

Second Redemption, Third Reconstruction

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INTRODUCTION

In *The Accumulation of Advantages*,¹ the picture that Professor Owen Fiss paints about equality during and since the Second Reconstruction is largely a picture in black and white. That makes some sense. The black/white experience is probably the most important throughline in the story of equal protection. It was the central theme of both the First and Second Reconstructions. In keeping with that orientation, the picture of disadvantage described by Fiss's theory of cumulative responsibility is largely drawn from the black/white experience. Important as it is, however, the black/white experience does not exhaust the subject of constitutional equality. So in thinking about the present condition of equal protection and its relationship to various constitutional Reconstructions—the Second, the First, and, if we are fortunate, the Third—it is worth asking what that way of telling the story leaves out about equal protection since the Second Reconstruction ended. I will mention three such omissions. One of them is about gender, one is about wealth, and one is about race.

First, in the realm of gender, the decades since the end of the Second Reconstruction have seen a series of progressive victories leading to, but not

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1. See Owen Fiss, *The Accumulation of Advantages*, 106 CALIF. L. REV. 1945 (2018).

limited to, the legalization of same-sex marriage.² This transformation was close to unimaginable when the Second Reconstruction ended.³

Second, the inequality between the wealthiest Americans and other Americans has grown immensely since the close of the Second Reconstruction.⁴ The significance of this development transcends its impact on racial inequality, but it is certainly also relevant to the continuing inequality of the black underclass on whom Professor Fiss focuses.

Third, American society is enormously more racially diverse than it was at the close of the Second Reconstruction. According to the Census Bureau, 99 percent of Americans in 1960 were either black or white.⁵ In the early 1970s, when *Griggs v. Duke Power Co.*⁶ was decided, a higher proportion of the people living in the United States was native born than at any time since American Independence.⁷ Because of restrictive immigration laws that had been in place since the 1920s,⁸ the percentage of Americans who were immigrants had been declining steadily for half a century. By the 1960s, this percentage had fallen quite low.⁹ So the population at the time of *Griggs* looked, racially, both relatively dichotomous across the color line and also relatively static in composition. To be sure, even that population could be described as kaleidoscopically diverse if one disaggregated ethnicities within the white population, as Justice Powell did in *Regents of the University of California v. Bakke*.¹⁰ But however one measures the racial diversity of the American

2. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that states cannot offer marriage only to opposite-sex couples).

3. See generally MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013) (describing these developments).

4. See, e.g., Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 421 (2015) (stating “the United States has, over the last generation, experienced a dramatic rise in income inequality”).

5. The total population was 178 million. See U.S. CENSUS BUREAU, 1960 CENSUS OF POPULATION AND HOUSING 1-144 tbl.44 (1960). The 1960 Census did not count Hispanic or Latino persons as a separate demographic group; they were included within the categories “White” and “Negro.” Other sources put the Latino population of the U.S. in 1960 at around six million, or between three and four percent of the total. See, e.g., Antonio Flores, *Facts on U.S. Latinos, 2015*, PEW RES. CTR. (Sept. 18, 2017), <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos> [<https://perma.cc/73QK-Z448>]. So the proportion of Americans who were at that time black or white and not Hispanic was roughly 96 percent.

6. 401 U.S. 424, 431 (1971) (holding that Section 703(b) of Title VII of the Civil Rights Act of 1964 creates a cause of action for employment practices that cause disparately adverse impacts on the basis of race).

7. See U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION IN THE UNITED STATES 3* (2011), https://www.census.gov/newsroom/pdf/cspan_fb_slides.pdf [<https://perma.cc/P8CU-78BW>] (showing that in 1970, only 4.7 percent of the U.S. population was foreign born and that that percentage was the lowest ever).

8. See, e.g., Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (limiting or forbidding immigration from many countries).

9. See U.S. CENSUS BUREAU, *supra* note 7 (showing a steady decline in the foreign-born population from 14.7 percent in 1910 to 4.7 percent in 1970).

10. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295-97 (1978).

population near the end of the Second Reconstruction, the successor population today is tremendously more diverse.

