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### The Fight for Equal Protection: Reconstruction-Redemption Redux

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# The Fight for Equal Protection: Reconstruction-Redemption Redux

*Kermit Roosevelt III*†  
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## INTRODUCTION

Justice Antonin Scalia is gone. Who will replace him? Justice Ruth Bader Ginsburg is eighty-three, Justice Anthony Kennedy seventy-nine, Justice Stephen Breyer seventy-seven. Which seats will open up during the next president's term?

No one knows, of course, but we do know that there is the possibility of significant movement on the Supreme Court in the next several years. A Democratic president could appoint a replacement for Scalia and maybe even another Republican appointee. Or a Republican could fill Scalia's seat and then have the chance to pick the successor to Ginsburg or Breyer. It depends on who wins the presidential election, of course, and also the vagaries of health and other factors that go into a justice's decision to retire, but it is likely that the next four years will move the Court, either to the left or the right, by at least one vote, and quite possibly two.

Either would be a stunning change. Most Americans have grown up accustomed to a 5–4 divide, with a real but not always reliable conservative majority. The Rehnquist Court gave us this pattern as early as 1991, when Justice Clarence Thomas replaced Justice Thurgood Marshall to shift power to the right. The appointments after that made changes at the margins—Ginsburg was certainly more liberal than Justice Byron White,<sup>1</sup> Breyer at the beginning of his tenure more conservative than Justice Harry

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<sup>1</sup> Christopher E. Smith, Joyce A. Baugh, and Thomas R. Hensley, *The First-Term Performance of Justice Stephen Breyer*, 79 *Judicature* 74, 76 (1995) (“White was arguably more conservative than Ginsburg with respect to certain issues.”).

Blackmun at the end of his,<sup>2</sup> Justice Samuel Alito notably different on women's issues than Justice Sandra Day O'Connor<sup>3</sup>—but for twenty-five years, we have generally had four reliable conservatives, four reliable liberals, and either O'Connor or Kennedy playing the role of the median or “swing” justice.<sup>4</sup>

The possibility of such dramatic change makes this an opportune moment to think about what is at stake—to think specifically about what kinds of doctrinal change we might see depending on how the Court shifts, and more generally about how to understand this historical moment. In this Essay, we try to do just that. A two-justice shift could upend just about any area of constitutional law, from the Commerce Clause, to Section Five enforcement power,<sup>5</sup> to individual rights such as abortion. But the possible movement of equal protection jurisprudence with respect to racial classifications provides a particularly revealing window into the larger trends at work. In this context, two strongly opposed visions of the Constitution contend against each other, and change in the Court's composition may determine the outcome of that struggle.

In what follows, we first set out the current state of the Supreme Court's race-based equal protection jurisprudence. We then note how a one- or two-justice shift, either to the right or left, would change that jurisprudence. Last, we use these possible jurisprudential changes to understand the competing constitutional visions and to place this moment in a larger historical context.

## I. WHERE WE ARE NOW

The Court's recent encounters with race-based equal protection have almost exclusively been in the context of attempts to aid historically disadvantaged minorities. In these cases, the Court has staked out a very clear position, which is typically called the anticlassification view of equal protection.<sup>6</sup> According to this view,

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<sup>2</sup> See Andrew D. Martin, Kevin M. Quinn, and Lee Epstein, *The Median Justice*, 83 NC L Rev 1275, 1300, 1318–19 (2005). See also David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U Toledo L Rev 37, 81 (1996) (noting that Breyer originally supported the death penalty, a traditionally conservative view, while Blackmun was generally opposed to it, a traditionally liberal view).

<sup>3</sup> See Joan Biskupic, *The Alito/O'Connor Switch*, 35 Pepperdine L Rev 495, 497–501 (2008) (discussing the differences between Alito's and O'Connor's positions on abortion rights and sex discrimination).

<sup>4</sup> A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 Va L Rev In Brief 76, 90–92 (2012).

<sup>5</sup> See US Const Amend XIV, § 5.

<sup>6</sup> Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U Miami L Rev 9, 10 (2003).

the point of the Equal Protection Clause of the Fourteenth Amendment is to protect people from being classified on the basis of certain characteristics. Race is the most suspect basis for classification, and all racial classifications receive strict scrutiny. Sex is also suspect, though somewhat less so; sex-based classifications receive intermediate scrutiny.

