privileges or Immunities Clause, the Equal Protection Clause, and the Due Process Clause), "any one . . . might have been selected by the Court as the great constitutional engine that would" dismantle segregation and other legacies of slavery. *See* TENBROEK, *supra* note 3, at 14.

71. *See, e.g., supra* notes 5 and 7.

72. *See, e.g.,* TENBROEK, *supra* note 3, at 41-44. Professor tenBroek describes the development of an abolitionist constitutionalism as a direct response to the early elaborations by F.W. Pickens and H.L. Pinckney of a constitutional justification for slavery. *Id.* at 42. Charles Olcott, in his detailed response, shaped the constitution into a document guaranteeing justice and equal protection under the law to all human beings:

"All slaves (who are 'people' also) are totally deprived of every one" of these rights [guaranteed by the Constitution] . . . "What abolitionists demand as naked justice is, that the benefit and protection of these just laws, be extended to all human beings alike, to the colored as well as the white . . . And that all mankind be allowed the same legal rights and protection without regard to color or other physical peculiarities."

Id. at 44 (quoting CHARLES OLCOTT, LECTURES ON SLAVERY AND ABOLITION 43 (1838)).

*E. The Reconstructed Amendments and the
Principle of Post-Racial Human Dignity as the
Architecture of The Third Reconstruction*

In the following Part, I take the abolitionists' vision to its next logical extension. I suggest a refinement that is consistent with their concern to improve the dignity of humankind, yet takes into account contemporary understandings of "race," and the more fully expanded notion of humanity of the present day. Namely, I suggest that the vision of the most radical among the abolitionists—of a spiritually-informed notion of universal humanity, and of a government committed to uplifting and protecting all humankind using both substantive and procedural means—would more likely than not, if asserted today, include some distinct notion of truly universal, complete human dignity: an explicitly post-racial, dignified conception of humankind. It is this concept that should be the courts' touchstone in interpreting the reach and contours of the Reconstruction Amendments.

Of course, prevailing interpretations of these amendments do not come close to these ideals, as an examination of Fourteenth Amendment doctrine in the following Part will reveal. I demonstrate below that the Fourteenth Amendment, the centerpiece amendment in the abolitionists' program, has been stymied by judicial interpretations that indicate a very narrow view of both the harms which prompted its drafting, and its remedial aspirations. Then, in Part IV, I explore the potential for transformation using post-racial human dignity as a guide to the interpretation of the Fourteenth Amendment, and propose a revised role for the Privileges or Immunities Clause.

III. THE FOURTEENTH AMENDMENT HAS BEEN RENDERED
INEFFECTIVE AS A TRANSFORMATIVE DEVICE
IN POST-SLAVERY AMERICA

The Fourteenth Amendment contains five sections.⁷³ The succinct but breathtaking Section One is the focus of the following analysis. Section One begins by overruling the *Dred Scott* decision and making formerly enslaved people *citizens* of both their state of residence and of the United States.⁷⁴ It goes on to convey the broader hopes of the abolitionists in three short clauses:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without

73. U.S. CONST. amend. XIV, § 1; *see also supra* note 56.

74. *See generally* Jordan, *supra* note 37; *see also* TENBROEK, *supra* note 3, at 122.

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁷⁵

Unfortunately, the three provisions in Section One have been hobbled for the past century by judicial interpretations that seek more to maintain the racial status quo than to transform it. The Privileges or Immunities Clause comes first; its placement up front may suggest its presumed importance in the amendment's grand scheme. However, the power of the Privileges or Immunities Clause was truncated by Supreme Court interpretation within a few years after its enactment.⁷⁶ The reach of the second, the Equal Protection Clause, has expanded and contracted over the years with the shifting sensibilities of courts vexed by a simultaneous commitment to the notion of permanently separate "races," and to the laudable, but apparently elusive, goal of "equalizing" them.⁷⁷ The third clause, the Due Process Clause, has had a colorful history marked by the hope of a substantive meaning that might provide real promise for those seeking the expansion of the substantive rights protected under the Constitution, but which the courts utterly failed to realize.⁷⁸ In the following two Subparts, I first briefly describe how prevailing Supreme Court doctrines inappropriately limit, indeed eviscerate, the most substantive provisions of Section One, the Privileges or Immunities Clause. I then discuss in some detail the failure of the clause most commonly applied in cases alleging race-related harm, the Equal Protection Clause.

*A. The Privileges or Immunities Clause was Rendered
Ineffective to Protect Non-Enumerated Rights
in the Slaughter-House Cases*

The Fourteenth Amendment's Privileges or Immunities Clause forbids any state law that "shall abridge the privileges or immunities of citizens of

75. U.S. CONST. amend. XIV, § 1; *see also supra* note 56.

76. *See infra* Part III.A.

77. From a sociological or sociohistorical perspective, it is not at all surprising that the official legal and political approaches have been conservative rather than radical and have tended to recreate systems of race-based oppression rather than to aggressively dismantle them. *See, e.g.,* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000) (arguing that equal protection doctrine demonstrates the proposition that "the ways in which the legal system enforces social stratification are various and evolve over time," and the fact that "efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric"—a dynamic Siegel aptly terms "preservation-through-transformation") [hereinafter Siegel, *Eyes of the Law*]; Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*]; Reva B. Siegel, "The Rule of Love": *Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178-87 (1996) [hereinafter Siegel, *Rule of Love*].

78. *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 299-313 (1987) (noting that the Eighth Amendment's prohibition against cruel and unusual punishment applies to states through the Due Process Clause of the Fourteenth Amendment, but concluding that the clause was not violated by statistical evidence of race-based disparity in application of death penalty). Consideration of the ways in which due process doctrine fails to live up to its transformative potential is set aside for a separate article.

the United States.”⁷⁹ In more than one hundred years since its incorporation into the Constitution, the Supreme Court has failed to speak to the requirements of that clause in a way that articulates a role for it in the racial reformation of America, despite its prominent placement in the primary amendment aimed at restructuring the rights of former slaves. Indeed, the present day understanding of the meaning of the clause dates to the *Slaughter-House Cases*,⁸⁰ decided by the Supreme Court in 1873.

The *Slaughter-House Cases* gave the Supreme Court its first opportunity to interpret the meaning of the Privileges or Immunities Clause. The case challenged the validity of a Louisiana statute that granted a monopoly to one company, compromising the rights of butchers to work.⁸¹ The challenge was brought under a number of theories, including claims under the Thirteenth, Fourteenth, and Fifteenth Amendments.⁸²

While the Supreme Court acknowledged that the purpose of the statute challenged was to provide full citizenship opportunities for newly freed slaves,⁸³ it nevertheless interpreted the clause in a way that failed to identify a particular role for the clause in the racial transformation of America and “rendered” the clause “a ‘practical nullity’” for the practical elevation of the status of black Americans.⁸⁴ Writing for the majority, Justice Miller began auspiciously by articulating the unavoidable intent of the Reconstruction Amendments—to provide constitutional redress against the violations imposed upon blacks under the system of slavery.⁸⁵ He then went on, however, to interpret the Privileges or Immunities Clause as having its primary relevance in the debate over the question of state versus federal rights of citizenship.⁸⁶ He concluded that the clause protected only the “privileges” of citizens of the United States and had no reach over infringements on the privileges of citizenship of a particular state.⁸⁷

As to what the “privileges” of federal citizenship might be, the Court was even less inspired. Miller “venture[d] to suggest” that they would include the right to assert a claim against and transact business with the government, “to seek its protection, share its offices,” and to engage in its administration; the right to “free access to its seaports,” to the “courts of justice,” and to “demand the care and protection of the Federal government over his life, liberty, and property when on the high seas”⁸⁸ In short, Miller limited the reach of the Privileges or Immunities Clause to those

79. U.S. CONST. amend. XIV, § 1; see also *supra* note 56.

80. 83 U.S. 36 (1872).

81. *Slaughter-House Cases*, 83 U.S. at 57.

82. *Id.* at 66.

83. *Id.* at 69; see also *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

84. THE LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (Edward S. Corwin ed., 1953) [hereinafter CONSTITUTION ANALYSIS].

85. *Slaughter-House Cases*, 83 U.S. at 71; see also *supra* note 58 and accompanying text.

86. *Slaughter-House Cases*, 83 U.S. at 73-74.

87. *Id.* at 74.

88. *Id.* at 79.

privileges already protected by other provisions of the Constitution.⁸⁹ Not only did this interpretation render the Fourteenth Amendment and the Privileges or Immunities Clause superfluous, worse still, it made irrelevant the question of the scope of its drafters' full intent to address race-based subordination in America.

Therefore, more than one hundred twenty-five years ago, the Court gutted the reach of the Privileges or Immunities Clause by announcing that the clause referred to a narrow complement of rights related to matters such as use of seaports.⁹⁰ The Court's interpretation of the clause in *Slaughter-House* is arguably inconsistent with its placement within the Fourteenth Amendment and is a mockery of its potentially transformative implications for its primary intended beneficiaries—newly freed slaves.⁹¹

That the *Slaughter-House Cases* beg reinterpretation of the Privileges or Immunities Clause is an argument that has been made cogently elsewhere.⁹² It also should be noted that by foreclosing a full consideration of the meaning of the Privileges or Immunities Clause, the courts have forced litigants to appeal to other provisions within the Fourteenth Amendment, which stretch the bounds of those provisions to limits bordering on the absurd.⁹³

89. *Id.* at 80; see also CONSTITUTION ANALYSIS, *supra* note 84, at 965-67.

90. JOHN DENVIR, *DEMOCRACY'S CONSTITUTION* 6 (2001). This is not to suggest that access to seaports without fear of molestation or undue process was a minor issue for black Americans. Indeed, historical reports confirm the importance of the frequent and pervasive abuses of blacks who entered Southern ports on Northern ships in the fermentation that led to the Civil War. See, e.g., AMENDMENT DEBATE SUPPLEMENT, *supra* note 55, at ii-iii (describing the rise in laws prohibiting access to Southern ports for blacks working on Northern vessels in direct response to the rise of the Northern abolitionist movement). Rather, I mean to suggest that the progenitors of the provision in the Fourteenth Amendment may not have intended or expected it to obtain such a narrow reading in the courts. And even if they had so intended, the courts today would certainly be free, in light of the acknowledged scope of the purpose of the Reconstruction Amendments generally to read its scope more broadly.

91. See DENVIR, *supra* note 90, at 6-8.

92. See John Harriman, *Reconstructing the Privileges of the Immunities Clause*, 101 YALE L.J. 1385, 1414 (1992) (discussing the Supreme Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* as having "effectively banished [the clause] from the Constitution"). For a recent application of the clause, see *Saenz v. Roe*, 526 U.S. 489 (1999), indicating the possibility of a reinterpretation of the Privileges or Immunities Clause in the modern era.

93. Consistent with the reasoning in the *Slaughter-House Cases*, the Privileges or Immunities Clause has been unavailable to litigants seeking to redress substantive inequalities, and, hence, claims seeking such redress have been brought under other provisions of the Fourteenth Amendment. An important example here is *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In *Rodriguez*, plaintiffs argued that the Equal Protection Clause required a more equitable distribution of educational funds, because education was a fundamental right implied under the Constitution. *Rodriguez*, 411 U.S. at 16. The Supreme Court rejected the notion of giving the federal courts broad berth to identify and describe the substantive characteristics of so-called fundamental rights "implied" under the Constitution. *Id.* at 33. *Rodriguez* involved the right to education, but the court took the opportunity, in dicta, to refer to other savage inequalities against which the Constitution's Fourteenth Amendment, as interpreted by the Court, would not protect:

[T]he logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of *Dandridge v. Williams*.

Id. at 37. The cited case deals with interests in welfare benefits. *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (affirming the application of the rational basis test to analysis of rules which deal with "state

Thus, a new interpretive framework is needed to restore to the Privileges or Immunities Clause a role consistent with its provision within the Fourteenth Amendment, in light of purposes so clearly aimed at providing substantive rights for blacks that even Justice Miller acknowledged in the *Slaughter-House Cases* before laying both these purposes and the whole of the Privileges or Immunities Clause to rest in a deep sleep.

*B. Equal Protection Doctrine Has Been Undermined
by an Implicit Commitment to Racialization and by Its
Over-Reliance on a Comparative Notion of Equality*

There is ample support for the claim that the equal protection doctrine, as applied by the courts today, is inconsistent with the clause's original scope and purpose from the viewpoint of its progenitors.⁹⁴ As the Supreme Court eloquently acknowledged in *Slaughter-House*, the Reconstruction Amendments should be interpreted in light of their overriding purpose: "[T]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."⁹⁵ However, except to the extent it has been raised in rhetorical flourishes,⁹⁶ the human dignity interests at the heart of the Reconstruction Amendments have played surprisingly little role in the courts' development of antidiscrimination law.

Other deviations from the application of the clause as envisioned by its progenitors have been noted, as well. For example, in his thorough review of the record of the intellectual history of the Equal Protection Clause, Professor tenBroek notes the absence of concern among the abolitionists for "classifications:"

The meaning of the equal protection requirement which [eighty years] of Supreme Court decisions has made primary, namely, that it enjoins proper classification, never occurred to the abolitionists in this debate. The failure of protection, the unequal protection in the case of slavery, was so gross that refinements of this sort were irrelevant.⁹⁷

Put simply, the Equal Protection Clause was intended simply and profoundly to ensure all citizens access to the courts and to make available the application of law on behalf of all citizens harmed by others.⁹⁸ Indeed, that

regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights").

94. See TENBROEK, *supra* note 3, at 53-54.

95. *Slaughter-House Cases*, 83 U.S. 36, 71 (1872); see also *supra* notes 58-59 and accompanying text.

96. See *infra* notes 226, 243-249 and accompanying text.

97. TENBROEK, *supra* note 3, at 54.

98. See *id.* at 117-19. This is not to argue that the expansion of the Clause to cover violations of

extending *protection* of the law to blacks, in a more literal sense of the word, would have been the focus of the clause from the standpoint of its progenitors should not be surprising given the violent, and in many ways literally lawless, racial context in which the clause emerged, and the conditions it was designed to address.⁹⁹

Nevertheless, and, in many ways, fortunately, the history of the application of the Equal Protection Clause indicates the courts' extension of the notion of "equal protection" to cover infringements of the principle of "equality" that go beyond the literal sort of "protection" that animated the progenitors' arguments in favor of such a provision. Obviously, such extensions have paved the way for significant advances in the quality of life for racialized Americans.¹⁰⁰ However, to the extent that advocates of broader social justice objectives in the modern era have relied on the it, the Equal Protection Clause has arguably been forced to shoulder excessive weight in the service of social justice objectives that it was not intended to bear. Contemporary *over*-reliance on the Equal Protection Clause to address all manner of social injustice, though understandable and indeed desirable in light of the courts' failure to expand upon other provisions within the Fourteenth Amendment (such as the Privileges or Immunities Clause), or on the Thirteenth and Fifteenth—which might more logically support substantive rights and privileges—might long ago have suggested a pragmatic rationale for reconsidering the scope and reach of the Privileges or Immunities Clause. In reality, however, contemporary over-reliance on the Equal Protection Clause has seemingly succeeded only in narrowing the views of scholars and judges on the range of plausible approaches to remedying race-related justice under the Constitution, leading to endless resort to that clause and insufficient attention to the Privileges or Immunities Clause, the other Reconstruction Amendments, and other Constitutional doctrines and founding documents as sources for transformative legal rules.¹⁰¹

rights which extend beyond "protection" in its most liberal sense was inappropriate. Rather, the point here is that such over-application of the Equal Protection Clause has contributed to the under-application of the Privileges or Immunities Clause.

99. See, e.g., LEON LITWACK, *BEEN IN THE STORM SO LONG* 10, 182 (1979) (detailing the violence which descended upon blacks in the South following the failure of Reconstruction).

100. See generally *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483 (1954) (ending state-sponsored segregation in public schools, and ultimately ushering in a new wave of anti-discrimination law).

101. For example, others have argued in favor of using the Declaration of Independence to support broadening the rights and privileges of American citizenship. Many have done so in the context of the anti-abortion movement, seeking to ground calls for greater protection of "the sanctity of [unborn] life." Paolo Torzilli, *Reconciling the Sanctity of Human Life, the Declaration of Independence, and the Constitution*, 40 CATH. LAW. 197, 203 (2000); Mark Trapp, *Created Equal: How The Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 845 (2001). Others, perhaps most notably Professor Charles Black, have argued that the Declaration of Independence (among other documents) provides support for a jurisprudence of human rights. See generally CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* *passim* (1997) (arguing in favor of the establishment of a body of national human rights law to protect human rights in America, and grounding his argument on the Declaration of Independence, the Ninth Amendment, and the Privileges or Immunities Clause).

At least equally problematic is the role of the doctrine itself in perpetuating the notion of race in ways which make race more, not less, salient over time, and which further entrench our societal commitment to a racialized world. Plainly, equal protection doctrine over the last century has taken shape around the concept of race, and the historical and cultural operation of race is extremely important to understanding the development of the doctrine. At the same time, however, as society has evolved, consistently with the hopes of the abolitionists in some ways, and continuously refined its understanding of what it means to be human, old conceptions of "race" have become tattered and worn. The concept of race is perpetually undergoing revision within American society; however, the changes in recent years have been particularly profound. Notwithstanding these trends, the doctrinal framework of the Equal Protection Clause analysis continues to reflect a notion of race as biologically determined and static, conceptualizations which contribute to the maintenance of racial hierarchy in America.

This Article's thesis is that changes in the meaning of race demand a candid reconsideration of the role of the language and constructs used in the law itself in holding back evolution of race and freeing us from its most negative implications. In the interest of justice, the tension between the concept of race endorsed by the law, the law's role in socially constructing race, and the understandings of race articulated among intellectuals in other fields must be addressed.