History never repeats itself precisely. Human society is too complicated for any generation to replicate all the conditions of some earlier period. Nonetheless, there are times when social patterns do look familiar to observers who are historically aware: history never quite repeats itself, but perhaps it sometimes rhymes. The three equality storylines that I've identified as prominent within the time since the Second Reconstruction all have analogs in storylines that followed the First Reconstruction. In the half century beginning with what historians of the white South generally call Redemption, there was a progressive revolution in the realm of law and gender, culminating in (but not limited to) the adoption of the Nineteenth Amendment.¹¹ The differences between the richest Americans and everyone else increased dramatically through the period we call the Gilded Age. New kinds of immigrant populations arrived in the United States in large numbers, vastly increasing the diversity of America's population. All of these changes occurred as progress toward racial equality remained stalled. The combination of these storylines, laid alongside those of the time since the Second Reconstruction, present enough of a historical rhyme to explain why some say we are now living through an advanced stage of the Second Redemption.

I.

FROM RECONSTRUCTION TO REDEMPTION

Why did the Second Reconstruction end? One reason is that radical progress always ends, and usually quickly. Radical progress is not the normal state of society. Sometimes, and on some issues, progress does not occur at all. Sometimes progress happens gradually over a long period of time, and from the end looking back, one can see dramatic change. But when radical progress occurs quickly, it usually does so only for a relatively short time. Then the unusual conditions that fostered the moment of radical progress fade.

While it lasted, Professor Fiss says, the Second Reconstruction gave force to an idea that he calls the Theory of Cumulative Responsibility.¹² As I understand it, that theory has two aspects: one descriptive and one normative. As a descriptive theory, the Theory of Cumulative Responsibility insists that inequality, or perhaps the specific sort of inequality that exists between privileged and disadvantaged demographic groups, is the product of discrimination in many different settings, rather than a single setting. What creates the system of hierarchy is the combined force of many mutually reinforcing social processes. As a normative theory, the Theory of Cumulative Responsibility insists that society collectively has a duty to redress the system of

11. In my view, the movement that produced the Nineteenth Amendment can usefully be understood as the same movement that, at a later stage, would produce same-sex marriage. *See infra* Part IV.

12. Fiss, *supra* note 1, at 1946.

inequality that those mutually reinforcing discriminatory processes create and sustain. In the Theory of Cumulative Responsibility, the descriptive claim takes “responsibility” to be a synonym for “causation.” The normative claim takes “responsibility” as a synonym for “obligation.”

*Washington v. Davis*¹³ was an important blow to the normative form of the Theory of Cumulative Responsibility. By rejecting a disparate impact standard in equal protection cases, that decision took courts out of the business of correcting the self-reinforcing effects of prior discrimination, except where specifically instructed to do so by regulation or statute. Fiss’s article *Groups and the Equal Protection Clause*¹⁴ joined issue with *Washington v. Davis* in a fundamental way. Under the article’s Group Disadvantaging Principle, courts would interpret equal protection as prohibiting laws causing status-harm to disadvantaged groups.¹⁵ The Group Disadvantaging Principle is thus both an early articulation of the normative claim of the Theory of Cumulative Responsibility and an argument against *Washington v. Davis*, which was one of the most important decisions marking the end of the Second Reconstruction.¹⁶

II.

CROSON AND CUMULATIVE RESPONSIBILITY

Here, however, I want to focus on a different Supreme Court case relevant to the Theory of Cumulative Responsibility—one that is significant for both that theory’s descriptive aspect and its normative aspect. The case is *City of Richmond v. J.A. Croson*,¹⁷ decided in 1989. *Croson* was the first case in which the Court squarely held that all racially classificatory affirmative action programs undertaken by state governments are subject to strict scrutiny.¹⁸ For present purposes, I focus on Justice O’Connor’s analysis of what sorts of discrimination an institution is responsible for correcting.

The *Croson* Court held that the affirmative action program at issue was subject to strict scrutiny, meaning in part that it could be justified only by some compelling state interest. According to Justice O’Connor’s majority opinion, a public institution has a compelling interest in correcting the continuing effects

13. 426 U.S. 229 (1976) (holding that a showing of disparate racial impact does not establish an equal protection violation).

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

15. *Id.* at 157.