The anticlassification approach embodies three principles articulated in *Adarand Constructors, Inc v Pena*:<sup>7</sup> skepticism, consistency, and congruence. These principles mean, respectively, (a) that racial classifications receive strict scrutiny;<sup>8</sup> (b) that this scrutiny extends to all racial classifications, regardless of their purpose or distribution of benefits and burdens;<sup>9</sup> and (c) that the first two principles apply to the states and the federal government equally.<sup>10</sup>

The battles since *Adarand* have mostly been about how to apply strict scrutiny. The Court has recognized only two interests as sufficiently weighty to count as compelling: remedying the government's own past discrimination, and enhancing diversity as a means to improve education at the post-secondary level. In *Gratz v Bollinger*<sup>11</sup> and *Grutter v Bollinger*,<sup>12</sup> the Rehnquist Court, with Justice O'Connor as the median justice, achieved a sort of détente between supporters and opponents of affirmative action: explicit consideration of race in higher education admissions was permissible, the Court suggested, as long as race was one factor considered among many, had no fixed weight, and was part of a holistic, individualized assessment of each applicant.<sup>13</sup> (Rigid mechanical or quota-based systems, by contrast, were forbidden.)<sup>14</sup>

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<sup>7</sup> 515 US 200 (1995). *Adarand* held that strict scrutiny must be applied to all racial classifications, whether benign or otherwise, imposed by the federal government, state governments, and local governments alike. See *id.* at 226–27. *Metro Broadcasting, Inc v FCC*, 497 US 547 (1990), had previously held that benign racial classifications by the federal government could be scrutinized less closely. *Id.* at 564–65.

<sup>8</sup> *Adarand*, 515 US at 223–24.

<sup>9</sup> *Id.* at 224.

<sup>10</sup> See *id.* By holding that strict scrutiny must be applied to all racial classifications, whether benign or otherwise, imposed by the federal government, state government, and local governments alike, the Court overruled its previous holding in *Metro Broadcasting*. *Id.* at 224–27.

<sup>11</sup> 539 US 244 (2003).

<sup>12</sup> 539 US 306 (2003).

<sup>13</sup> Compare *Gratz*, 539 US at 271–76 (finding that the university's admissions policy of awarding a twenty-point bonus to minority applicants was not narrowly tailored), with *Grutter*, 539 US at 337–39 (finding that the university's "holistic" admission process, which considered race as one of many factors, was narrowly tailored).

<sup>14</sup> *Grutter*, 539 US at 334.

The Roberts Court saw the replacement of O'Connor by Justice Alito, which made Justice Kennedy the new median justice. The effects of that shift were visible in *Parents Involved in Community Schools v Seattle School District No 1*,<sup>15</sup> in which the Court invalidated programs that sometimes used race in assigning students to elementary and secondary schools in an effort to avoid de facto segregation.<sup>16</sup>

*Parents Involved* differed from the ordinary affirmative action context in that school assignment was not a merit-based competition.<sup>17</sup> That might have alleviated some of the common concerns about affirmative action—that valued admission slots were being given to undeserving applicants, that beneficiaries of the program suffered stigma, or that recipients of preferences would end up in schools too competitive for them.<sup>18</sup> Nonetheless, the plurality opinion viewed the program with extreme skepticism. Chief Justice John Roberts, writing for the plurality, pronounced the state's interest in diversity for its own sake as being not just less than compelling but actually illegitimate,<sup>19</sup> and he interpreted *Brown v Board of Education of Topeka*<sup>20</sup> to condemn not segregation or stigma but the mere fact of classification.<sup>21</sup> Kennedy, concurring, moderated the plurality's position by suggesting that a state's desire to avoid de facto segregation was in fact compelling and that states might pursue it by methods short of explicit racial classification, such as “drawing attendance zones with general recognition of the demographics of neighborhoods.”<sup>22</sup> Kennedy, though, suggested that explicit classifications would rarely, if ever, survive.<sup>23</sup>

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<sup>15</sup> 551 US 701 (2007). *Parents Involved* solidified the Court's current anticlassification approach to affirmative action.

<sup>16</sup> *Id.* at 709–11, 747–48.

<sup>17</sup> Compare *Parents Involved*, 551 US at 711–18 (explaining that the use of affirmative action was part of the random allocation of pupils among public schools in the district), with *Gratz*, 539 US at 253–57 (explaining the many merit-based qualifications considered as part of the admissions process).