During the last generation, a growing consensus among scientists and intellectuals regarding the socially constructed nature of race¹⁰² forced a reckoning with the implications of that fact for the law of "racial" remedies. In the following discussion, I argue that the equal protection doctrine, which developed in the twentieth century, is inherently racialized; that the particular way in which it is racialized shares important similarities with the worst implications of "race" as it was known in the nineteenth century; and that the racialization implicit within equal protection doctrine renders the provision inefficacious as a device for moving us beyond the dehumanizing legacies of American slavery.

The following discussion assumes the validity of paradoxical logic: that is, that a thing can *simultaneously* be both one thing and its opposite.¹⁰³ It is

102. The literature on the social construction of race is by now voluminous. The following provide but a representative sample of the major works on the issue. See, e.g., APPIAH & GUTMANN, *supra* note 41; STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (2d ed. 1996); IAN F. HANEY LOPEZ, *WHITE BY LAW* (1996) [hereinafter *WHITE BY LAW*]; MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994); see also *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberle Crenshaw et al. eds., 1995); Crenshaw, *supra* note 5; Ian Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) [hereinafter *Erasure*].

103. Paradoxical logic is best contrasted with the Aristotelian logic that has dominated Western thought. As described by Erich Fromm:

[Aristotelian logic] is based on the law of identity which states that A is A, the law of contradiction (A is not non-A) and the law of the excluded middle (A cannot be A and non-A, neither A nor non-A). . . .

from the standpoint of paradoxical logic that the following claim may be appreciated: That equal protection doctrine, which has served to dismantle overt forms of race-based oppression characteristic of slavery and segregation has *at the same time* almost indelibly reinforced the notion of separate races, and of race itself, and thereby contributes to the continuing negative significance of race and racialization in American life.

*1. Equal Protection Doctrine is Inherently Racialized,
and Hence, Cannot but Fail as a Transformative Approach*

Though it does not include the word "race" among its terms,¹⁰⁴ the Equal Protection Clause has been interpreted as raising, perhaps most saliently among a number of issues, the issue of "race."¹⁰⁵ Consistent with this approach, the Civil Rights Acts explicitly identify race as a protected marker, barring discrimination on the basis of race.¹⁰⁶ Presently, these anti-discrimination laws each depend for their application and enforcement on some notion of "race."¹⁰⁷ Hence, for all the good that they do, they are nevertheless unwitting agents of the practice and perpetuation of racialization in America.¹⁰⁸ The colorblind approach, which ostensibly seeks to undermine the salience of race, replaces race-consciousness with an exaggerated individualism and, typically, a marked lack of compassion, and hence, that approach exacerbates the conditions of oppression which are the hallmarks of racially disparate treatment of people in society.¹⁰⁹ In the following discussion, I first focus on the role of equal protection doctrine as an agent of the racialization process. I then turn to the unconscionable extent to which the Court's prevailing colorblind doctrine demonstrates a lack of compassion towards the ongoing oppression of America's traditionally disadvantaged.

From the perspective of many on the left, the identification of a wrong and the evaluation of remedies under the Equal Protection Clause cannot but focus on the issue of race.¹¹⁰ Race has been, and no doubt continues to be, the most salient characteristic through which bias, privilege, and oppression

This axiom of Aristotelian logic has so deeply imbued our habits of thought that it is felt to be "natural" and self-evident, while on the other hand, the statement X is [simultaneously] A and *not* A seems to be nonsensical.

FROMM, *ART OF LOVING*, *supra* note 24, at 73.

104. U.S. CONST. amend. XIV, § 1; *see also supra* note 55.

105. *See generally* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

106. As an example, the Civil Rights Act of 1964 reads, in pertinent part:

(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2 (2000).

107. *See supra* notes 94-103 and accompanying text.

108. *See supra* notes 94-103 and accompanying text.

109. *See infra* notes 123-39 and accompanying text.

110. *See, e.g.,* Enid Trucios-Haynes, *Why "Race Matters": LatCrit Theory and Latina/o Racial Identity*, 12 LA RAZA L.J. 1 (2001) (arguing that Latinos should embrace the language of race).

have been channeled in America.¹¹¹ Thus, what many liberal and critical race theorists argue is that, to ensure redress of substantive conditions of oppression, the last thing we need is less of a focus on race.¹¹² Instead, we need to focus more attention on explicitly racial concerns.¹¹³ We need, for example, analytical frameworks that take better account of the historical and social dynamics that explain how race develops and operates generally and in particular settings.¹¹⁴ Under this view, the prevailing approach to equal protection law is flawed primarily insofar as it misapprehends the nature of race and its subordinating consequences, and under appreciates its continuing significance.¹¹⁵ From this perspective, the race problem is certainly not one of racial classifications per se, but of the legacies and contemporaneous operation of white supremacy; not primarily one of the maintenance of "race," but of the ideology of the racial-ranking hierarchy by which so many racially patterned inequalities and outcomes are justified.¹¹⁶ The goal, then, is to ensure "equality" before the law to members of traditionally threatened groups, or if not equality, some form of anti-subordination.¹¹⁷

Notwithstanding its obvious value, a significant problem with this approach is that it reifies the scientifically unsound and historically pernicious concept of race to an unacceptable degree. Reification is the process by which abstract notions are made real in the material and social world.¹¹⁸ It refers to "our tendency to convert abstract concepts into entities (from the Latin *res*, or thing)."¹¹⁹ In the race context, it is the process by which some arguably distinctive, essential characteristics are reduced to the term "race" and are associated with human bodies based on a variety of more or less arbitrary lines of demarcation. By continuing to structure the notion of injury and harm primarily around the concept of race, the present interpretation of race under the Equal Protection Clause plays a central role in the social-psychological process of reifying race, which provides the basis for the practices of racialization and racial subordination. Whether presented as

111. See PEREA, *supra* note 35, at 5-6.

112. See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992). Bell states:

[M]any will wish to deny, but none can refute. . . . [That] [b]lack people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt policies based on what I call: "Racial Realism." This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgment enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.

Id. at 373-74.

113. *Id.*

114. See, e.g., Flagg, *supra* note 7, at 19-43.

115. See generally Gotanda, *supra* note 5.

116. See *id.*

117. *Id.*; see also CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 251 (1997).

118. Black's Law Dictionary defines "reification" as the "mental conversion of an abstract concept into a material thing." BLACK'S LAW DICTIONARY 1290 (7th ed. 1999).

119. See GOULD, *supra* note 102, at 24.

questions involving group or individual rights, the relevant issues, since the time of the clause's drafting to the present day, have been naturally conceived of in terms of the categories that gave American slavery its pernicious character—that is, in terms of race.

It is easy to see why, given the basic goal of ensuring that the law would be equally available to blacks as to whites, and given the race-bound reality of the time, the Equal Protection Clause (which does not mention the word race at all) and its “equality” norm became bound up almost inextricably with the concept of race. In a world in which the harms to be addressed were meted out in explicitly racial terms, and in which the rules denying access to justice to blacks and others operated explicitly along racial lines, race has been an essential construct in identifying violations of the principles of equal protection. As a consequence, race has been an essential construct in shaping proposed remedies.

Indeed, the de facto racialized nature of equal protection analysis may have been an inevitable, and perhaps even necessary, consequence of the provision's birth in immediate post-slavery America and of its interpreters' desire to address the particular injustices of the time. With its genesis in Reconstruction, the Equal Protection Clause evolved within an intellectual and political context which was itself immanently racialized.¹²⁰ At the time of its origination, widespread commitment to racialization, and the dispute over its permissible limits and implications under the Constitution, was the very threat that had nearly toppled our nascent democracy. When the Equal Protection Clause, originally designed to give constitutional protection to freed slaves and their descendants, was eventually animated in the fight against segregation, the country remained in the grips of an intractable commitment to the ideology of race and to myriad practices of racialization. As a result, the equal protection doctrine that developed embodied a tacit but inevitable commitment to the idea of race and to a racialized world. Ironically, this commitment to race is simultaneously undermined and reinforced by the doctrine of strict scrutiny for classifications based on race.

For example, the pernicious use of race was the catalyst of strict scrutiny review, and application of strict scrutiny to race-based classifications was ultimately successful in dismantling segregation.¹²¹ In the context of a society still officially committed to degradation on the basis of race, applying the doctrine to require compelling justification for the use of a narrowly tailored use of a racial classification was at least arguably consistent with the vision of its progenitors. It further pushed the new understanding of humanity that fueled the First Reconstruction into the major societal transfor-

120. See GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 76-87 (1981) (describing the development of racial caste slavery in the American South and its persistence through the Civil War).

121. See, e.g., *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “[s]eparate educational facilities are inherently unequal”). Strict scrutiny review requires that the state demonstrate the use of a racial classification is narrowly tailored to meet a compelling governmental interest. See, e.g., text accompanying notes 131, 134, *infra*.

mations of the Second. Thus, the commitment to regulating governmental use of race embodied in the doctrine has served the cause of justice—not merely “racial justice”—tremendously well.

Nevertheless, it cannot be denied that this approach to equal protection cases inevitably reflects and supports a racialized view of the world and of the problems to be addressed by the Fourteenth Amendment. In its zeal to demonstrate commitment to undermining the pernicious use of race, the courts have paid too little attention to other aspects critical to the pursuit of happiness and the protection of the general welfare that are undermined by state action and inaction. Thus, over one hundred years after the formal abolition of state-sponsored slavery, the law continues to support the notion that race is a salient organizing principle in the United States. This raises the following question: Is this the vision that the progenitors of the Fourteenth Amendment had in mind?

The best guess as to the answer to the question is a resounding “no.” Racialization is inconsistent with the belief in the universal dignity of humanity that gave rise to the constitutional arguments codified in the Reconstruction Amendments generally, and the Fourteenth Amendment in particular. The amendments were drafted at a time when science was unanimous in support of the notion of separately identifiable races; however, today, social science has debunked biological race as unsupportable by the evidence and as scientifically unsound.¹²² When these developments are considered in light of the abolitionists’ vision, it seems plausible to surmise that the continued practice of racialization implicit therein would be viewed by the most progressive abolitionists as rendering today’s race-conscious law and remedies both constitutionally and morally suspect.

The explicit racialization inherent in race-conscious remedial policies, and its deviation, therefore, from a post-racialized worldview, might lead even liberals to consider endorsing the sort of colorblind approaches being supported by the presently prevailing view of the Supreme Court. Perhaps if such colorblind approaches could lead to the desired transformation of American society, the resulting material losses from the standpoint of racial minorities—the ending of affirmative action, desegregation measures, and the like—could better be accepted as strong medicine leading inevitably to a clean bill of health. The current analytical framework, however, demonstrates that a strict colorblind approach inevitably leads to racially disparate results and indirectly but unmistakably perpetuates racialization.¹²³ Worse still, colorblind remedies perpetuate the conditions of deprivation and oppression (poor education, lack of wealth, unequal access to jobs and other resources) which maintain the legacies of the racism and racial bias of our past and, to an unacceptable extent, our present.

122. Gotanda, *supra* note 5, at 28-30; Ramirez, *supra* note 8, at 42-46.

123. Gotanda, *supra* note 5, at 2-3.

That colorblind constitutionalism leads to the maintenance of the status quo and hence supports racialization has been detailed elsewhere.¹²⁴ The short of the argument is that by focusing only on the procedural question of the use of race in the crafting of some remedy, deeming all uses of race equally suspect from a constitutional standpoint, and denigrating virtually all proposed governmental interests suggested to justify the use of race-conscious remedies to benefit traditionally disadvantaged groups, the law puts most of the race-related harm suffered by racialized people beyond its reach and locks in place conditions of oppression that perpetuate racially disparate results.¹²⁵ From the standpoint of the progenitors of the Fourteenth Amendment, this means that the substantive conditions that both result from and give rise to unequal treatment and protection under the law remain locked in place, and the problem of the law's systematic perpetuation of racialization remains unremedied.

Accordingly, whether analyzed through a race-conscious or a colorblind perspective, the present framework inevitably embodies a conception of race that both maintains its nineteenth century meaning as an objective fact beyond the power of the court to eradicate (thereby capturing the most pernicious aspects of the meaning of race) and also strips race of its socio-historical implications, permitting, for example, whites, who continue to control America's major institutions and the vast majority of the country's wealth, to claim equal if not greater vulnerability to race-based oppression in present day America.¹²⁶ Thus, the law as presently applied establishes both theoretical and practical roadblocks against the demise of white supremacy and racial stratification.

One reason that the current equal protection doctrine has the effect of maintaining an outmoded notion of race is that the notion of race that underlies the operation of the Equal Protection Clause is not substantially different from the notion of race that lay back of the system of slavery: one's race was then and still is now seen as a fixed, objective concept.¹²⁷ As an unintended consequence, by operation of the strict scrutiny doctrine to regulate the improper use of race, we are all inadvertently supported by the law in seeing race as somehow fixed and objective, and the process and practice of racialization is furthered from one generation to the next in much the same way as it has been for the bulk of American history. "Race," as the drafters knew it, was apparently here to stay—and so, not surprisingly, it has.¹²⁸

124. *Id.*

125. *See infra* Subpart III.B.2.

126. *See, e.g.,* MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH* 129-36 (1995); *see also* text accompanying note 205 *infra*.

127. Yamamoto, *supra* note 105, at 847.

128. Social construction theory would explain this result by the notion of the "self-fulfilling prophecy." As W.I. Thomas articulated it famously, "[I]f you define a thing as real it is real in its consequences." WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA* 572 (1928). This postulate has become known among social scientists as the "Thomas Theorem." Thus, race, being defined by the law (and other major institutions of social construction) as a more or less permanent feature of American life, has been a more or less permanent feature of American life.

That race is essentially only a very powerful idea and not at all a biological fact is, again, an emerging contemporary understanding of the meaning of race.¹²⁹ Further, the role of legal institutions in disseminating ideas and shaping social reality has been explored in interdisciplinary and critical analyses of the law,¹³⁰ but is not central to mainstream understandings of the role of the law in society. Thus, the idea that “race,” as mediated through application of the Fourteenth Amendment, might be as much a part of the problem as of the solution has been recognized by some commentators,¹³¹ but has apparently not yet been fully appreciated.

I contend that the notion of race is a perpetually divisive factor, and its operation both *within* and *via* “equality” jurisprudence must be acknowledged, critiqued, and continually re-examined. Again, the claim that race as mediated through the Fourteenth Amendment is inherently divisive may be evaluated on closer look at the operation of the doctrine of “suspect classifications.” The Supreme Court adopted the suspect classification doctrine as a means of rationalizing its review of alleged denials of equal protection.¹³² The doctrine applies to those “classes” subject to strict protectionist evaluation under the Equal Protection Clause.¹³³ Because of the role of race in both slavery and the segregation that was its most obvious legacy, the paradigmatic suspect classifications have been those based on race. Thus, all one needs to invoke an equal protection review is allege a governmental classification based on race. When mediated through the antidiscrimination principle, however, the most logical import becomes clear: the Equal Protection Clause stands for the proposition that race-based classifications must be strictly scrutinized *because of* the history of their pernicious use in America to denigrate disadvantaged.¹³⁴ The colorblind approach ignores the subordinating implications of the present racial context, locks in place the historical and contemporary advantages of whites, and subjects all uses of race to strict scrutiny.¹³⁵ At the same time, the strict scrutiny doctrine itself reinforces the appeal of a racialized view of the world. As demonstrated in a Part to follow, whether analyzed under the prevailing colorblind approach,

129. See *supra* note 122.

130. See generally Crenshaw, *supra* note 6.

131. See, e.g., Ramirez, *supra* note 8, at 50.

132. *Korematsu v. United States*, 323 U.S. 214, 217 (1944).

133. *Korematsu*, 323 U.S. at 219.

134. See Gotanda, *supra* note 5, at 4.

135. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

Justice Scalia wrote:

In my view, government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual, and its rejection of dispositions based on race, or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Adarand Constructors, 515 U.S. at 239 (citations omitted).

or under a race-conscious alternative, equal protection doctrine “racializes” the problem of the treatment of formerly enslaved Americans and other subordinated peoples through its application of the suspect classifications doctrine to these analyses of challenged violations of equal protection. What is needed today, however, is a way of deepening our thinking about the harm against which the Reconstruction Amendments sought to protect, in terms that go well beyond “race” to address the underlying assault against humanity that lies at the heart of so-called racial injuries.

*2. Equal Protection Doctrine’s Comparative Notion of
“Equality” Presently Falls Short of the Vision
of a Transformed America*

Perhaps a still deeper philosophical problem with current equal protection doctrine is that the equality norm does not go far enough in the direction needed to help reconstruct society in a post-racial world. In a society organized around racist political and social thought and committed to the practices of racialization, equality has always naturally seemed to imply a number of often-unacknowledged assumptions.

One of these is that the objects of the analysis are to be compared, inevitably placing them in the context of some vaguely construed competition. The implicit notion of perennial competition between groups or individuals who represent different sides of some divided issue contributes to the failure of equal protection doctrine to serve as a force for cohesion rather than disunity. Neither the colorblind nor race-conscious approaches address this problem.

Underlying the comparison assumption is the assumption that the protected classes denote wholly separate entities, rather than inseparable parts of a single whole, or interconnected beings. In that sense, the notion of equality, as conceived by the drafters of the Fourteenth Amendment, and as applied within Fourteenth Amendment jurisprudence by liberals and conservatives alike, has traditionally depended on a prior concept of separately identifiable racial groups.¹³⁶ Historically, race-based classifications were used to deny “equal treatment” under the law to blacks and other racialized groups. Hence, today, to allege a claim of race discrimination under the Equal Protection Clause, one must identify oneself as a member of a protected class—for our purposes here, a racial group—and satisfy the court that a particular practice or classification based on that class amounts to unlawful discrimination.¹³⁷ The implicit commitment, embodied by this approach, to a vision that presumes an American populace comprised of

136. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483 (1954).

137. In other words, because it is not sufficiently narrowly tailored to a compelling government interest, the “discriminating” classification fails as a justifiable means to a government end. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108-17 (1976).

wholly autonomous but racialized individuals or interest groups also contributes to the failure of the doctrine to serve as a force for cohesion rather than disunity.