16. I largely agree with Professor Fiss’s criticisms of *Washington v. Davis*, both as to the rule of law it established and as to the aggressive way in which the Court reached out to establish that rule. *See id.* The broad constitutional statement about disparate impact was not at all required by the case as it was litigated. Students who know *Washington v. Davis* mainly from casebooks (and practitioners who know it pretty much as “the thing that stands for the proposition that equal protection plaintiffs must plead discriminatory purpose”) probably have a sense of that case as having been much cleaner than it actually was.

17. 488 U.S. 469 (1989).

18. *Id.*

of its own past discrimination.¹⁹ But public institutions have no compelling interest, Justice O'Connor wrote, in correcting the continuing effects of past discriminatory actions taken by other actors in society.²⁰ Justice O'Connor seems to have taken the view that cleaning up your own mess is your particular responsibility—a responsibility powerful enough to justify using generally disfavored tools like racial classification. But you cannot use those tools to clean up someone else's mess. When the mess is someone else's, you have no special responsibility justifying the use of extreme measures.

One can imagine Justice O'Connor here as naïve or as knowing. If we imagine her opinion as naïve, we could read it to say that the effects of past discrimination exist in society as separate messes, here and there. The causes of the disadvantages that persons of disadvantaged racial groups experience can be isolated; the effects of discrimination exist separately, as the results of discrete acts of discrimination, rather than as the cumulative effects of a mutually reinforcing web of discriminations. This view is, of course, the opposite view from the one proposed by the Theory of Cumulative Responsibility.

I doubt Justice O'Connor was that naïve. So it makes sense also to consider an interpretation of her opinion as knowing—an interpretation on which she understood perfectly well that racial inequality is not, as a descriptive matter, sensibly disaggregated into separate instances of disadvantage, each of which results from a discrete act of discrimination within a discrete social setting. Perhaps Justice O'Connor understood the descriptive aspect of the Theory of Cumulative Responsibility only too well. Perhaps it was precisely her understanding that racial inequality results from a thick web of discriminatory actions spanning the breadth of American society that attracted her to *Croson's* limiting rule.

In the context of *Croson*, the consequence of treating racial inequality as the combined product of discrimination across many different social settings, and of recognizing that redressing one discriminatory practice is unlikely to solve any underlying problem if the surrounding discriminatory practices go unredressed, would be to give broad authorization for affirmative action. At issue in the case, after all, was how freely affirmative action could be used. The particular question, in relevant part, was whether an institution could engage in racially classificatory affirmative action on the grounds that the affirmative-action practice would redress the continuing effects of “societal discrimination”—that is, discrimination by other actors, or by the full set of social actors—rather than by the specific institution whose affirmative-action practice is at issue. Justice O'Connor did not think affirmative action was categorically unconstitutional. But she did think it should be rare. In her view, practicing race-based affirmative action has important costs, so it should not

19. *Id.* at 492.

20. *Id.* at 505–06.

become a standard operating procedure. Thinking of the continuing effects of past discrimination as flowing from scores of social phenomena together makes it hard to limit the remedy to exceptional cases. To limit the use of the costly remedy, it helps to think of discrimination as occurring in discrete settings: this discrete act of discrimination caused these discrete consequences, and the specific institution involved—but only that institution—has a compelling interest in remedying the particular damage it caused.

Justice O'Connor's approach strove to make the racial aspects of American social structure less visible. From a certain perspective, that is a virtue of the approach. Race is a sensitive topic, and making race salient can often be divisive. It is therefore sometimes a good idea, even when trying to remedy problems of racial disadvantage, to deflect attention from race. This approach is, of course, directly contrary to the approach favored by the Theory of Cumulative Responsibility. That theory strives to increase the visibility of the racial aspect of our social structure. It wants to shine a light on the broad set of practices that reinforce racial hierarchy and to point out, clearly, the pernicious effects that those practices have, even beyond their local domains. That is the move the Court made in *Gaston County v. United States*,²¹ near the height of the Second Reconstruction, by linking past discrimination in schools to ongoing racial dynamics in voting, rather than saying that schools are one thing and voting is another. *Croson* goes the other way: it narrows the frame. It focuses equal protection on specific transactions within specific institutions. In so doing, it shifts the focus of equal protection away from the general hierarchical ordering of demographic groups in society and toward discrete acts of discrimination practiced by specified decisionmakers against specified individual victims.