<sup>18</sup> See, for example, Richard Sander and Stuart Taylor Jr, *The Painful Truth about Affirmative Action* (The Atlantic, Oct 2, 2012), archived at <http://perma.cc/9K3T-PEKP>.

<sup>19</sup> *Parents Involved*, 551 US at 729–33 (Roberts) (plurality).

<sup>20</sup> 347 US 483 (1954). *Brown* prohibited racial segregation of public schools on the grounds that segregation inevitably stigmatized minority students and produced inherent inequality. *Id.* at 495.

<sup>21</sup> *Parents Involved*, 551 US at 746–48.

<sup>22</sup> *Id.* at 789 (Kennedy concurring). Such measures, he suggested, would not receive strict scrutiny. *Id.*

<sup>23</sup> *Id.* at 789–91 (Kennedy concurring).

## II. WHERE WE MIGHT GO: ONE-JUSTICE SHIFTS

The situation after *Parents Involved* seems volatile and incoherent. Justice Kennedy's position seemed to be motivated by a somewhat idiosyncratic concern that explicit racial classifications involve the government's assignment of a racial identity that individuals might not share, what he described as "a classification that tells each student he or she is to be defined by race."<sup>24</sup> This interest in self-definition is a common concern of Kennedy's jurisprudence, expressed most strikingly in the so-called sweet mystery of life passage from *Planned Parenthood of Southeastern Pennsylvania v Casey*.<sup>25</sup> But this concern does not seem to be shared by other justices in the equal protection context. And Kennedy's suggestion that measures short of explicit racial classifications may be used to achieve racial diversity without facing strict scrutiny is hard to square with the Court's longstanding precedents holding that intentional use of a facially neutral tool to achieve a preferred racial result is treated like an explicit classification.<sup>26</sup>

Before Justice Scalia's death, then, it seemed likely that equal protection jurisprudence would continue its rightward drift. Kennedy, as the median justice, would move the Court a bit further, most likely in the direction of a repudiation of *Grutter* and a categorical ban on the explicit consideration of race in school admissions. That seemed to be the suggestion of the Court's first *Fisher v University of Texas at Austin*<sup>27</sup> decision: strict scrutiny should be applied in the traditional, "fatal in fact" manner rather than the more permissive version assumed after the Court's decision in *Grutter*.<sup>28</sup> The Fifth Circuit did not get the memo, though,

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<sup>24</sup> Id at 789 (Kennedy concurring).

<sup>25</sup> 505 US 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

<sup>26</sup> See, for example, *Washington v Davis*, 426 US 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.").

<sup>27</sup> 133 S Ct 2411 (2013) ("Fisher I"). *Fisher I* held that the Fifth Circuit had improperly applied strict scrutiny. While the Fifth Circuit had allowed a presumption that the school acted in good faith when it classified on the basis of race, leaving the burden with petitioner to rebut that presumption, Justice Kennedy, writing for the Court, stated that *Grutter* places the burden on the university to prove its program is narrowly tailored, and that no deference is due to the university. Id at 2419–20.

<sup>28</sup> Id at 2421. In *Parents Involved*, Kennedy did suggest that explicit consideration of race would be permissible if necessary, but the import of *Fisher I* seems to be that necessity means more than it did in *Grutter*. Compare *Parents Involved*, 551 US at 790 (Kennedy concurring) (stating that explicit race classifications "may be considered legitimate only if they are a last resort to achieve a compelling interest") with *Fisher I*, 133 S Ct at 2420 (observing that "strict scrutiny does require a court to examine with care, and not

leaving the Court poised to explain itself more clearly and forcefully in the second *Fisher v University of Texas at Austin*.<sup>29</sup>

But with Scalia no longer on the Court, that outcome did not come to pass.<sup>30</sup> Instead, the Court affirmed the Fifth Circuit, in a Kennedy opinion that sounded much more like the O'Connor of *Grutter* than the Kennedy of *Parents Involved*.<sup>31</sup> If a Republican appointee replaces Scalia, we may see a slight tack back to the right, but otherwise the future of affirmative action looks suddenly brighter. If a Democratic president appoints Scalia's successor instead, Justice Breyer will become the new median justice. At the least, that would preserve the *Gratz-Grutter* compromise. Strict scrutiny might well persist for race-based affirmative action, but it would be the watered-down, deferential strict scrutiny of *Grutter*. In fact, a new, five-justice liberal majority could push the law substantially further. But there are also reasons it might stay its hand: disagreement with prior decisions is not necessarily sufficient motivation to overrule them, preserving the *Gratz-Grutter* status quo might seem enough of an accomplishment, and with only five votes the Court might not want to risk a sudden tack back if the balance shifted again. We thus postpone discussion of the more ambitious liberal move for the next Part.