As a partial corrective, advocates of colorblind constitutional doctrine seek to minimize dependence on the idea of racial *groups*¹³⁸ and suggest, instead, a dependence on the notion of race-blind, hyper-individualism.¹³⁹ However, this approach places too great an emphasis on the notion of the autonomous individual to adequately address the broad humanitarian concerns that gave rise to the Reconstruction Amendments generally and the Equal Protection Clause in particular.

Thus, equal protection doctrine, whether committed to colorblind or race-conscious remedies, applies a comparison-based notion of equality that contributes to our minimal understanding of an important aspect of the human condition: its fundamental interconnectedness and the consequent mutual identity of our interests as human beings. Thus, a thorough critique of equal protection doctrine must include a critique of the presumption of autonomy between competing individuals or groups, a notion which courses throughout anti-discrimination law as throughout liberal legal jurisprudence generally.

In short, courts and commentators have failed to fully appreciate the affirmative role envisioned for the federal government by the framers of the Reconstruction Amendments, who were guided in their interpretations of the obligations of the federal government by the natural rights notions implicit in both the Declaration of Independence and the Preamble of the original Constitution. In doing so, they have missed the central goals of the abolitionists, and they have failed to continue adequately the reconstruction of post-slavery America. The abolitionists aimed to usher in a society in which the dignity of humankind, stripped away by the principle and practice of slavery, would be reconstructed, and in which human dignity would reign supreme. The failure of our law to complete the reconstruction along these lines may be seen as both a cause and a consequence of the courts' continued exclusive reliance on a narrow conception of the Equal Protection Clause and failure to use other doctrinal means of addressing the root harms of racialization and other legacies of American slavery.

The foregoing suggests that the continued exclusive reliance on the Equal Protection Clause to address the legacies of slavery is inappropriate and has stymied contemporary efforts at further fundamental change. In the following Part, I discuss the real world consequences of the errors in interpreting and applying the Fourteenth Amendment and the equal protection

138. See, e.g., *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring).

139. See, e.g., RUTH COLKER, *AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY AND THE STATE* 24-26 (1998). This argument implicitly highlights a tension between two competing conceptions of society: society as an aggregate of autonomous individuals, on the one hand; and society as a unit comprised of interconnected groups and individuals, on the other. For purposes of this analysis, I favor the latter conceptualization, leaving aside, for now, a full consideration of the implications of this approach for liberal legal jurisprudence, generally.

doctrine in the context of the *Belk* desegregation decision in particular. In Part IV of this Article, I suggest a totally new approach to Fourteenth Amendment law, one that would, among other possibilities, pave the way toward the use of the Privileges or Immunities Clause in the role the abolitionists intended it to serve.

3. *Some Important Implications of the Equal Protection Clause's
Conceptualization of Race: Insights from Belk
v. Charlotte-Mecklenburg Board of Education*

a. *The Persisting Reification of Race*

In both the identification of violations and the evaluation of remedies, equal protection law encourages a focus on crude distinctions based on race as a more or less permanent factor in American life, and subtly supports its dehumanizing effects. Consider, for example, the recent case of *Belk v. Charlotte-Mecklenburg Board of Education*.¹⁴⁰ *Belk* represents what appears to be the final chapter in the drama written by the dismantling of de jure segregation in the area of Charlotte and Mecklenburg County, North Carolina. It was originally known as *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁴¹ a case celebrated for its endorsement of affirmative measures to desegregate schools formally segregated by race. In an irony characteristic of these cases and a sign of the paradox at the heart of this Article, the name “Belk” reflects the transformation of the *Swann* case from one aimed at protecting the black victims of de jure discrimination under the Equal Protection Clause to one aimed at protecting the interests of whites.

In *Belk*, the Fourth Circuit Court of Appeals considered the claim of Cappichione, a white student who claimed that the desegregation decree under which the system imposed a range of aggressive integration measures, violated her equal protection rights under the Fourteenth Amendment.¹⁴² Plaintiff sought a finding that the school district had achieved “unitary status;” that is, that it no longer bore the marks of state-sponsored segregation.¹⁴³ In addition, Cappichione sought a finding that certain measures undertaken by the board—in particular, a scheme for admission into a magnet school that employed racial quotas—violated her rights under the Equal Protection Clause.¹⁴⁴ Although it found that the use of quotas was justified at the time of their original adoption by the desegregation orders in *Swann*, the Fourth Circuit took the gist of Cappichione’s complaints to heart and took the opportunity presented thereby to declare court-mandated desegre-

140. 269 F.3d 305 (4th Cir. 2001).

141. 431 F.2d 138 (4th Cir. 1970).

142. *Belk*, 269 F.3d at 335-36.

143. *Id.* at 312.

144. *Id.* at 316.

gation the Charlotte-Mecklenburg school district—busing, quotas, all—a thing of the past.¹⁴⁵

To see how the law assisted in both making real the notion of race and maintaining its societal consequences in the *Belk* case, one must consider the nature of the challenge brought and the role of race in structuring that challenge. In *Belk*, the Equal Protection Clause was relevant simply because of the use of race in the challenged admissions scheme.¹⁴⁶ Again, the doctrine holds that the mere use of race as a factor in the scheme presumptively gives rise to an equal protection challenge, in keeping with the “formal and historically static concept of discrimination” by race upon which contemporary race-related equal protection doctrine is premised.¹⁴⁷ Claims are thereby inevitably channeled into a paradigm that reaffirms the significance of race in our society. This result has the advantage of underscoring the continuing significance of race in a society in which race still indisputably matters; however, this approach simultaneously underscores the “reality” of this fictive construct.

The term “race” was used this way in the *Belk* case. From the outset, the opinion takes for granted the existence of the racial categories “protected” by the doctrine.¹⁴⁸ Appealing readily to the doctrine of suspect classifications, the plaintiff in *Belk* needed only to point to the existence of the court-mandated desegregation plan and its endorsement of explicitly race-conscious remedies, to entice the court into a strict review.¹⁴⁹ By facile invocation of the suspect classification doctrine in this way, the case demonstrates the use of the apparatus of the judiciary to reify—recreate, support, and maintain—the idea of race in our society. The *Belk* decision thus typi-

145. *Id.* at 311. That is, the court overturned a district court ruling that the school district had violated Cappichione’s civil rights by application of the magnet school admissions plan. As one opinion noted, even though the quotas, if enacted today, would be unconstitutional, *id.* at 418, they were not necessarily so at the time of their adoption, and hence, the district court’s finding that the school district intentionally discriminated under the Equal Protection Clause was inappropriate. *Belk*, 269 F.3d at 370.

The court then went on, however, to address the question whether the district had, by virtue of its implementation of a variety of desegregation measures, achieved “unitary status.” *Id.* at 312. The court concluded that it had done so, thereby ending all further efforts to remedy past discrimination in the district, and making all such future efforts, to the extent “race-based,” unconstitutional and intentionally discriminatory. *Id.* at 335.

An emphatic dissenting opinion criticized the court’s finding of unitary status, citing facts which indicated the existence of continuing legacy of the three centuries of denial (to blacks) and then segregation of education in the district, and warning the court against the application of a colorblind approach to suggest that we be not only blind to race, but “ignorant” of it, and leads us to deny our history. *Id.* at 371-418.

146. *Belk*, 269 F.3d at 343.

147. See Siegel, *Why Equal Protection No Longer Protects*, *supra* note 77, at 1113. Siegel states:

Contemporary equal protection law is premised on a formal and historically static conception of “discrimination.” Race or sex discrimination occurs when the state regulates on the basis of race- or sex-based classifications; heightened scrutiny of such state action is necessary for the nation to transcend a “history of classification”—the Court’s summary referent for the history of race- and gender-subordinating state action.

Id.

148. *Belk*, 269 F.3d at 343.

149. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989).

fies the way in which traditional equal protection analysis unintentionally perpetuates the myth of race.

The *Belk* case also exemplifies the way in which the doctrine perpetuates the practice of racialization and enhances the appeal of identity politics. The viability of an equal protection claim typically turns on the ability of a plaintiff to cast herself or himself in terms of a beleaguered victim of racial discrimination and, in the desegregation cases, to pit members of society against one another based on the concept of race.¹⁵⁰ Thus, the doctrine encourages continued appeals to racial politics and discourages the recognition of our common humanity.¹⁵¹

b. The Oversimplification of Race and its Operation

In addition, the *Belk* case demonstrates the arbitrariness at the heart of definitions of race accepted by courts in their analyses, and the false sense of both certainty and reality with which the law addresses this socially contingent and constantly evolving concept. Questions of the meaning of "race" in a given context, and the implications for equal protection analysis of the existence of a multitude of racially distinct and stratified groups in contemporary society, are typically ignored in the analysis. For example, in *Belk*, the separate opinion by Judges Motz and King, which argues against the finding of unitary status on these facts,¹⁵² informs the reader that the plaintiff, Ms. Cappichione, is not unambiguously "white." Instead, she is "Caucasian and Hispanic."¹⁵³ This information complicates the analysis of the question of the effective race of the plaintiff, and has implications for the public policy implications of a finding for or against plaintiff in this case. Ignoring this complexity altogether, however, the court simply characterizes the plaintiff, whose own heritage would give her the option in many settings to choose to identify herself as a "person of color," as "white" for purposes of the equal protection analysis at the heart of this lawsuit.

The given facts do not indicate whether or not the school district set aside positions for "Hispanics" or "Latinos." If it did, Ms. Cappichione may have availed herself of the opportunity to cast herself in terms of that race, and thereby perhaps have alternative access into the magnet school. Of course, the very fact that Ms. Cappichione, as a person of mixed white and Hispanic heritage, *could* choose to cast herself as "white" in the still white-

150. See, e.g., *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1034 (1999); Gitanjali S. Gutierrez, *Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools*, 86 CORNELL L. REV. 1283 (2001); David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools*, 16 HARV. BLACKLETTER L.J. 39 (2000).

151. By promoting racial identity politics, race-conscious policies lead to inevitable competition between and among racialized groups who "compete for benefits and status on the ground that their suffering is more intense or authentic than that felt by other groups." APPIAH & GUTMAN, *supra* note 42, at 27.

152. See *Belk*, 269 F.3d at 379-97.

153. *Id.* at 378.

dominated state of North Carolina, is itself a race-related privilege that a person of mixed white and black heritage would not have had. It approximates the degree to which "Hispanics" or "Latinos" are less racialized in the cultural context of North Carolina than blacks.

Notwithstanding these considerations, however, the law of equal protection forces all parties to engage in rigid, overly simplified, decontextualized, and ahistorical understandings of race in a manner that facilitates smooth application of the law. This result would be appropriate if ease in applying the law were the purpose of the equal protection analysis. But if the purpose of the equal protection analysis is to eradicate the vestiges of a race-based hierarchy in this society, something more than an oversimplified approach to the definition of race is required. The reality is that the meaning and import of race and racialization is far from simple, and its import in a particular case demands an approach which critically evaluates that multifaceted meaning in an effort to determine what "equality," or some other humanizing principle, would look like in a given case. *Belk* demonstrates that the prevailing equal protection doctrine not only reifies and concretizes the concept of race in America, but also encourages an allegiance to categories of "race," and oversimplifies the meaning and operation of race in our society today. In doing so, it encourages an oversimplification of *our thinking* about race and its operation in society. The analysis suggests that racial *categories* are virtually static and resistant to the changes occurring on the ground in the area of race, ethnicity, and identity. It also suggests that one's racial identity is a simple, unambiguous matter, when the facts of this case, just as is the case with a growing percentage of the American population, might well give rise to a debate about the plaintiff's race.¹⁵⁴

In shaping court opinions regarding the meaning of race for equal protection purposes, the doctrine influences the development of a narrative that plays a central part in shaping our thoughts and actions around a concept of "race" that is inherently meaningless. As *Belk* demonstrates, the cases are now telling a story in which the meaning and operation of race in our lives is a simple and unambiguous matter, and in which whites are among the most beleaguered victims of racial oppression in America. This story could scarcely be further from the truth.

c. The Appeal of Racial Politics

Unfortunately, the standard analysis does more than merely reify race today and contribute to the process by which our thinking about race is structured along oversimplified, racist lines. The analysis arguably has even

154. In recent years, "Latinos," including "white Hispanics," have come to be considered a racial group, or at least, a "racialized," group. See, e.g., PEREA, *supra* note 35, at 246-366. The increasing percentage of persons of "mixed race" presents obvious challenges to a doctrinal approach that depends on the categorization of litigants as members of identifiable races.

worse implications for the future of race in America. The courts' reliance on race in this way to structure equal protection analysis reinforces our commitment to traditional notions of race because of their political utility. Consistent with the approach codified by the Equal Protection Clause, many people, especially those who have traditionally been associated with the most intensely racialized groups, believe that the most effective way to combat the undesirable effects of racialized thinking is to coalesce around their "racial" identities and work for political and social change for one's respective groups through identity politics. Thus, as conventional wisdom goes, it is in our best interest to cling to our racialized identities. Without them, we are nobody.

But as Professor Appiah suggests, the reification of race and the invitation to racial identification and racialization embodied in the Equal Protection Clause is not without risk of theoretical and moral harm:

There is a danger in making racial identities too central to our conceptions of ourselves; while there is a place for racial identities in a world shaped by racism . . . if we are to move beyond racism, *we shall have, in the end, to move beyond current racial identities.*¹⁵⁵

*d. The Attraction of Formal Race and the
Level of Scrutiny Problem*

Before calling a halt to the race-conscious measures used in the desegregation plan altogether,¹⁵⁶ the majority of the Fourth Circuit Court of Appeals in *Belk* concluded that a magnet school's explicitly race-conscious admissions scheme was, when adopted in 1992, authorized by the relevant desegregation orders.¹⁵⁷ Hence, it did not violate the Equal Protection Clause.¹⁵⁸ This ruling marked a rejection of plaintiff's claim that the admissions program constituted improper reverse discrimination and protected the school board from the exorbitant damages plaintiff sought as a result of the claimed violation.¹⁵⁹

However, in a dissenting opinion, Judge Traxler argued that the board's practice of reserving openings for admission into a magnet school based on race violated the Equal Protection Clause.¹⁶⁰ For Judge Traxler, consistent with the Supreme Court's ahistorical colorblind doctrine, the fact that the

155. APPIAH & GUTMAN, *supra* note 42, at 32 (emphasis added).

156. See *supra* notes 140-44 and accompanying text.

157. *Belk*, 269 F.3d at 305.

158. *Id.* A separate opinion made clear that what saved the plan from the finding of its unconstitutionality was not its value in service of the overall goal of desegregation, but the fact that the law had become more clear since its 1992 inception; that is, if adopted today, the magnet school admissions plan would have been clearly unconstitutional. *Id.* at 353 (Wilkinson, C.J., concurring).

159. See *supra* note 145 and accompanying text. See also *Belk*, 269 F.3d at 370.

160. *Belk*, 269 F.3d at 312.

plan was adopted as a means of furthering the desegregation orders issued many years earlier and approved of in *Swann* was irrelevant to the decision whether to evaluate a racial classification under the strict scrutiny standard:

[Charlotte Mecklenburg] and the *Swann* plaintiffs contend that strict scrutiny does not apply when a school district is under court order to dismantle the dual system. Such an approach, however, ignores two of the three pillars of Supreme Court's equal protection analysis: *skepticism of all racial preferences* and *consistent application of heightened scrutiny regardless of the race of the person burdened or benefitted*.¹⁶¹

Thus, for Judge Traxler, there was no discussion of the purposes of the classification or of the goals of the plan *as a prerequisite for* the application of the strict scrutiny standard; instead, the strict scrutiny approach was presumptively applicable based on the use of "race" in the scheme.¹⁶²

As Judge Traxler demonstrated, the Supreme Court has adopted, and the courts have vigorously applied, a formal race view under which all classifications that use race are constitutionally suspect, "regardless of the race of the person burdened or benefitted."¹⁶³ Professor Neil Gotanda is among the leading critical scholars to call for a closer consideration of the effects of this approach. As discussed above, Gotanda's thesis is that "modern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist."¹⁶⁴ Gotanda argues that the formal race approach, under which all racial classifications are considered suspect, protects the maintenance of the racial hierarchy in America by disallowing uses of race which would undermine that hierarchy and perpetuating the myth that white superiority is no longer the major race-related threat to justice in America.¹⁶⁵

In both the majority opinion dealing with the question whether the time had come to end the desegregation practices, and Traxler's dissenting opinion, the *Belk* court's analysis exemplifies the way in which the strict scrutiny doctrine perpetuates the myth of race, thereby enhancing the appeal of racial politics, while simultaneously promoting the myth of racial *equality*. It does this by discussing the issue of the possible equal protection violation in a way which makes a racial classification "suspect . . . regardless of the

161. *Id.* at 343 n.14 (citing *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 223-24 (1995)) (emphasis added).

162. *Id.*

163. *Id.*

164. Gotanda, *supra* note 5, at 62-63.

165. *Id.* at 2-7. As a corrective, Gotanda argues that racial classifications that are intended to remedy the effects of past discrimination should be subjected to a mid-level scrutiny, akin to the level of scrutiny accorded religious classifications. *See id.* at 62-68. Again, these and other ironically stultifying consequences of modern antidiscrimination law have been noted by others as well. *See, e.g.*, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995).

race of the person burdened or benefitted.”¹⁶⁶ Thus, the court strips the equal protection analysis of the historical content that provides both meaning and purpose for the provision.¹⁶⁷ The result is that sympathy for the plight of racial minorities, whose continued relative lack of resources when compared to whites contributes daily to the sedimentation of inequality along the lines of race in communities across the country, has eroded in recent decades among relatively more powerful whites.