III.

INDIVIDUALISM AND EQUAL PROTECTION

It is well known that individualist analysis waxed, and analysis based on group disadvantage waned, in equal protection cases from the time of *Griggs* and *Gaston County* through the time of *Croson*.²² A lot of academic literature has criticized this development.²³ One central criticism emphasizes that individualism alone cannot generate a workable approach to equal protection;

21. 395 U.S. 285 (1969).

22. See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 552–65 (2003) (analyzing the ideas of individualism and group treatment in disparate impact law).

23. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing against an equal protection jurisprudence that requires plaintiffs to prove deliberate discriminatory intent, pointing to the subconscious patterns of discrimination that are latent in America's historical and cultural heritage); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1141–45 (1997) (arguing that equal protection litigation employing a disparate impact standard would more successfully disestablish historic patterns of race stratification).

any workable theory of equal protection needs a way of specifying the axes of discrimination to which it will be sensitive, and the simple idea that all people should be treated equally cannot so specify. Why, for example, should equal protection care more about discrimination on the basis of race and sex than discrimination on the basis of the first letter of one's last name? A theory that grounds equal protection in a concern for redressing unjust social hierarchies can answer that question: it is because some axes of difference map unjust social hierarchies and others do not.²⁴ It is more difficult to answer this question under a theory of pure individualism. No workable theory can be equally sensitive to *any* differentiation between individuals, because garden-variety governance routinely and properly classifies individuals and treats them differently on the basis of those classifications. (Children may not drive. Michiganders may not vote in Ohio elections. Only licensed physicians may prescribe narcotics.) Without more, the value of individualism cannot sort the unproblematic bases of classification from the disfavored ones.

It does not follow, though, that individualism is a misplaced value in equal protection. It follows only that individualism cannot be the sole value. For a combination of reasons, some flawed and some excellent, the ideal of individual-based equality is deeply attractive in American culture. That ideal seems to capture the intuitions that each person has the same inherent worth, that people are entitled to succeed and fail and generally to be judged on the basis of their own characteristics rather than those of groups to which they involuntarily belong, and that all of America—perhaps all of humanity—is in the end a single social group in which autonomous individuals can be mobile captains of their own fates. These ideals have serious limits, but they also have powerful attractions. And partly because of those attractions, the individualist impulse in equal protection is a powerful one.

To reflect on both the appeal and the limits of that impulse, consider a great American cultural artifact that was born at the height of the Second Reconstruction: *Sesame Street*. The program debuted in 1969, five months after the Supreme Court decided *Gaston County*.²⁵ Within a short time, *Sesame Street* became a beloved and ubiquitous piece of American culture, so much so that we may not stop to think about what distinctive social vision it might represent. But it definitely represents one—one that was distinctively progressive in 1969, just a year after the assassination of Martin Luther King Jr. and the urban rioting that followed, but whose politics in the twenty-first century are considerably more ambiguous.

24. Yes, constitutional law then needs a substantive account of justice in order to identify what counts as an unjust social hierarchy. How deeply theorized that account must be, and how the relevant account should be assembled, are important questions beyond the scope of this Essay.

25. It happens that I was born during the five-month interval between those two events. Whether my interest in the tensions within equal protection doctrine was accordingly fated from my birth is a question I will leave to others.

Sesame Street rose to prominence in the 1970s while showcasing a particular kind of classical liberal vision. In the multiracial urban neighborhood it depicts, the characters are highly diverse, and their demographic differences are of little or no consequence. The show's foundational social premise and central ethos was that all of us are equal individuals, regardless of where we come from or what we look like. Black kids and white kids, English-speakers and Spanish-speakers, boys and girls, big yellow birds and fuzzy blue monsters: We're all the same underneath. It is a thoroughly individualist vision, and a lovely one.