### III. WHERE WE MIGHT GO: TWO-JUSTICE SHIFTS

What if the change on the Court is more dramatic? If a Republican president appoints Justice Scalia's successor and then gets the chance to replace a Democratic appointee like Justice Ginsburg or Justice Breyer, the median justice will be someone to the right of Justice Kennedy, and there is another shoe waiting to

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defer to, a university's serious, good faith consideration of workable race-neutral alternatives") (quotation marks omitted).

<sup>29</sup> 758 F3d 663, 642–49 (5th Cir 2014), cert granted, 135 S Ct 2888 (2015) (applying strict scrutiny on remand and upholding the University of Texas's affirmative action program). The Fifth Circuit found for the university after the remand of *Fisher I*, and the Court granted certiorari again to review that decision. In *Fisher v University of Texas at Austin*, 2016 WL 3434399 (US) ("Fisher II"), the Supreme Court decided that the Fifth Circuit properly applied strict scrutiny as articulated in *Fisher I*. Id at \*14–15.

<sup>30</sup> Scalia's death did not eliminate the conservative majority in *Fisher II*, because Justice Elena Kagan recused herself. It did, however, mean that Kennedy remained the median justice for *Fisher II*.

<sup>31</sup> See Garrett Epps, *How Affirmative Action Won the Day* (The Atlantic, June 23, 2016), archived at <http://perma.cc/W67E-VTWT> ("Kennedy has now placed himself firmly in the Powell-O'Connor camp.")

drop—the theory that disparate impact causes of action are unconstitutional. The *Ricci v DeStefano*<sup>32</sup> decision foreshadowed this possibility. In that case, the City of New Haven threw out the results of a test it had used for promoting firefighters on the grounds that it appeared to have a disparate impact on minority candidates.<sup>33</sup> But throwing out the results was disparate treatment—intentional race discrimination—according to the Supreme Court, and impermissible under Title VII.<sup>34</sup>

*Ricci* thus shows us one feature which is apparently already part of our equal protection jurisprudence: attempts to avert or remedy disparate impact count as intentional discrimination and will receive strict scrutiny.<sup>35</sup> But Scalia, in his concurrence, hinted at another possibility for equal protection jurisprudence. Because Title VII shifts the burden to the employer to show a business justification for employment practices with disparate impact,<sup>36</sup> employers presumably have an incentive to avoid or remedy disparate impact—which is to say, in *Ricci*'s terms, that it gives employers an incentive to engage in intentional discrimination.<sup>37</sup>

Is a law that encourages private racial discrimination (even if that discrimination is intended to be beneficent) constitutional? Quite possibly not, Scalia suggested.<sup>38</sup> The ambitious conservative move in race-based equal protection, then, might be to use the Equal Protection Clause not simply to ban explicit considerations of race but also to ban disparate impact lawsuits—to invalidate any legislative attempt to give disparate impact legal significance. It seemed possible that the Court might take that step in *Texas Department of Housing and Community Affairs v Inclusive*

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<sup>32</sup> 557 US 557 (2009).

<sup>33</sup> *Id.* at 561–63.

<sup>34</sup> *Id.* at 563.

<sup>35</sup> See *id.* at 582 (noting that “certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a strong basis in evidence that remedial actions were necessary”) (quotation marks omitted).

<sup>36</sup> *Ricci*, 557 US at 594–95 (Scalia concurring).

<sup>37</sup> *Id.* at 581 (“Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact.”).

<sup>38</sup> See *id.* at 594 (Scalia concurring) (observing that “[the Court’s] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution’s guarantee of equal protection? The question is not an easy one.”).



*Communities Project, Inc.*,<sup>39</sup> but it did not.<sup>40</sup> Shift the median to the right of Kennedy, though, and such a move becomes increasingly likely.