The consequences of this approach in the real world can be devastating. Again, using *Belk* as an example, the court concluded that the school district had, from the standpoint of the law, become “unified” virtually the day after the original *Swann* desegregation order was signed and implementation began in 1971.¹⁶⁸ Under the reasoning of *Belk*, the only remedy to which the children of Charlotte-Mecklenburg were entitled for the insults and injuries of segregation was the good faith promise on the part of the system that it had stopped its evil ways and would never do it again.¹⁶⁹ Thus, the only remedy really required under the Constitution was an injunction against segregative practices. Anything more was essentially “too much justice.”¹⁷⁰

The court’s conclusion on this is perfectly consistent with the formal race-and-colorblind remedy approach. Unfortunately, from the standpoint of anything like social justice, the Fourth Circuit’s decision in *Belk* also perfectly illustrates why this prevailing approach is simply wrong.

For example, consider its decision that the district had become “unified” and thus should be released from the desegregation orders issued in *Swann*.¹⁷¹ In *Belk*, the equality principle somehow was not violated by evidence of widespread variance between the district’s average black to white student ratio,¹⁷² a profound achievement gap,¹⁷³ and other concerns voiced not only by the *Swann* plaintiffs but also by Charlotte-Mecklenburg itself.¹⁷⁴ The equality principle permitted a white-hispanic woman to successfully claim a constitutional violation based on the continuation of the desegregation orders entered against Charlotte-Mecklenburg, after not only the *Brown* decision, but an additional seventeen years of foot-dragging.

The “foot-dragging” in Charlotte-Mecklenburg, and districts like it across the country, had real-life consequences. It consigned another generation of students to segregated public schools in the post-*Brown* era.¹⁷⁵ Add

166. *Belk*, 269 F.3d at 342-43.

167. See John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 892 (1995); see also *Belk*, 269 F.3d at 342.

168. *Belk*, 269 F.3d at 320, 332-33.

169. *Id.* at 356.

170. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

171. *Belk*, 269 F.3d at 311.

172. *Id.* at 320.

173. *Id.* at 331.

174. *Id.* at 351-53. Judge Traxler’s opinion actually derides the concerns on the part of educators that the desegregation plan should not be lifted, indicating a disrespect for the competence of educators in determining what best addresses the educational and developmental interests of the students to whom they have dedicated their lives. *Id.*

175. For examples close to home, it resulted in my own sister, who is ten years older than me, attend-

that to the generations of students trapped in inadequately funded and maintained schools during the years of state-supported segregation, and we should begin to have a better understanding of why there is an achievement gap among black and white students in the Charlotte-Mecklenburg district. Nevertheless, the majority in *Belk* suggests that the Constitution owed no remedy beyond the cessation of the intentionally discriminatory action on the part of the Board.¹⁷⁶

The overwhelming evidence of the continuing disparities between black and white students in the Charlotte-Mecklenburg system represents unremedied legacies of over three hundred years of segregation, slavery, and other related race-mediated oppression in North Carolina. Moreover, and more to the point of this Article, the court's response to this continuing disparity is the very kind of affront to human dignity and to substantively dignified treatment under the law that the progenitors of the Fourteenth Amendment sought to disrupt. The idea that the district's remedial obligation under the Constitution all but ended with the district's agreement to end its intentionally discriminatory practices is an affront to the dignity of all students in the district. Moreover, that Cappicone's Equal Protection Clause argument required the Charlotte-Mecklenburg Board of Education to defend its remedial measures in light of the "startling"¹⁷⁷ evidence confirming the continuing disparity in educational results for black and white students strikes me as little short of outrageous. That the Fourteenth Amendment is presently interpreted in a manner that permits such results not only represents the extent of its deviation from the purposes and effects contemplated by its progenitors, but more importantly, it indicates our failure to establish the primacy of universal human dignity as a constitutional value in the post-slavery era.

Thus, *Belk* demonstrates that the interpretation of the Equal Protection Clause in racial remedies cases today has led to a failure to provide substantive protection against the indignity of a poor education in a county with a three hundred year history of race-based denigration of black citizens and thirty years of limited court-sponsored redress. A result that leaves the consequences of the state's history of segregated education largely unremedied is an unjust result. It is a result that fails to appreciate not only the impact of several hundred years of state-sponsored denigration of black North Carolinians, but also the supreme importance of education in the definition of the dignified treatment which the Constitution was to ensure.

In *Belk*, the strict scrutiny approach threatened not merely to overturn the admissions process vis-à-vis the magnet schools; indeed, the "unitary status" analysis ultimately ended the operation of that program in the Char-

ing segregated public schools in the Fourth Circuit's Lenoir County, North Carolina for ten of her twelve post-*Brown* educational years in North Carolina public schools. And it led to my own attendance at a segregated school for kindergarten in the fall of 1971, some seventeen years after the *Brown* decision.

176. *Belk*, 269 F.3d at 353-55.

177. *Id.* at 331.

lotte-Mecklenburg school system, as it has in so many places in recent years.¹⁷⁸ What the strict scrutiny approach also threatened to do in this case was to label the school district seeking to redress the wrongs of its predecessors as the racist violator of the principles of “equal protection” and “equality,” and to impose attorneys’ fees of over one million dollars against Charlotte-Mecklenburg (and indirectly, of course, against its students).¹⁷⁹ In other words, by virtue of this wooden application of strict scrutiny to all race cases, Charlotte-Mecklenburg faced the threat of liability for enormous amounts of attorneys’ fees—money that the district clearly needed to address the educational needs of its children—simply for its efforts to fashion a thorough remedy for the eighty-year practice of de jure segregation and degradation of the minds of blacks by the Charlotte-Mecklenburg school system before *Swann*,¹⁸⁰ and the decimation of their fair chance to perform in the economy, which unquestionably contributes to the current “socioeconomic” disadvantages that the court finds are, of course, beyond the scope of its remedial reach.¹⁸¹

In short, the application of strict scrutiny, when combined with a color-blind approach to the evaluation of remedies, leads to results that cannot fairly be characterized as just. On the other hand, the uncritical endorsement of a super-sensitivity to the use of race under the strict-scrutiny approach, though responsible for much racial reform in the first phase of the Reconstruction, and arguably up through the second, encourages a fixation on race that contributes to its perpetual salience in American life. Again, this is the central paradox at the intersection of race and law: In aiming at justice for oppressed racial minorities, these approaches enlist the law and public policy in the role of perennial supporter of a race-based view of the world. That our law and policy continue to provide wholly inadequate support for a fully dignified existence for all should be viewed as a failure of the Constitution’s express promises to “promote the general welfare,” “secure the blessings of liberty,” and its implied promise to promote human dignity.

In the following Part, I discuss the contours of an approach to the evaluation of claims of undignified treatment under the Fourteenth Amendment that might get the courts back in line with the broad vision of the radical abolitionists, and lead to more just results without further entrenching race, racialization, and the racism that inevitably results.

e. The Normalization of Dehumanization

Finally, continued reliance on race leads inevitably to the maintenance of a society in which subtle but pervasive dehumanization is the normal

178. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 499 (1992); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 441 (1976).

179. *Belk*, 269 F.3d at 358-64.

180. *Id.*

181. *Id.* at 331.

result. In *Belk*, that dehumanization is implicit in the court's conclusion that widely disparate education outcomes among blacks and whites were beyond the concern of the courts in that jurisdiction.¹⁸² The court concluded that such outcomes were the result of socioeconomics and not segregation; hence, such results were beyond the court's interests.¹⁸³ The fact that the court could leave unremedied such divergent results in the wake of a three hundred year period of segregation in the relevant county sends a chilling message: The education of some of America's children is not sufficiently important to merit radical efforts to ensure its success. It is but one way of stating a fact that has been stated repeatedly in public discourse since our country's founding: that some lives are, from the standpoint of our public institutions and their keepers, more deserving of dignified nurture and development than others.

IV. RE-IMAGINING "RACIAL" JUSTICE: TOWARD A HUMANITY-CENTERED JURISPRUDENCE FOR THE TWENTY-FIRST CENTURY

A. *The Notion of Humanity under American Law*

The ongoing debate over race-conscious remedies such as affirmative action, and the growing extent to which the colorblind doctrine and reverse discrimination cases have won the day, demand a careful consideration of the justice of these approaches. When considered against the most progressive abolitionists' vision, it is clear that though the prevailing trends in equal protection analysis may be justified by some notion of formal equality, these trends fail under a doctrine aimed at establishing justice for all human beings in post-slavery America.

Given the persisting economic and political legacies of slavery, how are we to determine the requirements of justice in post-slavery America? Under one popular theory of justice, justice obtains in a liberal democracy whenever the principles of fairness reign.¹⁸⁴ These principles of fairness enable a shared commitment to a public conception of justice on the basis of reasoned, informed, and willing political agreement.¹⁸⁵ In this view, justice is equated with fairness in the decision-making process.¹⁸⁶ On the other hand, Professor Mari Matsuda is among the critical theorists who have criticized this conception of justice as inadequate for governing race cases.¹⁸⁷ Matsuda

182. *Id.* at 330-31.

183. *Id.* at 331.

184. JOHN RAWLS, A THEORY OF JUSTICE 11 (1981) [hereinafter A THEORY OF JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM 107 (1993) [hereinafter LIBERALISM].

185. A THEORY OF JUSTICE, *supra* note 184, at 9.

186. *Id.*

187. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) [hereinafter Matsuda, *Looking*]; Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

suggests that, in lieu of a focus on abstract ideals and metaphors, the concrete experiences of individuals who have suffered the false promises of liberalism should be given primary consideration.¹⁸⁸ I tend to agree that a concept of justice that focuses much more on process rather than substance falls far short of glory. Regardless, it is clear that if we are ever to reach common ground in a society characterized by multiple competing political interests and worldviews, we must be able to agree upon basic unifying principles.

Thus, I begin with the following: Any theory of justice regarding the legacies of slavery and racialization in America requires, like all theories of justice, an underlying theory of humanity—that is, an underlying theory of what it means to be human, and of the basic, most essential characteristics of humankind to ground our sense of the possible.

But what does “humanity” mean? And what are the essential characteristics of what it means to be human that should guide our conceptions of justice? The law, our society’s formal “justice system,” imports and relies upon all sorts of assumptions about the nature of humanity, most of which are unstated and implicit rather than set forth explicitly. Generally speaking, the principles of utilitarianism have dominated the perspectives of jurists within American liberal legal jurisprudence.¹⁸⁹ Underlying the preference for utilitarianism are a number of generally unstated assumptions about human beings as essentially both rational and competitive.

Beyond that, what we mean by humanity bears serious reflection and elaboration.¹⁹⁰ Vague, unexamined notions will not get us where we must go in the interest of a more just society. In all likelihood, any discussion of what it means to be human, and of what we mean by humanity, will require that we wrestle with the critique that such definitions rest on indeterminate “natural rights” assumptions.¹⁹¹

188. Matsuda, *Looking*, *supra* note 187, at 324.

189. JULES L. COLEMAN, *RISKS AND WRONGS* 205 (1992). It is worth noting that utilitarianism under a liberal democratic regime is but one form of moral philosophy-and-governmental system among many possible forms. Continuing commitment of our society to this particular form may help explain its relative stability, but also reflects the application of state power in support thereof, which relative to the adherents of opposing comprehensive doctrines could be called oppression. See *LIBERALISM*, *supra* note 184, at 37.

190. The American College Dictionary defines “humanity” as follows:

1. the human race; humankind.
2. the condition or quality of being human; human nature;
3. the quality of being humane; kindness; benevolence.

The American College Dictionary 588 (1962). My view is that the term “humanity” encompasses the special and even divine nature of humankind, similar to that expressed in the Declaration of Independence in its reference to people “endowed by their Creator with certain Inalienable Rights.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). It is that which is universal among humankind, and embodies the notion of a qualitative characteristic that exists, with varying degrees of consciousness thereof, in all of us.

191. Indeed, for some, this critique will carry sufficient weight to render “humanity consciousness” and “human dignity” both too imprecise and abstract to serve as principles to guide interpretation of the Constitution. For example, on the groundlessness of human dignity as a guiding principle, Judge Frank Easterbrook wrote dismissively, “When we observe that the Constitution . . . stands for ‘human dignity’ but not rules, we have destroyed the basis for judicial review.” Stephen J. Wermiel, *Law and Human*

Rather than rely on conjecture or, while arguably slightly more reliable, on early philosophy for conceptions of the nature of humanity, we would be better off taking a closer look at contemporary guides. For example, social psychologists' studies of modern and post-modern man may be helpful. One such scholar, Erich Fromm, generally describes human nature as being shaped by two competing but equally intense instincts: one, the competitive instinct, is driven by the need for material resources; the other, the cooperative instinct, is driven by the need for psychological and emotional support and love.¹⁹² In describing the idea of the "social character" of a society, Fromm argues that the particular aspects of human nature or the human character given primary focus in a given place and time are largely determined by the society in which we are raised, and it is these aspects that we encourage, promote, and support to the denigration of others.¹⁹³ Contemporary American society supports focusing on the competitive, separatist, and individualistic instincts and, in so doing, penalizes focusing on cooperative, communalist, and altruistic instincts.¹⁹⁴ However, a more compassionate side to the social character of human beings, one that emphasizes common humanity, could be validated and coaxed into greater consciousness in our society.¹⁹⁵ If this is so, we must focus on the compassionate side of the human character when it comes to issues of social justice, including, perhaps especially, race-related justice.

Some of the past century's most advanced thinkers have gone even further, arguing that the essence of humanity is that which we experience as an invisible, but nevertheless real, unity and inter-connectedness or identity among us all. Albert Einstein adopted that view,¹⁹⁶ as has at least one eminent contemporary physicist.¹⁹⁷ On one hand the concept of humanity is characterized by some notion of individuality and autonomy, and on the other, it implies unity and indivisibility. In the end, it may be that the concept of humanity must be seen as yet another of several paradoxes that may

Dignity: The Judicial Soul of Justice Brennan, 7 WM. & MARY BILL RTS. J. 223, 237 (1998) (quoting Judge Frank Easterbrook, *Approaches to Judicial Review*, in *POLITICS AND THE CONSTITUTION: THE NATURE AND EXTENT OF INTERPRETATION* 17, 29 (Am. Studies Ctr. ed., 1990)). My response would be that a dichotomous view is unnecessary here: The Constitution stands for rules applied through the lens ever-respectful of the requirements of a society in which human dignity is the supreme value.

192. See FROMM, *TO HAVE OR TO BE*, *supra* note 24, at 104-07.

193. *Id.*

194. See, e.g., COLKER, *supra* note 139, at 8.

195. See, e.g., FROMM, *TO HAVE OR TO BE*, *supra* note 24, at 168; cf. ROBIN WEST, *CARING FOR JUSTICE* 23 (1997).

196. See WAYNE W. DYER, *YOU'LL SEE IT WHEN YOU BELIEVE IT* 89 (1989). Einstein has stated:

A human being is a part of the whole called by us "Universe," a part limited in time and space. He experiences himself, his thoughts and feelings, as something separated from the rest, a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from this prison by widening our circle of compassion to embrace all living creatures and the whole nature in its beauty.

Id. (quoting Albert Einstein, as attributed in *MATHEMATICAL CIRCLES ADIEU* (Howard W. Eves ed., 1977)).

197. See generally GARY ZUKAV, *THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS* 270, 271 (1979).

be unavoidable in a full discussion of the use of race in American society and a reconsideration of the law's ideal approach to it.

In sum, however we conceptualize it, our assumptions regarding the nature of humanity are important precursors to any discussion of justice, and especially of justice related to race. Yet these assumptions, whatever they are, are not commonly uncovered in talk of race, justice, and the role of the law. Instead, the discourse regarding the law of race typically begins without a consideration of the nature of humanity, generally, and the meaning of race in that connection; instead, the biological fact of our race, along with our individuality, rationality, and relative unrelatedness to one another are typically presumed. The discussion then usually proceeds to the term given primacy in Fourteenth Amendment jurisprudence: equality.

B. Justice as "Equality" Versus "Justice as Justice"

Indeed, justice and equality have become almost synonymous terms in race law.¹⁹⁸ Most scholars agree that equal protection jurisprudence has traditionally assumed that the Fourteenth Amendment generally reflects the principle of "equality as antidiscrimination."¹⁹⁹ This assumption has traditionally carried both normative and positive overtones. But the notion of equality as antidiscrimination presents problems at both the practical and the theoretical levels, which limit the notion's effectiveness in service of justice for racialized groups today.

198. The affinity for the terms "justice" and "equality" stems from seminal traditions within liberal democratic thought generally, in which citizens have been defined, for purposes of understanding their rights and obligations vis-à-vis the state, as "free and equal" persons. See LIBERALISM, *supra* note 184, at 19.

199. See Harriman, *supra* note 92, at 1410; see also Harris, *supra* note 8, at 1926 (positing that "race law became indissolubly linked with the principle of equality during the first Reconstruction").

Not all racial justice scholars agree with this traditional identity between racial justice and the equality principle. For example, Owen Fiss is credited with having first suggested an alternative to the antidiscrimination paradigm animating equal protection jurisprudence. Fiss, *supra* note 137, at 147. In his *Groups and the Equal Protection Clause*, Fiss throws down the gauntlet and states, unequivocally, his desire to decouple the Equal Protection Clause from the antidiscrimination principle. *Id.* As an alternative, Fiss suggested the "group-disadvantaging principle." *Id.* For Fiss, this principle seemed to have "as good, if not better, claim to represent the ideal of equality, one that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases." *Id.* at 108. Others have called the alternative principle suggested by Fiss the "antisubordination principle," an alternative to the equality principle in cases alleging discriminatory treatment based on race or other characteristic traditionally associated with disadvantage or exploitation. See, e.g., LAWRENCE & MATSUDA *supra*, note 117.

However, even the antisubordination jurisprudence has remained associated with a concept of race that inevitably would perpetuate the notion in ways that reflect nineteenth century thinking. For example, in his classic treatment, Fiss cannot imagine an explanation of the term "suspect class" which does not "coincide with what might be conceived of as a natural classes—for example, blacks, Chicanos, women, and maybe the poor." Fiss, *supra* note 137, at 125. Whether the mediating principle is equality, antidiscrimination or antisubordination, the presumption of the permanency of race limits its effectiveness as a mechanism for radically changing the social world. Thus, the antisubordination principle has not yet led to an adequate critique of the notion of race itself, or to a reconsideration of the comparison-based approach implicit in equal protection analysis.