But here's an important thing to remember about *Sesame Street*: it is a fully integrated neighborhood. Everyone's ascriptive group characteristics really *are* irrelevant—irrelevant, that is, to their life chances, their social power, their day-to-day experience. Nobody on *Sesame Street* has better schools, medical care, or police protection than anyone else. *Sesame Street* features adults and children, but no character on *Sesame Street* has *parents*: like everyone else, the children exist without differentiated backstories and therefore without the unequal resource endowments that real people come into the world with as accidents of birth. It is a society where no past injustices have legacy effects giving people different starting points in life. In a world like that, there is no need to think in terms of redressing social hierarchies. So a vision of equality as individualism alone is all the more appropriate.

Very few real American neighborhoods have that level of integration, let alone that level of autonomy from the past. In our society, where no casually multiracial paradise has yet been achieved, unjust social hierarchies matter a great deal.

IV.

SEX, GENDER, AND SAME-SEX MARRIAGE

The tools of *Griggs* and *Gaston County* are not now doing much to move society toward the vision offered on *Sesame Street*. The increased emphasis on individualism within equal protection doctrine, and indeed within antidiscrimination law generally, has meant that disparate impact standards are often understood as evidentiary dragnets for identifying intentional discrimination, not as tools for redressing unjust social hierarchies. Indeed, it may be that disparate impact doctrine can only survive in that trimmed form, because treating it as a more aggressive tool of reform would slight individualist values in ways that might render the doctrine constitutionally suspect. Taken together, the trimming of *Griggs* in *Washington v. Davis* and the decision limiting affirmative action in *Croson* constitute the spine of the limits of equal protection as a tool for advancing racial equality in the decades since the Second Reconstruction ended.

The limits of equal protection as a tool for reducing racial inequality in recent decades appear in sharp relief when contrasted with developments in the

realm of gender inequality. In the latter arena, the last few decades have seen an egalitarian transformation barely imaginable when *Washington v. Davis* was decided. That transformation includes, but is not limited to, the coming of legal same-sex marriage. Technically, of course, the Supreme Court's same-sex marriage decision sounded more in the register of due process than that of equal protection. But whatever Justice Kennedy may have written—and he wrote more than one odd thing in *Obergefell v. Hodges*—the substance of the constitutional rule barring states from limiting marriage to same-sex partners is best understood as a matter of equal protection.

As a fundamental matter, the relevant equal protection analysis is not just about discrimination on the basis of sexual orientation, though of course that sort of analysis could have decided the case in the same way. It is about discrimination on the basis of sex. If a woman wants to marry a woman and is denied a license for doing so, but would have been granted the license had she been a man, she is discriminated against on the basis of her sex, plain and simple. Laws restricting marriage to opposite-sex partners should therefore get heightened scrutiny like all other laws that classify and discriminate on the basis of sex. This sex-discrimination argument sounds in the register of individualism.²⁶ It is entirely at home in modern equal protection law. And it is, on its own terms, a fully compelling argument.

What's more, it is an argument that goes to the deep underlying nature of the transformation that brought about same-sex marriage. The movement for equality for LGBTQ persons is, both historically and conceptually, an advanced stage of the same movement that insisted on equality for women. The fundamental claim of that movement is that the law may not assign people to social roles on the basis of biological sex. To be sure, there are ways in which the particulars of LGBTQ liberation differ from the particulars of sex equality in a heteronormative context, just as there are different particulars for L, G, B, T, and Q (and such other initials as may be added). But it is not an accident that same-sex marriage gained legal footing so quickly after sex discrimination became a topic of heightened equal protection scrutiny, where "quickly" is reckoned in the sweep of constitutional time. To pull the frame out more broadly, it is not an accident that once centuries of legalized patriarchy officially gave way to the idea of equal status for women and men, it took only one generation more for the law to give up the requirement of opposite-sex partners in marriage. Once the law no longer insisted on different roles and entitlements for husbands and wives, it was difficult to understand why one of each should be necessary.

This social transformation should not be underestimated. The breakdown of legally enforced gender roles is an enormous reordering of a core aspect of human society, and it operates in a decidedly progressive direction. The

26. It also sounds in the register of group hierarchy, inasmuch as requiring gender differentiation in marriage perpetuates a more general system of legal gender differentiation that helps preserve a system of gender roles in which power is disproportionately allocated to men.

magnitude of the change from, say, the middle of the nineteenth century to the second decade of the twenty-first is staggering. But it has left the problem of racial hierarchy more or less unresolved. That problem persists, at tremendous human cost. And as noted above, one of the central legal tools that could help redress it—the doctrine of disparate impact—now hangs by a thread.