What about the liberals? Simply replacing Scalia with a Democratic appointee moves the median to Breyer; another liberal replacement of a conservative could move it further. A solid six-justice liberal majority would likely feel less constrained by precedent and freer to take bold steps. The new majority could turn its attention to disparate impact. The reconstructed Court might assert not only that statutes giving disparate impact legal significance are constitutional, but also that the Constitution, too, counts it as significant. The liberal majority could find that equal protection analysis, like Title VII, shifts the burden to the defendant upon a plaintiff's mere showing of disparate impact.

An ambitious liberal majority might also revise the anti-classification approach to equal protection. Before *Adarand's* consistency principle appeared, the Supreme Court suggested that not all racial classifications were the same. It suggested that classifications intended to benefit a disadvantaged minority were less suspect than classifications that burdened that minority.<sup>41</sup> This implication is clear in the famous footnote four of *United States v Carolene Products Co*<sup>42</sup> and in the criteria announced in *Frontiero v Richardson*<sup>43</sup> for deciding whether a particular group counted as a suspect class.<sup>44</sup>

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<sup>39</sup> 135 S Ct 2507, 2513 (2015) (addressing whether the Fair Housing Act allowed for disparate impact liability). Some have argued that reading the statute to allow for disparate impact liability rendered it unconstitutional. See, for example, Brief of *Amici Curiae* Judicial Watch, Inc and Allied Educational Foundation in Support of Petitioners, *Texas Department of Housing and Community Affairs v Inclusive Communities Project, Inc*, No 13-1371, \*7–12 (US filed Nov 24, 2014) (available on Westlaw at 2014 WL 6706834) (arguing that “[t]he only way to treat the troubled concept of ‘race’ in the law should be to absolutely prohibit its use as a basis for making decisions affecting individuals or groups”); Michael K. Grimaldi, *Disparate Impact after Ricci and Lewis*, 14 Scholar 165, 166–67 (2011) (explaining that conservatives think that the disparate-impact prohibition should be abandoned).

<sup>40</sup> *Texas Department of Housing*, 135 S Ct at 2521–22, 2525–26.

<sup>41</sup> See, for example, *Fullilove v Klutznick*, 448 US 448, 480–82 (1980) (finding a government program that gave preference to minority-owned businesses was constitutional and “reject[ing] the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion”).

<sup>42</sup> 304 US 144 (1938). *Carolene Product's* footnote four announced the criteria that should trigger closer scrutiny from the Court: those being discriminated against are “discrete and insular minorities,” and the political process is not functioning to properly protect the interests of the groups at issue. *Id* at 152 n 4.

<sup>43</sup> 411 US 677 (1973).

<sup>44</sup> *Id* at 684–86 (announcing that a “suspect class,” meaning one needing the government’s protection through the application of heightened scrutiny, could be distinguished

If it did this, the Court would be restoring a different understanding of the Equal Protection Clause, what is called the anti-subordination perspective. Rather than prohibiting discrimination based on certain characteristics, this understanding of the Equal Protection Clause prohibits oppressive or unjustified discrimination.<sup>45</sup> Heightened scrutiny is used to evaluate only classifications that are highly likely to be oppressive—something that can be said much more easily of discrimination against a vulnerable minority than discrimination in its favor.<sup>46</sup>

Like the conservative repudiation of disparate impact, this would be an ambitious move. But just as the ground has been laid for the conservative move in *Ricci*, building blocks for the return to antistatutoryism exist. One could point to the continued vitality of antistatutoryism discourse in sex discrimination, perhaps most notably in Ginsburg's majority opinion in *United States v Virginia*.<sup>47</sup> Ginsburg has made notable attempts to shift the basis for the Court's abortion jurisprudence to a rationale rooted in equality; one could easily imagine her embracing a doctrinal distinction between benign and invidious classifications.

#### IV. THE SHIFTS IN HISTORICAL CONTEXT

The discussion to this point has suggested modest and more ambitious moves that might result from changing membership on the Supreme Court. Those moves may be understood as steps towards the fulfillment of two different visions of the Equal Protection Clause. The conservative antistatutoryism view would bar any government consideration of race, even if the intent is to avert or remedy the disparate impact of the government's own policies. It would likewise bar any attempt to encourage private employers to avoid or remedy disparate impact. The Equal Protection Clause, under this view, would stand as a barrier to most government attempts to promote racial equality. It would have the effect, in many cases, of leaving undisturbed or even locking in existing racial inequalities.