The prevailing antidiscrimination approach under the Equal Protection Clause defines equality and race in formal, ahistorical ways. To be a violation, the use of race must typically be “intentional,” and remedies for previous discrimination must, in virtually all cases, be administered without regard to race, i.e., they must be colorblind remedies.²⁰⁰ This is what the Supreme Court views as equality. However, as discussed above, this approach leaves most of the legacies of our over three hundred year history of black subjugation largely without remedy.

The equality-as-anti-discrimination approach, as seen in *Belk* and so many cases, is wrong because what the Constitution requires is not merely equality in some formal, procedural sense. What the Constitution requires, quite simply, is justice. And in defining justice with regard to cases involving race and education, the visionary approaches to Constitutional reinterpretation by the abolitionists should serve as important guides. In fashioning their early arguments against slavery, they not only looked to other founding documents, they reached for language within the Constitution itself.²⁰¹ They did not come up empty handed, nor should we. In their eyes, it was not only moral and natural right that necessitated the freeing of enslaved Americans—the Constitution demanded it.²⁰² In our eyes, as well, moral and natural right should necessitate that we provide a better response to evidence of continuing educational disparity in a district marked by centuries of race-based denial and degradation of a resource basic to human dignity than that demonstrated in *Belk* and its progeny.

Recall, for example, the abolitionists’ argument that the Constitution’s promise to “establish justice” required the federal government to “make just” the relationships between black and white men.²⁰³ Similarly, one could today argue in response to *Belk* that the Constitution requires that the courts go beyond ensuring procedural equality as to classifications used by government entities. The Constitution requires that the federal government ensure educational justice for the children most affected by the historical practices of segregation, and indeed, to all children.²⁰⁴ Taken seriously, the goal of justice would, I believe, militate in favor of a much broader view of what

200. *Missouri v. Jenkins*, 515 U.S. 70, 212 (1995) (Thomas, J., concurring).

201. TENBROEK, *supra* note 3, at 33-131. Early abolitionists, most notably Lysander Spooner, argued that slavery was unconstitutional under the original Constitution using an interpretive theory based on natural law. Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, in 5 HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT, *supra* note 9, at 65, 65-66.

202. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?*, in 5 HISTORY OF THE AMERICAN ABOLITIONIST MOVEMENT, *supra* note 201, at 76-87.

203. Of course, women, both black and white, were required to wait for the Nineteenth Amendment and a later equality movement, to assert similar claims to justice. See U.S. CONST. amend. XIX. In some ways this movement is also still in its infancy.

204. See, e.g., AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 195-99 (1999) (arguing that the Thirteenth Amendment, the Republican Form of Government Clause, and the Citizenship Clause of the Fourteenth Amendment are constitutional provisions favoring an affirmative right to an education).

is at stake in desegregation cases. Just how far it should go will be addressed in a later Part.

The foregoing should provide substantial support for the proposition that that equal protection doctrine fails to achieve the promise of racial justice in that it focuses on a narrow view of the goal of “equality”—treating like cases alike—rather than on some more transformative goal.²⁰⁵ Indeed, even a cursory review of the recent Equal Protection Clause cases indicates that the clause has once again come to be of greater transformative value to whites than to blacks. An astonishing percentage of the Equal Protection Clause cases brought today are reverse discrimination cases.²⁰⁶ The last era in which the clause was interpreted in ways which were as beneficial to whites as that being promulgated by the present Court was in the generation following the First Reconstruction, as embodied in the *Plessy v. Ferguson* opinion. It should be of no surprise that such a phenomenon is taking place in this, the generation following the Second Reconstruction.²⁰⁷ When the actual operation of the clause is placed in its inevitable historical context, one cannot help but see the cruel irony belied by this contemporary development.

How did we get to a place in which such unfortunate consequences could be sustained under the Fourteenth Amendment? I suggest that the problem may be related to the failure of social justice advocates to convince the courts to give broad meaning and effect to *all* of the clauses of the Fourteenth Amendment’s Section One, including the Privileges or Immunities

205. In this connection, it should be noted that the term “equality,” whether enhanced by a more substantive treatment than is currently favored by the courts in these cases, implies no particular floor: as long as no black is treated worse than the least advantaged white, then the equality principle is satisfied. See *supra* note 199 for a discussion of the alternative antistatutory approach suggested by professors such as Fiss and Matsuda. The antistatutory approach would impart a more substantive meaning to the word “equality.” While I do not object to such proposals, it is clear that the present Supreme Court has rejected calls to adopt a broader, more substantive view of the requirements of justice under the Equal Protection Clause. This Article suggests a different path—the Privileges or Immunities Clause—to a result similar in many ways to that sought by Fiss and others. I must leave to a future article a critique of the “equality” principle on broader grounds. Specifically, analyzing methods that provide an inadequate norm for a people who see their interconnectedness, essential oneness, and common human dignity, i.e., for a “humanity conscious” people. See, e.g., FROMM, *ART OF LOVING*, *supra* note 24, at 15 (“Equality [in capitalist societies] today means ‘sameness,’ rather than ‘oneness.’”).

206. See, e.g., Maria A. Citeroni, *Iadimarco v. Runyon and Reverse Discrimination: Gaining Majority Support for Majority Plaintiffs*, 48 CLEV. ST. L. REV. 579 (2000); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657; Janice C. Whiteside, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413 (1998). For exemplary cases see, e.g., *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001). See also *Saunders v. White*, 191 F. Supp. 2d 95 (D.D.C. 2002) (successfully challenging, at the district court level, the Army’s equal opportunity policy as a violation of the Fifth Amendment rights of white men).

207. See Rhonda Magee Andrews, *Race Weary* (unpublished manuscript, on file with the author) (noting the similarity between the retreat of sympathy for the plight of blacks in the generation after the Reconstruction, and the present withdrawal of sympathy from and aggressive effort toward racial reform—which follows the Second Reconstruction by a similar interval—and arguing that such “race weariness” should be anticipated as typical following successful reform movements, and as critical to the process of “preservation-through-transformation” identified by Reva Siegel); see Siegel, *Rule of Love*, *supra* note 77, at 2178-87.

Clause. For example, the courts have failed to elaborate on privileges or immunities in ways that might secure more substantive “blessings” to racialized citizens. Led by the well-meaning desperation of racial remedies advocates, the courts have pushed equal protection doctrine far beyond its originally intended purpose—that of simply ensuring the availability of the law and its protections on behalf of blacks; yet, they have refused to apply either the Equal Protection Clause or other available doctrines to go the further distance required to ensure substantive equality.

As suggested by the discussion at Part II, the abolitionists might have predicted such a consequence of failing to take seriously each of the separate clauses of Section One of the Fourteenth Amendment, including the Privileges or Immunities Clause and to make use of those clauses, ultimately, in making good on the federal government’s guarantee of dignified treatment to all of its citizens.²⁰⁸ Given the clear intent of the progenitors of the Fourteenth Amendment to enable the protection of broadly conceived interests in dignity for all, and consistent with the Preamble’s endorsement of a federal role in that process, the Fourteenth Amendment should be expansively made available to continue the process of reorienting post-slavery America in a way that addresses the underlying problem of dehumanization, which is slavery’s most persistent legacy.

*C. Human Dignity as the Missing Constitutional
Principle and the Guide toward Justice*

The last half-century witnessed the inclusion of a potentially transformative normative principle in the panoply of reformed principles for organizing society, both domestically and internationally.²⁰⁹ The principle of universal human dignity evolved from the law’s endorsement of a much more modest and narrowly applied concept to become the source of a new moral philosophy of justice that holds the promise of reshaping the world.²¹⁰

Within American law generally, the concept of *dignity* has appeared regularly for over a century.²¹¹ References to the term “*human dignity*” began to appear around the time of the phrase’s inclusion in international law documents such as the International Declaration of Human Rights in the 1950s.²¹² The term has become increasingly more prevalent in decisions over the past half-century.²¹³

208. See discussion in text and notes 18-72, at Part II *supra*.

209. Human dignity has been widely embraced as a norm in international law and in humanitarian and human rights discourse generally. Indeed, the constitution of Germany places human dignity as the primary protected value. See Oscar Schacter, *Commentary: Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 854 n.2 (quoting Article 1 of the German Federal Constitution: “Human dignity is inviolable. It is the duty of all governmental power to respect and protect it.”).

210. See Paust *supra* note 19, at 149-62.

211. *Id.*

212. *Id.* at 151.

213. *Id.*

What is meant by human dignity? There are definitions for this term, some of which are more satisfying than others. Like Potter Stewart's characterization of obscenity in the *Jacobellis* case,²¹⁴ human dignity tends to have an "I know it when I see it" feel; a quality of abstractness that becomes more concrete and recognizable in specific factual scenarios.²¹⁵ Elaboration of the meaning of the term has been hampered, I think, by the desire to avoid the criticism that it inevitably imparts a non-secular connotation. Implicit in this Part of the Article is a call for just such an elaboration. It is imperative that courts and commentators address the question of the meaning of human dignity and its constitutional principles.

I am by no means the first to recognize this compelling normative failure and call for its redress. On the bench, among the strongest and most consistent supporters of a jurisprudence based upon the primacy of human dignity as an underlying constitutional value appear to have been Justices Murphy and Brennan.²¹⁶ Justice Murphy made what may have been his strongest reference to human dignity in the *Korematsu* case.²¹⁷ Justice Brennan's ruminations on human dignity in speeches and cases have been reviewed in a recent article.²¹⁸ They arguably demonstrate the nascent development by these Justices of a theory of social justice with human dignity at its center.²¹⁹

Further, the Supreme Court has held that human dignity is at the heart of one of the most longstanding common law actions of all, the action for defamation. The tort of defamation explicitly protects against damage to reputation. The deep, longstanding support at common law for the tort of defamation derives from a notion of individual human dignity; its value, as reflected by the defamation action, has traditionally been among the most protected by the courts. As Justice Stewart wrote in the case of *Rosenblatt v. Baer*:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than *our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty*. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any

214. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

215. One author has suggested that international law should serve as a guide for the hallmarks of dignified treatment. See Paust, *supra* note 19, at 184.

216. See generally Wermiel, *supra* note 191, at 232-34; see also Paust, *supra* note 19, at 150-51.

217. *Korematsu v. United States*, 323 U.S. 214, 233 (1944).

218. Wermiel, *supra* note 191, at 223.

219. See *id.* at 223-35.

less recognition by this Court as a basic of our constitutional system.²²⁰

Justice Stewart's remarks are among the most eloquent statements by any Supreme Court Justice regarding the centrality of universal human dignity as a deep principle undergirding our system of "ordered liberty."²²¹ Thus, the concept of human dignity as an underlying value deserving of protection under the law is a deeply rooted, if under articulated, principle within Anglo-American law. Human dignity has been acknowledged by Supreme Court jurists as among the foundational values protected by law, which explains its longstanding and deeply rooted protection under the law of defamation.²²² It is implausible to argue that so central and general a concept would be limited in its application to the specific injuries at issue in the few Supreme Court cases where it has been explicitly named. Rather, human dignity must be the deep principle which provided support for the American experiment at its inception, and which has provided unacknowledged guidance in constitutional interpretation of every kind today. I am arguing that the principle should be brought above the surface and explicitly recognized as a constitutional norm.

In addition, the development of constitutional protections for other interests not identified expressly in the Constitution may provide analogies for justifying the extension of constitutional protection to the concept of human dignity. For example, if certain "zones of privacy" can arguably be conceived as being deep and implicit in the Fourteenth Amendment,²²³ then a right to human dignity may similarly be implicitly grounded. Indeed, the "right to privacy" cases provide further evidence of the Supreme Court's acknowledgment of a deep principle of human dignity as a guiding constitutional theme.²²⁴

As we seek to understand the issue of race, the concept of human dignity has much more to offer us than has been generally understood. Without a doubt, human dignity has been an animating principle in the American dialogue on race within the law and social movements for some time.²²⁵ Among the courts, Supreme Court opinions dealing with race have sometimes referred to the concept of human dignity as a normative source. For example, over fifty years ago, Justice Murphy relied on the concept of human dignity as a guiding force in his analysis of the *Kahanamoku* deci-

220. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (emphasis added).

221. *Rosenblatt*, 383 U.S. at 92.

222. *Id.*

223. *Griswold v. Connecticut*, 381 U.S. 479, 848 (1965).

224. See, e.g., Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 978.

225. See Bernard R. Boxill, *Dignity, Slavery, and the Thirteenth Amendment*, in CONSTITUTION OF RIGHTS, *supra* note 12 (stating that "[i]n abolishing slavery, the Thirteenth Amendment thus abolished one frightful challenge to the human dignity of black people in America and paved the way to their full participation in the society. But other lesser, though perhaps more intractable, challenges persist, for example, racial discrimination").

sion.²²⁶ Justice Murphy described the affront represented by the race-based internment at issue in that case as a violation of human dignity: "Racism has no place whatever in our civilization . . . it renders impotent the ideal of the dignity of human personality."²²⁷

In the realm of activism, Martin Luther King, Jr. movingly persuaded millions around the world that this goal of ensuring dignified treatment of all humans was at the heart of what was needed to reform America from the legacies of racialization and other forms of state-supported exploitation. King put the goal this way:

We are simply seeking to bring into full realization the American dream—a dream yet unfulfilled. A dream of equality of opportunity, of privilege and property widely distributed; a dream of a land where men no longer argue that the color of a man's skin determines the content of his character, the dream of a land where every man will respect *the dignity and worth of human personality*.²²⁸

Thus the concept of human dignity has been important as a normative source in the interpretation of the dictates of the Constitution for judges and activists for some time. Recent scholarship has argued for an interpretation of the Constitution that recognizes the centrality of human dignity;²²⁹ few have set forth an elaboration of the means of incorporating the principle into particular frameworks for adjudication;²³⁰ and no one has heretofore located the concept of human dignity within a doctrinal framework for evaluating claims alleging racial discrimination.

I conclude that the focus on race in remedying the legacies of slavery was appropriate to the context of the last century, or rather, during the First and Second Reconstructions. The focus on race did not, however, push the proposed remedies for "racial violations" far enough. It did not go beneath the term race itself, to unmask and reveal the real value undermined by slavery, which was not *racial* integrity but *integrity of the human being*. In the next Reconstruction, courts and policymakers must do just that: Human dignity must be brought forth as the guiding principle for interpreting the scope and application of the Reconstruction Amendments.

226. *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring).

227. *Duncan*, 327 U.S. at 334.

228. JAMES H. CONE, MARTIN & MALCOLM & AMERICA 58 (1991).

229. See CONSTITUTION OF RIGHTS, *supra* note 12, at 1.

230. See *id.* at 3-4 (making a similar point in that "[t]he value of human dignity is often presupposed in moral and legal argument, but the precise function of the concept is almost never explained. In comparison with the attention it has paid to such notions as justice, equality, and rights, contemporary scholarship has devoted surprisingly little analysis to the concept of human dignity").

*D. Beginning the Third Reconstruction: Post-Racialized
Human Dignity and the Process of Neo-Humanization*

*1. Post-Racialized Human Dignity is the Missing
Principle in the Interpretive Framework for
the Reconstruction Amendments*

To assist in the reconstruction of America in the post-slavery era, however, the concept of human dignity must itself be reconceived to specifically incorporate a post-racial view of what “human dignity” means. A post-racial notion of human dignity depends on a post-racial notion of humanity. We must ultimately dismantle the concept of race, end the practice of creating and recreating racial groups and identities, and reconstruct the notion of humanity based on our underlying interconnectedness and the indivisible commonality we share as human beings. We must relinquish the “comfort zones” of our racial identities, insist upon freedom, and begin the work necessary to move us there. In short, we must end racialization.

2. Ending Racialization

What we know about race now that was not known when either the Constitution or the Reconstruction Amendments were drafted is of enormous importance. We now know that race is, from a scientific standpoint, a fiction.²³¹ Indeed, it has been argued persuasively that race was constructed specifically to justify the paradox of slavery under the Constitution.²³² When considered against the harm done by continued commitment to the ideology of race, and in light of the universalist underpinnings of the Fourteenth Amendment, deep uncertainty about continued reliance on the prevailing racial framework is the ineluctable result.

I join the relative handful of leading liberal scholars of color who have called for a rejection, to some extent or another, of the language of race and of the continued tendency to use race as an organizing principle in remedying the repercussions of our history of race-based subordination. Professor Darren Hutchinson has been furthered this discourse in his article on “progressive race blindness.”²³³ Another, K. Anthony Appiah discusses what he

231. See *supra* note 122 and accompanying text.

232. See, e.g., PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 17-18 (2d ed. 1978) (positing, as one of three factors contributing to the genesis of Western racism, “the need among white Europeans and North Americans to rationalize the blatant contradiction between the treatment of slaves [and colonial peoples] and the official rhetoric of freedom and equality”).

233. See generally Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 *UCLA L. REV.* 1455 (2002). In a subsequent essay, I will address the similarities and differences between my approach and those described by Hutchinson. See Rhonda V. Magee Andrews, *An Impossible Task? A Reply in Favor of Humanity Consciousness* (Dec. 1, 2002) (unpublished work in progress, on file with author). It should be noted here that, to the extent that this Article would fall into Professor Hutchinson’s “progressive color blindness” category, it specifically meets one of Professor Hutchinson’s major critiques in that it “fails to explain how to end race consciousness.” Hutchinson, *supra*, at 1471. I argue here that race consciousness can be ended gradually by

believes is necessary to combat the scourge of white supremacy.²³⁴ In *Color Conscious*, he argues that current notions of race must be reconsidered, dismantled, and overcome.²³⁵ David Hollinger, Orlando Patterson, and others have also called for a rejection of race, with some suggesting replacing the notion, where appropriate, with ethnicity or other concepts.²³⁶ The question also has been addressed specifically with reference to the impact on the Latino and Asian racial subgroups-in-the-making.²³⁷

I have not arrived at the proposal to end racialization lightly. Indeed, my own previous work confirms I have had a longstanding personal interest in, and no small degree of personal commitment to, racial identity theory and politics and, indeed, love for the racialized people from whom I have drawn my own "African-American" identity.²³⁸ In calling for the abandonment of race, I want to make clear, as have other left-leaning scholars who have made consistent appeals, that I recognize the continuing social, political, and, to some extent, cultural significance of race, and the widespread extent to which many people across the social and political spectrum continue to hold biological views of race. "Race" is a real factor in the lives of virtually all Americans, whether we each are cognizant of its relevance, either in general or in a particular situation, or not. The language of race, then, does illuminate and does provide insights into the operation of subordinating practices in America. Moreover, racial identity is a tremendous source of pride for many of all races and has especially been so for me.