Professor Fiss contends that the thread is strong enough to hold. In his view, Justice Kennedy—whose vote for some years controlled the Supreme Court’s decisionmaking on the relevant issues—exhibited a growing awareness, over time, of the need for law to be attentive to unjust racial hierarchies. I agree that Kennedy moved some distance in that direction during his career. One need only compare his opinions in *Grutter*²⁷ and *Ricci*²⁸ to his opinions in *Inclusive Communities*²⁹ and *Fisher*³⁰ to see that Justice Kennedy in his later years was, if not exactly woke, then not quite comatose, either.

I suspect, however, that it is a mistake to imagine that the future of constitutional doctrine depends much on Justice Kennedy’s trajectory. His views were those of a Justice, not those of an institution. His tenure as the determinative Justice lasted for more than a decade, but now that it is over, there is no reason to think that his particular thinking will continue to constrain constitutional doctrine. And to think about what the future of this area might look like, I suggest that it is necessary to pose the question within two different frames.

The first frame is the frame of normal constitutional time. Within that rubric, the analysis begins by noting that the Supreme Court has had a majority of Republican-appointed Justices at all times since 1969—the year in which *Gaston County* was decided, and two years before *Griggs* was decided. Quite clearly, several Republican-appointed Justices since 1969 have thought disparate impact doctrine compatible with equal protection. Were it otherwise, disparate impact doctrine would long since have disappeared, if indeed it had ever appeared in the first place.

But the fact that disparate impact doctrine has long coexisted with a majority-Republican Supreme Court means little for the question of the doctrine’s future viability. As relevant here, Justices appointed by Republican Presidents in the twenty-first century are not the same as Justices appointed by Republican Presidents in the twentieth. The set of twentieth-century Republican appointees was internally diverse on questions of race and equal protection. Some, like Clarence Thomas and Antonin Scalia, held views that would seem to

27. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Kennedy, J., dissenting from decision upholding race-based affirmative action at the University of Michigan Law School).

28. *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Kennedy, J.) (invalidating municipality’s measures to prevent a firefighter-promotion system from causing a disparately adverse impact on nonwhite candidates).

29. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015) (Kennedy, J.) (holding that disparate impact claims are cognizable under the Fair Housing Act).

30. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (upholding affirmative action at the University of Texas).

augur poorly for disparate impact doctrine.³¹ Others, like Kennedy and O'Connor, had more moderate views. And that is to say nothing of Justices David Souter and John Paul Stevens, or, for that matter, Chief Justice Warren Burger, who wrote *Griggs*, or Justice John Marshall Harlan, who wrote *Gaston County*. But the Republican Party has moved in recent decades, and the elite legal wing of that party from which federal judges are recruited is much less diverse on the relevant issues. Chief Justice John Roberts and Justice Samuel Alito, appointed in the twenty-first century, do not share Kennedy's perspective on race in equal protection.³² There is little reason to think that later Republican appointees will, either.³³

There are reasons why no Justice appointed in the twenty-first century is likely to share Kennedy's perspective. Members of the elite legal wings of both major political parties are now socialized early in their careers. Within each party, that socialization usually includes the absorption of attitudes about important constitutional issues, including issues of race and equal protection. To be sure, many law students and young lawyers are drawn to one party or the other because of their preexisting attitudes on these issues: the lawyers who become federal judges are not blank slates before entering the profession. But under current conditions, the reason why no Republican President is likely to appoint a Justice like Kennedy is not merely that a candidate with Kennedy's views would probably be deemed unacceptable by relevant gatekeepers within the Republican Party's judicial vetting apparatus. It is also that there are not many high-level lawyers at mid-career or younger who have Kennedy's views in the first place.³⁴ This does not mean, of course, that anyone can know for certain that affirmative action and disparate impact doctrine will be declared fully unconstitutional once a majority of the Justices are twenty-first century Republican appointees. But if that happens, nobody should be surprised.