Nevertheless, I am compelled to argue for the rejection of the language of race and appeals to racial identity in American public discourse. I do so not only, or even primarily, as a result of utilitarian and rationalistic analysis of the net benefits to be gained as a result. Indeed, I acknowledge that from a utilitarian standpoint, certain particular interests of mine as a black woman are threatened by the potential abandonment of race-based thinking and practice, as are certain of the interests of the African-Americans and other racialized groups as distinct political and social groups.²³⁹

supplanting it with increasing degrees of humanity consciousness over time. Further consideration of Hutchinson's work and elaboration on criticisms of my approach is reserved for future works.

234. See APPIAH & GUTMANN, *supra* note 42, at 32.

235. See *id.* ("If we are to move beyond racism we shall have, in the end, to move beyond current racial identities."); cf. Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 232-33 (2000) (arguing that race does not exist beyond its historical and social contexts).

236. See *Erasure*, *supra* note 102, at 1150-51.

237. *Id.* (calling for a contextualized and rationalistic or utilitarian evaluation of whether to abandon race in a given circumstance).

238. See Magee, *supra* note 10, at 867, 871-75, 876 (embracing critical race jurisprudence and arguing in favor of reparations for African-Americans as part of cultural equity theory, a justification for broad remedies for the redress of racial harm which "posits that a full range of remedial theories, supporting a host of creative public and private policy initiatives, is necessary to attain [racial equality in America]"; and calling for "a realization [among non-whites] of the power of cultural group self-love as an anti-white-supremacy device").

239. The consequences of this approach are far ranging and significant, and will be addressed in a series of articles to follow.

I stake my position on the firm, deep conviction that to use the language of race is to participate in the essentially arbitrary division and devaluing of humankind, which are at the conceptual heart of the ideology of racialization. Because I believe that race talk is almost always counter-humanitarian and dehumanizing on some level, or so often as to require handling with extreme care, my own conception of humanity and of our essential commonality demands a rejection of race as an organizing principle in political thought, action, and everyday life.

This proposition, that race talk and race consciousness too often dehumanize to make them routinely acceptable at this point in our history, may be challenged on a number of grounds. First, one might argue that it is not race or race consciousness that dehumanizes, but racism, the perverse application of race consciousness, which does so. Second, one might argue that even if racialization does sometimes dehumanize, it also has humanizing effects. Indeed, some would hold that the experience of racial subordination leads to an expanded ability to empathize and sympathize with others. Such a compassionate ability to empathize is one of the hallmarks of enlightened humanity; consequently, race should be viewed as favorable to the development of a more humane society. Finally, and perhaps most compellingly, race still matters. Thus, whatever its fictional nature from a scientific standpoint, because we cannot regulate the impermissible operation of race without using the language of race, we must live with whatever reifying consequences result and press on. I discuss each of these objections in turn.

As for the point that it is not “race,” as such, that dehumanizes, but racial subordination, or the perverse use to which race is put by some, I can see how some might take this position. After all, for many, race has not just a formal or social meaning, but a personal and culturally specific meaning as well. However, it seems to me the argument that it is not race, but the use of race in particular ways, which is the entirety of the race problem, shares a perilous similarity to the specious logic of the gun lobby’s bumper sticker favorite: “guns don’t kill people, people do.” One might respond that, to some important degree, in both cases people are the actors, whether race-ing or shooting is the verb. However, without access to either “things,” there is no question in my mind that there would be less harm done to the people of this country, and indeed, the world. Race almost inevitably invokes, even if only implicitly, a discussion of what it means to be human.²⁴⁰ Thus, whether

240. Cornel West, Keynote Address at the Stanford Law School Colloquium on Race, Stanford Law School (Apr. 4, 1998) (notes on file with author). Compare West with Lawrence and Matsuda, as they argue generally for affirmative action as follows:

There is still another way to think about promoting equality and human dignity that does not ignore our country’s racism, one that derives from the point of view of human rights. Consider the constitutional command of equal protection as one requiring the elimination of society’s racism rather than mandating equal protection as an individual right. Such a substantive approach assumes that ridding society of racial subordination is indispensable and a prerequisite to individual dignity and equality. It understands that white supremacy hurts us all.

LAWRENCE & MATSUDA, *supra* note 117, at 80-82.

a social or biological notion of race is relied upon, the term itself necessarily imparts a conception of humanity that is divided in some essential way.

Indeed, while humanity may be divided along any number of characteristics, no matter how deeply ingrained in the template of contemporary national and international discourse, each is superficial. To speak of race, racial identity, and even culture is, in some meaningful sense, to speak of the inherently superficial. Again, this is not to say that these concepts with which we all identify and in which we often find deep personal meaning and satisfaction are unimportant. The argument I make here is simply that, relative to the traits that mark our common experiences as humans—our abilities to feel, to think, to love, to experience compassion, to procreate amongst ourselves, and to “grow”—our commonality as humans is in some critical sense vastly more important than any of our colorful and captivating differences.

So, race-based identification is, in some very basic sense, superficial. Identification based on humanity, on the other hand, is identification based on the essential. I opt, then, for language that moves both law and humanity toward a conception of ourselves which favors the essential over the superficial.

With regard to the proposition that race and race-consciousness may have more of a humanizing than a dehumanizing effect, I simply disagree. While there is ample evidence that the experience of racial subordination, discrimination, and other, similar experiences can have the effect of engendering compassion for others, that is not always the case, and there is no reason to believe that it is often enough the case to justify the assumption. Indeed, for example, there is sufficient evidence of both interracial and intraracial crime and violence, both here and in other cultures, to justify skepticism that racial oppression itself makes one likely to feel more connected to one's fellows in humankind. Even if true to some extent, however, whatever benefits gained in compassion by racial identification alone can as easily be gained by embracing and encouraging an identification that emphasizes our common humanity.

Finally, I address the critique that we cannot regulate racism without accepting racial categorization. It is on this point that utilitarian arguments begin to have some appeal. For a long time we have believed in two fallacies: in race, and in the power of the law of racial “equality” to somehow minimize its operation in society. The use of race to monitor the operation of equality has, indeed, been viewed as being in the best interests of traditionally oppressed groups.²⁴¹ However, we cannot deny that reliance on race

241. This is the primary argument raised against the Racial Privacy Initiative, recently sponsored by Ward Connerly—primary proponent of California's Proposition 209 (which effectively ended affirmative action in the state schools)—seeking to prohibit the state of California from keeping data by race. The Racial Privacy Initiative will appear on California's statewide ballot in November 2004. *Racial privacy initiative qualifies for 2004 ballot*, ASSOCIATED PRESS, July 15, 2002, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2002/07/15/state1650EDTD162.DTL> (on file with author). In this connection, it is worth noting that while attending the United Nations' World

today, even in purportedly benign ways, also perpetuates the problem of race. In the interest of the racially oppressed, the argument goes, we must relegate those who might be oppressed to the category of a perpetual Other. But as has been said, "Once you label me, you negate me."²⁴² Thus we are all given to trade a fully humanized identity for a racialized one, in exchange for the promise of "protection" by the state from the race-based denigration which, it is presumed, will at some point inevitably occur.

Perhaps, if the law were marginally effective in prohibiting the ill-effects of race today, this would be a bargain worth its hefty price. But as the foregoing discussion of the unjust implications of modern Fourteenth Amendment law demonstrates, the current law is virtually ineffective as a tool of protection against degradation of traditionally oppressed people of color. For example, despite the rhetoric, "blacks" are not, as a group, substantially better off today than we were a generation ago.²⁴³ We continue, for the most part, to live in segregated settings, to attend the least well-financed public schools, and to suffer daily from the disrespect attributed unconsciously to members of our "race."

In short, the law's "protection" has not been sufficiently availing to justify the daily submission to continued racialization that is one of its most consistent costs. Since, for blacks, the law's "protection" is no longer worth its price, this reliance on race fails its utilitarian justification.²⁴⁴ Add to that its tendency to divide and its perpetual use as a tool of oppression and the argument for the renunciation of race is perhaps more readily understood.²⁴⁵

I argue that race consciousness is not the vehicle that will lead us to a truly transformed America, or to a more just and humane international community, and that the language of race should ultimately be rejected in public discourse.²⁴⁶ However, simply abolishing the notion of race will not solve the problem of the disadvantaged treatment of people by or on account of race and the continuation of the practices of dehumanization

Conference Against Racism in Durban, South Africa (Sept. 2001), I observed that the issue of whether or not to require countries to maintain data by race was one major contention among the represented nations. A full consideration of the implications of the approach proposed as a preliminary matter here, including the implications of this approach for proposals like Connerly's, is beyond the scope of this paper, but will be considered in a subsequent article.

242. DYER, *supra* note 196, at 42.

243. See Hugh B. Price, *Black America's Challenge: The Re-construction of Black Civil Society*, at <http://www.nul.org/soba2001/sobaabstracts.html> (last visited Nov. 17, 2002).

244. See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001).

245. All of this is to say nothing of the extent to which interracial marriage and procreation undermine the racialization agenda. See, e.g., Kenneth E. Payson, Comment, *Check One Box: Reconsidering No. 15 and the Classification of Mixed Race People*, 84 CAL. L.REV. 1233, 1237 (1996) (discussing the multi-racial category movement and the U.S. Census Bureau's directive No. 15, requiring mono-racial categories and arguing that the traditional mono-racial approach is "inconsistent and arbitrary," especially given the "increasing mixed-race population" of America); cf. Robinson, *supra* note 235, at 262 (supporting the move away from traditional racial categories toward multi-racial categories as a means of "[moving] us not only toward 'racial' justice but also toward spiritual awareness").

246. Compare E. Christi Cunningham, *The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 715-18 (1999) (arguing that race should be discarded as a facet of personal identity, but maintained for use in political movements and equality jurisprudence).

which, at its most basic level, the American experience with slavery represented. An effective solution would be more complicated than that.

Stated simply, "ending race," a daunting (if possible) project to be sure, is a critical step. However, for at least two reasons, such a radical change would not, by itself, be enough. First, ending racial identification will not, alone, address the underlying use to which race and racial identity have been, and likely will continue to be, put in justifying the denial of the full complement of rights, privileges, and opportunities to various racially identified segments of the population. Instead, simply adopting the view that race no longer exists and no longer matters, without more, leads to the entrenchment of the status quo as discussed in a previous Part. This is the problem that results from the contemporary Supreme Court doctrine of color-blind constitutionalism.

The second and perhaps even more fundamental reason why ending race is not by itself a sufficient remedy to the problem of race in America is that it misperceives the nature of the problem. Again, the problem posed by slavery and its legacy of white superiority in America (and, partly as a consequence, much of the world) was not simply the entrenchment of the notion of the validity of the separation of the human race into distinct races. The more fundamental problem for all Americans posed by slavery and its cultural legacies is the entrenchment of the notion that the abject debasement of human beings could be accepted as consistent with the basic principles at the foundation of American constitutionalism. This is the essential legacy of slavery, of white superiority, and of racism that continues to sully the soul of America. It helps explain our societal tolerance for all manner of dehumanizing practices, from the death penalty to police brutality, from child abuse and sexual exploitation, to astoundingly poor public schools, and the banality of gun violence, including black-on-black crimes. It is this culture of dehumanization that must be undermined if real change is ever to occur.²⁴⁷

Thus, any correction of the problem of the legacies of slavery requires at least two moves. The first must be aimed at reaffirming the notion that human life is sacred and deserving of dignified treatment and that such treatment is guaranteed by the Constitution. Refocusing the remedial and aspirational reach of the Fourteenth Amendment's Privileges or Immunities Clause would go a long way towards supporting that end.²⁴⁸ The second is

247. It is interesting to note that Mahatma Gandhi is said to have arrived at a similar conclusion regarding the solution to the problem of caste in India. A revolution, he argued, would not solve the problem, which had become an ingrained aspect of Indian culture:

What Gandhi is suggesting by his rejection of revolutionary methods for improving the lot of the untouchables is that changes in the life of [the untouchables] could only be effectively accomplished by bringing about a change of attitude among the members of Hindu society as a whole. So making friends of untouchables was not enough, nor, it might be argued, could the abolition of caste labels be regarded as an adequate solution to the problem. As Gandhi indicates, nothing short of a restoration of the purity of the Hindu way of life would suffice.

GLYN RICHARDS, *THE PHILOSOPHY OF GANDHI* 88 (1991).

248. Cf. DENVIR, *supra* note 90, at 8 (elaborating an argument for reinterpreting the Privileges or

equally critical. It would not only constrain the use of race to continue the dehumanization legitimized through slavery and segregation, but would also undertake to redress the myriad ways in which that dehumanization has influenced the development of American law and social policy.²⁴⁹ In short, to move beyond racial identities while ignoring neither the role that race has played in undermining the dignity of *all* Americans, nor the realities of the continued operation of white supremacy and various forms and shades of race-based subordination, we must: *not only* (1) end all practices of racialization in law and public policy; *but also* (2) adopt a perspective of full reverence for all of humankind, that is, reverence for humanity and a commitment to ensuring treatment which guarantees and protects human dignity for all. It is this perspective, and the transformative applications of the Fourteenth Amendment that might result, that would begin the process of Third Reconstruction.

Thus, at the very same time that the problem of racialization is addressed, with specific measures undertaken to minimize its continued operation in law and public policy, we must affirmatively act to institute practices that redress the real problem at the root of racist practices, the problem of dehumanization, or the denial of full human dignity to all. The necessary *simultaneous* step is to reform public policy to incorporate the new perspective that validates, through concrete measures, the essential worth and value of all human beings. In this connection, we would consider carefully the ways in which American law and social policies impact the development of human beings across the social spectrum. We must undertake to make the articulation and inculcation of a new vision of what it means to be a human being—what might be called “neo-humanization”—the goal of the reform movement that would result.

What is neo-humanization? With this concept I suggest a complex of ideas, practices, and processes which, taken together, constitute the very opposite of the dehumanization that was the hallmark and most debilitating legacy of American slavery. Neo-humanization refers to the development and implementation of practices and principles that recognize the universal sanctity—or, if you like, supreme value—of human life. The emergence of the concept of human dignity, combined with the altered consciousness regarding the nature of discrimination, which resulted from the Second Reconstruction, arguably gives rise to a transformed viewpoint. This perspective considers the fact that among the most serious challenges to dignified treatment to those nurtured in racialized societies are the concepts of race and racism. I call this viewpoint “humanity consciousness.” The goal of

Immunities Clause under the Constitution to better protect fundamental interests of Americans, including the right to a job, to “a first-rate education,” and similar privileges.).

249. Cf. COLKER, *supra* note 139, at 1-26. Colker argues for a reconsideration of the assumptions underlying the law and economics approach to American law and capitalism in the interest of bringing about a greater concern for “quality of life” and “well-being” in that “[a] humane capitalism should be possible.” *Id.* at 25.

humanization demands that we incorporate the concept of human dignity into our laws and replace race consciousness in our minds with affirmative humanity consciousness.

To increase the possibilities for transforming American society that inhere in the application of the Fourteenth Amendment, the doctrine must be reconceived in ways that reduce and ultimately eliminate societal reliance on racialization and alternatively embody a post-racial conception of humanity as the ultimate goal. To regain its effectiveness, the Fourteenth Amendment must be reinterpreted using a post-racial notion of human dignity as the mediating principle, an enlightened consciousness born of the increased focus on the inherent commonality among all as the guiding perspective (i.e., "humanity consciousness"), and resulting in neo-humanization as the goal. In light of its historical underutilization among the Fourteenth Amendment's arsenal of tools for transforming post-slavery America, the Privileges or Immunities Clause is the logical source for such a change.

In the United States, appeal to the concept of human dignity as a guiding principle has drawn strong and tireless support, lukewarm indifference, and passionate criticism.²⁵⁰ In the Subparts to follow, I elaborate on the humanity consciousness perspective as one that reflects a primary reliance on the principle of human dignity as a normative source, and open a preliminary discussion of goals and practical consequences that would flow therefrom.

3. Humanity Consciousness as the Perspective that Results

As suggested by the foregoing, missing from the contemporary racial justice framework is a conceptualization of humanity that actually goes beyond the goal of "equality" in the treatment of racialized individuals, and instead unambiguously posits a transformed view of what it means to be fully human, and of our relationships with one another as human beings. In this Part, I posit the term "humanity consciousness" to describe that social-psychological approach which I believe should be the hallmark of such a transformed view and suggest that human dignity is the value that best captures that view of humankind.

What is humanity consciousness? Humanity consciousness is a term that I suggest to capture the evolving cognitive framework through which we, as individuals, interpret our relationships with one another. It may be viewed as a counterpoint to the term "race consciousness," which has been used to describe a state in which social actors are more or less constantly aware of the racial element in a given social setting.²⁵¹ In pointed contrast, humanity consciousness may be defined by the increasingly heightened

250. See generally Paust, *supra* note 19; Wermiel, *supra* note 191.

251. See Peller, *supra* note 6, at 761; Aleinikoff, *supra* note 6, at 1067.

awareness of the common humanity among all human beings. It is that point of view from which we recognize and focus our mental attention on the essential sameness of all human beings, regardless of so-called racial, ethnic, cultural, national, or other distinguishing characteristics.

Humanity consciousness is both the commitment to a deliberate point of view, one which takes the notion of universal human dignity to be a normative source for thought and action as the most basic principle implicit in any decent system of ordered liberty,²⁵² and the conscious perspective that results. At the interpersonal level, this perspective should guide our daily interactions with one another in ways that lead to new patterns of connection, of empathy, and of love. Translated into law and policy, this perspective should result in a commitment to eliminating systemic oppression, microaggression, and other forms of dehumanization, including, but not limited to, those mediated through the fiction of race.

To change our behavior and our actions we must change our minds, where all action begins. Humanity consciousness affirmatively addresses the mind-level changes that are necessary to change society from one committed to racialization to one committed to humanization. It is a deliberate point of view that directs psychological focus to common humanity in an effort to offset the often unintentional (but perhaps as often intentional) race consciousness which pervades American society,²⁵³ and which often has both liberating *and* inevitably subordinating implications.

In practice, we generally underestimate our ability to choose the thoughts that undergird our attitudes, shape our fears, and ultimately dictate the contours of our lives. And yet, the emerging understanding of the extent to which race is socially constructed—or rather, socio-psychologically constructed—demands that we each take a measure of personal responsibility in its social deconstruction. Consequently, we must adopt a perspective that endeavors to keep a keen focus on the essential commonality between others and ourselves.

The extent to which we adopt humanity consciousness will vary over time and social location, given the contexts in which we find ourselves. In light of our present commitment to race and racialization, one would find it difficult to bring humanity consciousness to bear exclusively in interacting with others. Thus, we must be prepared for life in the space of a profound, but very real paradox: We must find, within ourselves, comfort in *both* expressing our raced perspectives *and*, simultaneously, focusing on and expressing our commonality. This transitional perspective toward full humanity consciousness should be viewed as a dual consciousness state.²⁵⁴

252. See *supra* Part III.A.

253. See, e.g., Peller, *supra* note 6, at 758 (discussing race consciousness); see also Robinson, *supra* note 245, at 269, 285-87 (emphasizing the need to alter our thinking to bring about a racially deconstructed world).

254. See, e.g., Matsuda, *Looking*, *supra* note 187, at 333 (discussing W.E.B. DuBois's notion of dual consciousness).

The notions of dual consciousness and “multiple consciousness” have become features of contemporary critical theory.²⁵⁵ My elaboration here posits the following: to our consciousness born of our experiences along racial, gendered, and other social identification lines and boundaries, we must always deliberately and consciously consider our common humanity.

In sum, awareness of our common humanity is the first step; that step which accepts the notion of universal human dignity. The second step is to recognize that awareness should give rise to a new way of interpreting the law, one clearly absent from the minds of the drafters of the original Constitution and perhaps all but the most radical of the drafters of the Reconstruction Amendments—the perspective of humanity consciousness.

The last step in the transformation by which the Third Reconstruction will be known would require taking the perspective of humanity consciousness and applying it to the evaluation of our law and practice, with a view toward uplifting and promoting the dignity of every human being.²⁵⁶ This latter step represents the application of the perspective of humanity consciousness to specific problems of drafting and interpretation of the law in ways which not only denigrate the dehumanization implicit in systems of social injustice to which the law responds, but go one important step further—it affirmatively humanizes them.

4. Neo-Humanization as the Goal of the Practices that Result.

I want to be absolutely clear: the subject of any “humanization” project proposed here would not be those who were formerly enslaved, not their descendants. At least, they would be no more the focus than any others in society. In my view, what needs to be humanized is American law and society itself. By humanized, I mean that our practices and policies must take into account the basic needs of the human being, provide protection against infringement upon and affirmative access to the resources necessary to meet those needs and provide official encouragement for the dignified treatment of every person.

Humanization means the reinterpretation of law and policy to include a concern for human dignity and well-being. It means the reconstruction of institutions to enhance their role in the promotion and protection of human dignity. For example, with regard to the Privileges or Immunities Clause, an interpretation which put human dignity interests first would likely lead to a broader interpretation of the scope of the privileges than currently pre-

255. See *id.*; see also Magee, *supra* note 10, at 865 n.5, 909-13 (noting the importance of theories of “multiple consciousness” in critical race scholarship, and calling for multiple consciousness among all).

256. Humanitarian leaders have promoted the uplifting of all human dignity as the goal of social justice reform. For example, the goal of uplifting all, rather than simply providing “equality,” enabling the greatest happiness for the greatest number, or even providing “welfare,” was essential to the philosophy of Mahatma Gandhi. See RICHARDS, *supra* note 247, at 72.

vails.²⁵⁷ A broader interpretation was suggested by Professor tenBroek²⁵⁸ and was recently proposed by Professor John Denvir.²⁵⁹

Next, I discuss the implications of a reformed notion of humanity, which lead inevitably to a conclusion that the Constitution must play a larger role in protecting human dignity; a role that might be played by a re-interpretation of the Privileges or Immunities Clause. The Equal Protection Clause's near-exclusive appeal as a tool for the post-slavery transformation must be reconsidered, and the role of the Privileges or Immunities Clause must be expanded if the next phase of Reconstruction is to begin.

V. LAYING A FOUNDATION FOR THE THIRD RECONSTRUCTION:
APPLYING POST-RACIALIZED HUMAN DIGNITY AND
THE PERSPECTIVE OF HUMANITY CONSCIOUSNESS IN
SEARCH OF HUMANITY-CENTERED JUSTICE²⁶⁰

I have argued above that constitutional law responsive to the legacies of slavery has placed too little emphasis on aspects of the Fourteenth Amendment beyond the Equal Protection Clause. It has missed the opportunity to repair the flaw in the Constitution of which the problem of slavery—huge though it was—was only its most significant symptom. That fundamental flaw is the lack of protection under the Constitution for the basic human dignity of all. We must endeavor to see the broad dehumanization that is

257. See *supra* Part III.A.

258. TenBroek argues that the Privileges or Immunities Clause, from the standpoint of its progenitors, protected "natural rights" as well as:

such auxiliary rights as were necessary to secure and maintain those natural rights. They were the rights to life, liberty and property. They were the right to contract, and to own, use, and dispose of property. They were the right to equal protection of the courts and to the full and equal protection of the laws. They were the rights of unrestricted travel, sojourn, and residence. These were the irreducible minimum. . . . [The clause] was a constitutional reaffirmation . . . of the reciprocal relationship of allegiance and protection.

TENBROEK, *supra* note 3, at 236 n.1.

259. See generally DENVIR, *supra* note 90.

260. In this Part, I unapologetically use abstract principles such as racialization and humanization to refocus the terms of the discussion of matters typically discussed as "race" issues. I think these terms are necessary to get at a new ways of thinking about this aspect of the world we know. Also, the use of somewhat more abstract terms may be one way in which to create space for mutual understanding on topics in which the dialogue has become bogged down in well-worn opposing points of view. See LIBERALISM, *supra* note 184, at 44-46.

In political philosophy the work of abstraction is set in motion by deep political conflicts. Only ideologues and visionaries fail to experience deep conflicts of political values and conflicts between these and nonpolitical values. . . . We turn to political philosophy when our shared political understandings . . . break down, and equally when we are torn within ourselves. . . . The work of abstraction, then, is not gratuitous: not abstraction for abstraction's sake. Rather, it is a way of continuing public discussion when shared understandings of lesser generality have broken down.

Id.

If there is any area of public discourse in which our "shared understandings of lesser generality have broken down," it is in the area of race and race-related justice. See, e.g., Editorial, *Five Petulant Profs.*, DURHAM HERALD SUN, Mar. 6, 2002, at A16 (accompanied by a cartoon created by John Cole); Statement by the African-American Faculty of the UNC School of Law Regarding the Visit of Justice Clarence Thomas (Feb. 28, 2002) (unpublished manuscript, on file with the author).

permissible under the Constitution, as reflected by our experience with race, and to develop a means of addressing that serious flaw. We must find a way to see that the problem of slavery revealed the general under-appreciation in American law for the sanctity of the human being, and we must find Constitutional arguments to enable its redress.

In this project, we should creatively reconsider each of the Reconstruction Amendments. However, to begin addressing this flaw, to see reforms reflected in real lives, we should broaden the focus of Fourteenth Amendment doctrine for ending the legacies of slavery from the Equal Protection Clause to include the logical sources of a broader notion of the “blessings” and “protections” afforded under the law. We must broaden the focus to include both the Constitution and other founding documents (e.g., the Declaration of Independence) that support universal human dignity.

The abolitionists to whom we owe so much of our progress thus far were ahead of their time in interpreting the demands of justice under the Constitution. Their approach, looking beyond the reality of their time to what would be required under a just Constitution, suggests that they would have demanded concrete evidence of more dignified treatment of blacks and of changed material conditions as measures of success. So must we. In demanding a reconsideration of the operation of the Fourteenth Amendment, we must reconsider all of its provisions. In addition, as argued by the abolitionists, the preamble of the Constitution, with its guarantee of the “blessings” of liberty, and the Declaration of Independence provide foundation for elaborating on the requirements of justice.

Taking the abolitionists as inspirational guides, the disparate outcomes and substantive inequalities that persist along racial lines suggest we should do one of two things: either we must abandon our belief in the efficacy of law to transform society in ways that truly improve the conditions of the traditionally disadvantaged; or we must demand a reconsideration of the operation of the Reconstruction Amendments enacted toward that end. As this Article demonstrates, I opt for the latter.

In the remainder of this Part, I discuss the way in which a concern for human dignity should guide the determination of the substantive rights enabled by the enactment of the Fourteenth Amendment and lead us to search for a Constitutional source for such determinations. Taking the Fourteenth Amendment as a whole, I conclude that the Privileges or Immunities Clause is perhaps the most logical potential locus for the immediate elaboration of additional substantive rights under the Constitution in the interest of broadening protections for basic human dignity.

A. The Privileges or Immunities Clause Revisited

As discussed above,²⁶¹ the Privileges or Immunities Clause was rendered virtually irrelevant by the interpretation given it in the *Slaughter-House Cases*, and has not been subjected to significant Constitutional reinterpretation since. The clause reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."²⁶²

As described above, the abolitionists intended that all of the basic rights enshrined in government under the Constitution should be extended to everyone, without regard to race or politics.²⁶³

The text of the clause refers to "privileges or immunities," and they are not self-defining. The most progressive among the abolitionists viewed these as encompassing all of the natural rights of humankind.²⁶⁴ Some of these rights were enumerated in the Constitution; some were announced in the Constitution's preamble. Frederick Douglass and others also cited the Declaration of Independence as a source of the necessary privileges and rights.²⁶⁵ The Courts could certainly add others, and some have been so specified.²⁶⁶

Whatever the full complement of privileges or immunities of federal citizenship may be, they must go beyond the prevailing narrow interpretation. That the progenitors of the clause would have thought it sufficient to have the federal government protect against the kinds of privileges thus far identified would seem, at least from the standpoint of the radical abolitionists' much loftier overall aims, to border on the absurd. To be consistent with the panoply of arguments asserted by the abolitionists, *all* aspects of the Fourteenth Amendment would be interpreted as carrying with them the authority to bestow the full "blessings of liberty" on federal citizens. The amendment must, by implication, be read to require an elaboration on the blessings promised by the Constitution in the Preamble,²⁶⁷ and by its terms, the Privileges or Immunities Clause would be a good place to start.

261. See *supra* Part III.A.

262. See U.S. CONST. amend. XIV, § 1.

263. Though the clause as phrased in the Fourteenth Amendment refers to the privileges of "citizens," the abolitionists often made no distinction between the rights of "citizenships" and the rights of others subject to the reach of the Constitution. See, e.g., TENBROEK, *supra* note 3, at 88 ("In the end, the rights of citizens turn out also to be the rights of everyone, the natural rights of [humankind].")

264. See *id.*

265. *Id.* at 87.

266. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Black, J., concurring) (holding right to jury trial is a privilege of national citizenship); *Edwards v. California*, 314 U.S. 160 (1941) (Douglas, J., concurring) (holding right of interstate travel is a privilege of national citizenship); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (holding right to assemble and discuss national issues is a privilege of national citizenship). Others have noted that, at least according to some of the congressional drafters of the amendment, the clause referred only to the first eight amendments of the Bill of Rights. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 802 (3d ed. 1996) (citing CONG. GLOBE, 42d Cong., 1st Sess. (1871) ("[T]he privileges and immunities of citizens of the United States [are] chiefly defined in the first eight amendments to the Constitution.")).

267. I am not arguing here that the upper reaches of what might be expected of the federal govern-

The question becomes the one that the Court in *Slaughter-House* side-stepped but that must be discussed now. What privileges should the Constitution protect? Again, what the abolitionists would say here is subject to speculation. However, central to their condemnation of slavery was its total decimation of the dignity of the human being:

[S]lavery destroyed "a man's inalienable right to his own body," his ownership of himself. The slave was stripped of the "essentials of his moral nature"; he was changed from a man into a thing. And all the natural rights of manhood went with the change to thinghood. . . . His "immortal mind was famished." Books were withheld from him. He was forbidden to read and write.²⁶⁸

Taken together, these and many passages like them in the historical records suggest that at the heart of the abolitionists' philosophy was the dignity of humanity; and the opportunity for mental development and expression seemed central to that ideal.

Further, the abolitionists sought the protection of the federal government, under the authority of the Constitution, in securing for blacks the rights of whites. In their view, the federal government should "throw around the person, character, conscience, liberty and domestic relations of the one, the same law that secures and blesses the other."²⁶⁹

Thus, the abolitionists envisioned the Constitution and the federal government as the embodiment of the authority to correct the essential denials of basic humanity represented by the system of slavery and race-related oppression. This view embodies an affirmative obligation to ensure dignified treatment.

As codified by the Reconstruction Congress, the language of the Fourteenth Amendment does not suggest such an active role.²⁷⁰ But the historical records indicate that the concerns of the abolitionists went well beyond the question of race-based "equality." Indeed, a broad-based compassion for all humankind was at the heart of the anti-slavery movement.²⁷¹ Its roots trace to the religious, moral, and natural rights ideas that served as a foundation for their arguments.²⁷² Invasions of the "inalienable rights" not only of slaves, but of free Negroes and of the abolitionists themselves provided a basis for their commitment to a broad program of protection under the law for all citizens, irrespective of race or color:

ment under this interpretation should be unbounded. However, where the boundaries might lie is a question reserved for another article.

268. TENBROEK, *supra* note 3, at 124-25.

269. *Id.* at 48.

270. See U.S. CONST. amend. XIV.

271. See TENBROEK, *supra* note 3, at 118.

272. *Id.*; see also BERLIN, *supra* note 32, at 220.

Humanitarian, ethical, and religious sentiments and principles all reinforced these theories of government. Just as the great objection to slavery was its lack of legal protection for slaves, as well as the concomitant, invidious, and discriminatory treatment of free Negroes and the wholesale public and private invasion of the rights of abolitionists, so the first object of the abolitionists was to gain legal protection for the basic rights of members of all three classes. Because the curse and evil of slavery was the chattelization of man, the annihilation of personality, and the degradation of character, the remedy must be an affirmative protection of human beings as such, regardless of color, condition, or belief.²⁷³

Thus, a broadly conceived notion of human dignity would seem to be an important place to begin. The next question would be how to capture that concept within Fourteenth Amendment doctrine. Other scholars have suggested that a broader view of equality, an anti-subordination focus, would enable the use of the Equal Protection Clause to support a more substantive approach which more or less implicitly calls for an appreciation of the dignity interests of all.²⁷⁴ The current Supreme Court has embraced none of these suggestions. While pursuing such equal-protection-based reforms may ultimately prove worthwhile, I propose here a quite different approach. I suggest express incorporation of the principle of human dignity; that one way to incorporate the notion of human dignity into the Constitution would be by giving the Privileges or Immunities Clause an interpretation that broadens its scope and function.

B. Re-Thinking the Privileges Under the Constitution

A proper reinterpretation of the Privileges or Immunities Clause would include within its scope a concern for human dignity that would call into question our national delusions on the matter of race. At the time of the anti-slavery movement, there was widespread commitment to the notion of race, and no emerging intellectual consensus regarding the socially constructed and politically contingent nature of its meaning. In addition, the specific ills that abolitionists were most determined to eradicate—slavery and its correlates—were ordered along the lines of race. Thus, they could not have been

273. TENBROEK, *supra* note 3, at 118.

274. See, e.g., LAWRENCE & MATSUDA, *supra* note 117, at 251-52; see also Robinson, *supra* note 245, at 231-32.

Although we socially, historically, and psychologically co-create racism and white supremacy, race is not biologically factual. It is not real. As such, race does not have any meaning that survives its social and historical context. Race exists, if ever, in our individual and cultural consciousness. If we do not constantly and consciously meditate on it, race cannot exist. Unfortunately, we fuel this social construct with our mental kindling and intellectual logs. Race, racism, and white supremacy exist because we—individually and collectively—create it, enforce it, and sustain it.

Id. at 232-34 (citations omitted).

unmindful of the importance of a special focus on the problem of race-based oppression. Nevertheless, the abolition movement was founded on a deep principle of universal human dignity that rested on a reverence for all humankind, and the creation of a world which reflected that principle was its ultimate goal.²⁷⁵ Thus, any reinterpretation of the Fourteenth Amendment generally, or the Privileges or Immunities Clause specifically, should rely heavily on the objective of universal human dignity for its substance and form.

1. Humanizing the Recognized Privileges

Central to the privileges that should find special protection and reinforcement under the Constitution should be that of a truly adequate education.²⁷⁶ Indeed, humanity consciousness should dictate, as perhaps first among a number of other important privileges and protections under the Constitution, a quality education for all. This is the perspective that animated the plaintiffs in the *Rodriguez* case.²⁷⁷ From a pragmatic standpoint, the Court's failure to recognize education as a "fundamental right" under a substantive Equal Protection analysis may suggest that the Supreme Court would likewise refuse to recognize education as a "privilege" guaranteed by the Fourteenth Amendment.²⁷⁸ Nevertheless, the claim must be brought to begin the process of transformation of the interpretation of the Privileges or Immunities Clause. Once education is accepted as among the privileges protected under the Constitution, the primary issue will be the characteristics of the education at issue, and its adequacy, fullness, or completeness as preparation for a dignified life.