Professor Fiss also notes that Presidents do not have unlimited discretion to choose Supreme Court Justices.³⁵ The Senate acts as a gatekeeper. And Professor Fiss suggests that the Senate's gatekeeping role may also act to prevent the appointment of Justices who would reject *Griggs* entirely. I am skeptical. The Senate as currently constituted has many members who were willing to endorse Roy Moore as a candidate to represent Alabama in their chamber. Moore's bigotries are well known and overt. It is hard to see why officials willing to

31. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344 (2010) (describing the constitutional implications of Justice Scalia's views of disparate impact law).

32. Compare their views in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), or in *Fisher*, 136 S. Ct. 2198, or in *Inclusive Communities*, 135 S. Ct. 2507.

33. This is so in spite of a growing recognition among leading theorists of originalist interpretation—which Justices Thomas and Gorsuch take to be their own approach—that the original meaning of the Fourteenth Amendment is compatible with race-based affirmative action.

34. This is true for lawyers who self-identify as Democrats as well as for lawyers who self-identify as Republicans.

35. Fiss, *supra* note 1, at 1973.

endorse Moore would stand against a presidential nominee merely because the nominee took a dim view of disparate impact doctrine.

Indeed, the near election of Moore, and the actual presidency of Donald Trump, require a deeper rethinking of the role of equal protection doctrine, and not in a happy direction. For several decades prior to 2017, a going assumption in constitutional law had been that most governmental discrimination is hidden and likely unconscious.³⁶ The problem, this thinking went, is less about purposeful discrimination than it is about selective indifference—that is, the phenomenon by which public officials fail to think about the interests of marginalized populations.³⁷ It is not that officials want to make life hard for those marginalized groups; it is that officials don't make the effort to find ways of governing that will avoid making life hard for them. Against the background of that assumption, disparate impact doctrine has had an important role. It identifies practices that disproportionately burden marginalized populations, drags them into the light, and makes the government think hard about whether those practices are necessary. But in the age of Moore and Trump, equal protection may confront more than selective indifference. We have other problems now.

As a result, it is necessary to consider the possible future of equal protection within a second frame. It is the frame not of normal constitutional time but of constitutional rot.³⁸

CONCLUSION

The American Republic is in greater jeopardy of self-destruction today than at any time since the 1870s.³⁹ The problems creating that danger did not begin with the election of President Donald Trump. They had been gathering steam for some time. But since the election of 2016, the phenomenon has been fully manifest. And one feature of the present moment is that the constitutional future is limited by an unusually short event horizon. During the last two years, many things have happened that well-informed observers would have said, only a short time before, do not happen in American government. We should accordingly have little confidence in our ability to foresee what the next year or two will bring. So many things could happen.

36. See Lawrence, *supra* note 23.

37. See, e.g., Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 14 (1976) (“Race-dependent decisions need not be race-conscious, but may reflect unconscious racially selective indifference.”).

38. See Jack Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 150–51 (2017) (describing conditions of decay in the American constitutional system: “[C]onstitutional rot is a process of decay in the features of our system of government that maintain it as a healthy democratic republic”).

39. For more on this theme, see Richard Primus, *The Republic in Long-Term Perspective*, MICH. L. REV. ONLINE (2018), <http://michiganlawreview.org/the-republic> [<https://perma.cc/2TJK-SA89>]; STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

In a period of normal constitutional time, I would worry about the viability of disparate impact doctrine and, more generally, that of the theory of collective responsibility. Under current conditions, however, the most pressing worries are considerably larger. Our constitutional order has bigger problems.

But it also has great possibilities. The Republic is, as noted before, in greater danger of self-destruction than at any time since the 1870s. Americans now living face serious threats to the constitutional order with no more guarantee of success than the Americans who faced the nineteenth century's central constitutional struggle. There is no knowing where our slice of history will go. But we do know this: that earlier struggle was followed by a Reconstruction. If we can meet the present challenge, perhaps we can bring about another one. Because there is no going back to the Second Reconstruction, nor even to the late twentieth-century conditions that prevailed after the Second Reconstruction found its limits. For better or for worse, what comes next will be different from what came before. So the hope for a future in which something like the Theory of Collective Responsibility is realized now rests precisely where the hope for a healthy American constitutional order must rest in general: in a vision of, and a determination to work for, nothing less than a Third Reconstruction.