2. Humanizing the Analysis of Claimed Denials of Privileges

If a broader view of the privileges protected under the Constitution would, at a minimum, include education, how might humanity consciousness impact the legal analysis of claimed denials? Humanity consciousness

275. See TENBROEK, *supra* note 3, at 116-20.

276. Cf. DENVIR, *supra* note 90, at 56. As Professor Denvir compellingly puts it:

I would interpret *Brown* as promising each American child a first-rate education as a privilege of national citizenship. In doing so I rely on Warren's statement in *Brown* that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." This is a recognition that a good education is one of those fundamental rights guaranteed to all citizens. So interpreted, *Brown* holds that the minority children in Topeka, Kansas, were deprived of two separate rights. First, they were deprived of equal protection of the laws because the school district's policy of intentional racial segregation labeled them as inferior on account of their race. But they were also deprived of a privilege of American citizenship—the right to a first-rate education—because of the inferior schools they were forced to attend.

JOHN DENVIR, *DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP* 56 (Univ. of Ill. Press 2001) (1942).

277. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Further elaboration on the privileges that might be expected is reserved for a subsequent article.

278. *Rodriguez*, 411 U.S. at 37.

would impact such analysis by focusing on the requirements of human dignity with regard to a given set of facts. It would also, however, counsel a view which regards justice as demonstrated not merely by a focus on "equality;" instead, justice requires recognition that the parties are not wholly separate entities which must be compared, but parts of a whole which must be kept in view. In other words, humanity consciousness would dictate that justice be determined through a lens that recognizes that the well being of one is intimately connected to the well being of all others. Quite possibly, the perspective would first begin to have an effect on shaping an answer to the question of who would have standing to sue.

Take the *Belk* case, for example. Beginning from the perspective of humanity consciousness, one would find it difficult to engage at all in the sort of pitting of one group of students against another along racial lines that the Equal Protection Clause jurisprudence promotes. Instead the preliminary questions would be: How does the education system that we are creating each day meet the needs of all of our students to receive an education appropriate to enable them to develop their full potential; or, how can we design a system that will enable each one of these intrinsically valuable human beings to develop their talents as far as they will take them?

At this time in our nation's history, the race of the students is not entirely irrelevant in answering questions such as these. A full answer would need to take into consideration all of the barriers to full educational development facing each child, including the legacies of white supremacy in this country—such are the requirements of a race-conscious approach. Yet, humanity consciousness would counsel that we use our heightened awareness of the historical uses of race in education and of its developmental consequences as a starting point for considering what remedies we should adopt to eliminate the problem *for all*. Barriers such as poverty, which the court in *Belk* found to have been highly correlated with race in the Charlotte-Mecklenburg area, would be taken carefully into consideration, with every effort aimed at ameliorating its debilitating effects on each child's development.²⁷⁹ Such would be the approach suggested by a perspective grounded upon the dual race-and-humanity consciousness appropriate during this period of transition. The education and development of each child would be the central issue and goal, and improvements to our educational systems would be necessary to that result.

Had all of the parties in the *Belk* litigation begun their work from a perspective of race-and-human consciousness, such a case would likely not have arisen at all. It could not arise as a violation of equal protection, for "equal protection" would be seen right away as not the real issue. A focus on the common, full humanity of the parties and the obligations required of the state to provide full protection for it would lead to an entirely different set of questions, and would lead to results justifiable on both utilitarian and

279. *Belk*, 269 F.3d at 330-31.

idealist or moralist grounds. Focusing on the needs of the whole community in promoting the dignified development of all would lead to courses of action that humanize our educational system, its participants, and our society as a whole.

Still, what if Cappichione nevertheless pursued the claim, alleging a denial of the privilege of education due to the operation of the admissions plan? What does the principle of humanity consciousness tell us, as a preliminary matter, about how a court might decide the case? In the following Subpart, I suggest some insights that a humanity consciousness approach might lead to in a world in which the Constitution ensures an education sufficient for a dignified life.

*C. Negotiating the Transition: A New Dual
Consciousness and Belk Transformed*

Again, the argument here is that humanity consciousness is the perspective that ultimately should govern the interpretation of the Constitution generally, and the application of the Fourteenth Amendment specifically. However, there is no question that race still matters, and continues to be an organizing variable in society. The legacies of slavery and contemporary discrimination continue. Thus, society must evolve to a point where the concept of race, which has been debunked in the social sciences, no longer has meaning in the social world. However, such a transformation will take time, and the process of application of the humanity consciousness to law and policy must begin to initiate the transition.

Regardless of how much we might wish it to be so now, we are not anywhere near a point at which individuals see their interests as so intimately tied to the well-being of others that altruism alone would keep suits alleging reverse discrimination against affirmative action or desegregation plans from being filed under the *Belk* facts.²⁸⁰ During the period of transition, an interim approach to the application of the Fourteenth Amendment is needed. We need to envision an interim approach that increases the likelihood that, over time, the law and our society together reconstruct what it means to be a human being.

Thus, during the period of transition from a racialized to a humanized society, a transitional approach to the applicable law must be adopted. I suggest a dual lens approach. That is, humanity consciousness applied appropriately today would require that *race consciousness and humanity consciousness together* be affirmatively brought to bear on the analysis of Fourteenth Amendment claims.

A careful consideration of the full implications of this approach will be the subject of an upcoming article. For now, and as a preliminary demon-

280. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 311-17 (4th Cir. 2001).

stration only, it may be of value to reconsider the *Belk* decision from the standpoint of applying this approach.

Assuming that education would be deemed a privilege protected under the Fourteenth Amendment, and assuming a dual humanity-and-race-consciousness approach as a first step, what can we suggest about how such a reinterpretation would play out in evaluating the use of quotas in the magnet school admission plan as in *Belk*? Preliminarily, one might surmise that Cappichione might argue that the use of quotas in the plan violated her right to the privilege of a quality education and, hence, violated her right to dignified treatment. Insights from the humanity consciousness approach would suggest that the Court should find this claim worth considering carefully. After all, Cappichione would be entitled to the privilege of an education, and to the extent the operation of the plan would deny her that privilege, a violation arguably could be established.

Humanity-and-race-consciousness would suggest, however, that the court would not view the claimed denial in a vacuum. The analysis would *not* turn merely on a comparison of the treatment of one individual to another; instead, the court would be sensitive to the mutuality—or, indeed, identity—of interests between the alleged beneficiaries, blacks, and the alleged victim, a white student, or white students generally. The history of the denial of adequate educational opportunities to blacks would not be irrelevant, and the imbalance in resources that typically exist between blacks and whites in the community would be important as well. The Court would also be mindful of the connection between the well-being of the community as a whole, and the state of the imbalance in resources, including “educational equity”—the value of education to a particular community which increases and accrues over time.

Given the continuing salience of race at the time of this incident, the Court’s analysis would evaluate the claims of all children in the system from a dual race-and-humanity consciousness perspective. That is, taking into account the prevalence of racialization while assuming the goal of humanization going forward, the full facts of the situation will be carefully considered. The disparity in educational access among members of disparately racialized groups would be an important consideration.

A court applying this approach to the facts of *Belk* would focus on the claimed denial of the privilege of a quality education, and would evaluate the claims of all children in the system from that perspective. Again, given the transitional period in which this issue is presently set, and the court would consider the history of state-sponsored oppression and denial of education to blacks in the area in determining what remedies would be most appropriate now. The ultimate focus of the inquiry, however, would shift from race to the dictates of human dignity, and from the harm to “individuals,” to the harm to the interconnected humanity revealed by the facts, so that a compassionate response in light of the totality of the circumstances would be sought.

There are additional ways that we might imagine new doctrinal frameworks for the analysis. As one example, a humanity-conscious Supreme Court might determine that, to establish a claimed denial of the privilege of education based on a plan which disadvantages members of traditionally privileged groups, a traditionally privileged plaintiff would have to effectively rebut the State's testimony on the plan's benefit *to the plaintiff*, viewing the plaintiff and the alleged beneficiaries as sharing interests significantly.

Would Ms. Cappichione be successful in challenging the magnet school's quotas under this approach? Again, education would be deemed a constitutionally protected privilege, and the dual race-and-humanity-consciousness approach would make the race of the parties relevant to help determine what justice requires. The effort to address the question whether the privilege of a quality education had been abridged on these facts would look to all factors, including the interconnectedness between the plight of the "black" citizens of Charlotte-Mecklenburg and the "non-black" community. The impact of the legacies of slavery would be taken into account as well. All of this information would be considered in light of the question whether the education provided the students in the district meets the adequacy or completeness standard, and whether any claimed denial of the benefit to members of a traditionally advantaged race would have to be rebutted as not sufficiently beneficial to justify the alleged infringement.

In short, in a dual race-and-humanity conscious analysis, courts would be required to assiduously consider the totality of the circumstances when evaluating a claim under the Privileges or Immunities Clause, with the ultimate goal being explicitly and fully humanized and compassionate justice for all. The goal would not merely be equal treatment but the ethically and morally just treatment of all in light of the needs of the community that is itself a whole. Ultimately, humanity consciousness would become the dominant perspective, and race would no longer presumptively serve as a basis for a challenge.

In sum, the Fourteenth Amendment should be viewed as a guarantor of that level of treatment under the law that guarantees post-racialized treatment under the law to each individual. One way of attempting this transformation through reinterpretation of constitutional provisions would be that the Privileges or Immunities Clause be interpreted to protect all of the privileges necessary to the promotion of human dignity. Human dignity is a concept which captures the essence of what distinguishes free and slave, and hence, the essence of that which is inalienable from, and fundamental to, every citizen of a free society. Therefore, it should guide the interpretation of what privileges are due under the Fourteenth Amendment. The goal of humanizing the law of public education, and education itself, should be paramount. Education must finally be exalted to its place of honor as among

the most protected rights of citizens in a free and prosperous nation.²⁸¹ And even though the courts should be sensitive to the historical and contemporary significance of race for as long as it remains socially significant, the framework for evaluating competing claims of denial of privilege must be gradually less and less amenable to claims based on race alone.

I have argued here that the most logical provision in the Fourteenth Amendment for protecting education would be under an enhanced Privileges or Immunities Clause, and that the Privileges or Immunities Clause should be interpreted from the perspective of dual humanity-and-race consciousness in the transitional years to come. However, whether viewed as a matter of the Equal Protection Clause, the Privileges or Immunities Clause, or under some other constitutional provision, humanity consciousness should be the guiding perspective.

*D. Reflections on the Efficacy of the
Law in "Changing the World"*

Many critical theorists are skeptical of the power of the law to have any real transformative effect in the social world.²⁸² Others conclude that American law will never do more than maintain, by clever devices, the systemic white-over-black privilege that whites have come to expect.²⁸³ Perhaps they are right. Nevertheless, like many critical race theorists, I have refrained from giving up altogether on the principles that provide the only basis for the kind of human communication and negotiation by which real change ultimately can be made. Instead, I have argued here that the Constitution might serve now, as it has since its inception, to provide the inspirational principles through which interpretation might be mediated.

Still, a few words of caution must not go unsaid. From a sociological or social-historical perspective, constitutional law, like all law, must be viewed as a social product. Appeals to abstract principles generally serve better as masks for the socio-political power struggles which explain legal results than as clarion calls which effectively shape the moral and normative thrusts of the courts' opinions.²⁸⁴ In addition, critics have pointed out the tendency of competing "sameness" and "difference" rationales to obscure issues of unequal access to power and control over resources. For example, in a recent article, Professor Angela Harris notes that these contrasting approaches each nevertheless join together and obscure questions of power, mask the role of privilege, and encourage ignorance of "the reciprocal relationship between the observer and the observed."²⁸⁵

281. See generally Peter Gable & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

282. *Id.* at 24-36.

283. See generally Bell, *supra* note 112.

284. See, e.g., Siegel, *Eyes of the Law*, *supra* note 77, at 78 (citing Robert Post, *Prejudicial Appearances: The Logic of Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000)).

285. See Harris, *supra* note 8, at 2014.

From a social interactionist or social constructionist perspective, it may be argued that racism is inevitable as long as individuals choose, or society reflects and suggests, race consciousness; law only follows form with society, arguably not the reverse. Further, from a conflict-theory perspective, constitutional law may be viewed as the inevitable protector of ruling class and race interests. Perhaps as frequently as it has served to set the stage for lasting transformation, the law has served as a tool for the re-entrenchment of old systems of domination, a process that has been aptly referred to as the problem of preservation through transformation.²⁸⁶ Indeed, the concept of human dignity and humanity consciousness may simply be used as new masks for the interests of the status quo or as tools of white supremacy.

On the other hand, it must be remembered that constitutional law reflects the Constitution, which continues to stand as a symbol of the highest aspirations of our society. Constitutional law thus operates as media for disseminating meta narratives of humanity and as an institution for shaping the thoughts of individuals, which shape, ultimately, the reality we determine to create. Hence we must never cease to strive for interpretations of the Constitution that push us toward our highest and best as human beings. An interpretation of the Fourteenth Amendment in the *Belk* case that would have put education as a primary privilege of human beings under a constitutional government, and mandated that the courts compassionately consider the totality of the circumstances in reaching that result, would have been a step in the direction of doing just that.²⁸⁷

VI. CONCLUSION

In this Article, I have argued that equal protection doctrine has failed as a transformative device because “equality” and “race” taken together fail to deliver a visionary principle with the power to radically transform the post-slavery world. Similarly, the colorblind constitutionalism ideal embraced by scholars on the right and by the prevailing jurisprudence of the Supreme Court fails to deliver a method, beyond more or less sophisticated denial, for addressing the reality of continued subordination of racialized people in America. The principle of human dignity, informed by important insights deriving from the critical evaluation of the practices of racialization (i.e., “post-racialized human dignity”), provides a morally compelling vision, and one that is not only social-scientifically sound and more likely to lead to change at the cellular level of our society, but more importantly, captures the essence of that in each of us which should be most dearly protected under the Fourteenth Amendment in particular, and under the Constitution in general.

286. See, e.g., Siegel, *Rule of Love*, *supra* note 77, at 2178-87.

287. Again, a full elaboration of the prospects for justice using the concepts introduced here is beyond the scope of this Article, but will be the subject of a future article.

This Article also argues against racialization and in favor of a new way of looking at each other and ourselves which emphasizes our commonality but takes into consideration the role of race in our lives. I have set forth a proposal for an approach to race law that rejects the notion that “equality” is the inevitably mediating principle of American race law, and instead posits that a form of post-racialized human dignity be adopted. Applying such a principle would arguably lead to a shift in emphasis from analysis under the Equal Protection Clause to the Privileges or Immunities Clause in redressing violations of the principle of dignified treatment.

We have all been guilty of a certain over reliance on race in understanding and ordering the world. Traditional proponents of a colorblind perspective *seem* to recognize this, but have utterly failed to incorporate what we have learned about the implications of racialization and race-based oppression—its continuing threat to universal human dignity for all, and its ability to coexist with the colorblind approach. It suggests that we may abandon our concern for race or racial equality because, despite evidence to the contrary, we have already achieved it. And proponents of a colorblind approach have suggested nothing that would enhance the quality of the lives of Americans on the margin that we would put in the place of the goal of racial justice.

In this Article, I both *embrace* and *defy* the reasoning and conclusions of some of my most longstanding heroes in legal academia. I agree with those who have argued that the goal of racial “equality” should be challenged; but rather than abandon the attempt to right the wrongs of the system altogether, I suggest that the law, once again, reinvent itself. To assist in this project, I suggest the perspective I call humanity consciousness as an alternative lens and humanization of the law and our society as an objective.

In light of what we know of the law’s seemingly inexhaustible ability to enable the appearance of transformation while actually legitimating the usual patterns of oppression, the proposal here may be criticized as utopian. So it may be. It is offered nonetheless with the hope of providing some light in an otherwise dim but essential aspect of our civic lives: the meaning of humanity and constitutional obligations that arise therefrom.

The reconstruction of America to overcome the legacies of slavery and minimize the extent of their continuing impact on all our lives is not over. Indeed, given our inability to grasp the challenges to human dignity at their roots, it has hardly begun. Only with the debunking of the science of race in the past generation have we as a society paved a way for a reformation with the potential to free us all. This Article seeks to reorient debates over racial remedies law in ways informed by emerging contemporary understandings of the concept of race and of the processes by which, we now know, we each participate in the recreation of that pernicious concept. The goal has been to open the door to new ways of framing the legal questions which deal with the problem of race so that, going forward, we neither blindly deny the salience of continued racial subordination in our society, nor unconsciously participate in the perpetual reification of race and its dehuman-

izing effects. Instead, we boldly stake out a fresh path toward human understanding.

So, here at the end of the second phase in the reconstruction of America, we face a dilemma. To end the problem of white supremacy we must end the practices of racialization upon which racial subordination theory and practice depend. But ending racialization and addressing its consequences alone is simply not enough. We *must* replace the notion of race, and our collective illusion of a racially divided humanity, with a new conception of humankind, one that emphasizes the commonality among us all. We must embrace, in short, humanity consciousness.

I suggest that a reinterpretation of the Privileges or Immunities Clause of the Fourteenth Amendment would restart the process of racial transformation of American society that has come to a virtual standstill in recent years, and in some ways, especially for black Americans, has lost ground. Ultimately, I envision an America in which race is a concept of the past that so badly needed it. Equally important, I envision a world in which we can no longer tolerate widespread practices of dehumanization—in the form of counter-humanitarian law and social policies. Widespread indifference toward the suffering of others in our midst, which is perhaps slavery's most devastating legacy, should exist no more.

Without question, however, the process of reconstructing America in the image of our highest constitutional and moral aspirations will continue for some time. The purpose here has been merely to lay the foundation for changes that ultimately must take place one reconstructed individual at a time, and lead to our ultimate understanding of ourselves as one people, one humanity bound in compassion and love—a process the success of which will herald America's transition into what might be fairly be called the Fourth, and one can only hope final, Reconstruction.