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by several characteristics, including the following: the group (1) has suffered a history of unjustified discrimination; (2) is defined by an immutable, unchosen characteristic; (3) is defined by a characteristic that is irrelevant to merit; (4) has a lack of political power; and (5) is presently suffering from discrimination).

<sup>45</sup> John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *Fordham L Rev* 423, 515 (2002).

<sup>46</sup> *Id.* at 517.

<sup>47</sup> 518 US 515, 531–34 (1996).

The liberal antisubordination view, by contrast, would give the government a freer hand in attempting to promote racial equality. Under this view, the Equal Protection Clause would prevent race-based oppression or attempts to create a racial caste system, but not attempts to bring the races together or to break down racial hierarchy.<sup>48</sup>

The liberal vision here is relatively easy to locate in history. It expresses the meaning assigned to the Equal Protection Clause in the Reconstruction era. The Court was not a friend to Reconstruction, but it did consistently describe the purpose of the Equal Protection Clause as averting “unfriendly action” based on “jealousy and positive dislike”<sup>49</sup> or which might “necessarily imply the inferiority of either race,”<sup>50</sup> stamp one race “with a badge of inferiority,”<sup>51</sup> or be enacted “for the annoyance or oppression of a particular class.”<sup>52</sup>

What about the conservative vision? The anticlassification view can be found in stray sentences of early cases, such as *Strauder v West Virginia*'s<sup>53</sup> suggestion that “the law in the States shall be the same for the black as for the white.”<sup>54</sup> But this view does not really emerge until *Regents of the University of California v Bakke*<sup>55</sup> in 1978, and it does not acquire majority support until *City of Richmond v J.A. Croson Co*<sup>56</sup> in 1989 and *Adarand*<sup>57</sup> in 1995. In terms of Supreme Court membership, these decisions are the product of Reagan appointments—Justices O'Connor, Scalia, and Kennedy. We might then associate anticlassification with the constitutional vision of the Rehnquist and late Burger Courts, what is often called New Federalism. President Ronald Reagan, after all, kicked off his 1980 campaign with a speech in Philadelphia that praised states' rights.<sup>58</sup>

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<sup>48</sup> For more on different potential motivations behind equal protection laws, see generally Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv L Rev 493 (2003).

<sup>49</sup> *Strauder v West Virginia*, 100 US 303, 306 (1879).

<sup>50</sup> *Plessy v Ferguson*, 163 US 537, 544 (1896).

<sup>51</sup> *Id.* at 551.

<sup>52</sup> *Id.* at 550.

<sup>53</sup> 100 US 303 (1879).

<sup>54</sup> *Id.* at 307.

<sup>55</sup> 438 US 265, 290–91 (1978) (Powell) (plurality) (suggesting strict scrutiny for race-based affirmative action programs).

<sup>56</sup> 488 US 469, 493–94 (1989) (applying strict scrutiny to city minority business contracting preference).

<sup>57</sup> 515 US at 223–24 (applying strict scrutiny to federal minority business contracting preferences).

<sup>58</sup> See, for example, Leland Ware and David C. Wilson, *Jim Crow on the “Down Low”: Subtle Racial Appeals in Presidential Campaigns*, 24 St John's J Legal Comm

But there's also another place to look, starting with the historic antagonist of the Reconstruction vision. Reconstruction met opposition—from the Supreme Court, from congressional Democrats, and from organizations like the Ku Klux Klan. Reconstruction failed—the North lacked the political will to maintain a military presence in the South, and after the Compromise of 1877, Reconstruction yielded to “Redemption.”<sup>59</sup> The black Reconstruction governments were overthrown by force, black voting rights were curtailed, and for nearly one hundred years the Constitution's promise of equality meant almost nothing.

Then came the Second Reconstruction—the civil rights movement. A social movement for equality challenged the status quo. It received support from federal antidiscrimination laws and Warren Court decisions that expanded federal power and imposed new limits on the states. (Notably, these cases continued the Reconstruction antisubordination understanding of equal protection: the most famous example, *Brown*, invalidated school segregation at least in part on the grounds that it “is usually interpreted as denoting . . . inferiority.”<sup>60</sup>) And it changed the status of blacks in American society.

It is not surprising that the Second Reconstruction was met with a reaction. It is perhaps more surprising that this reaction is commonly called the New Federalism.<sup>61</sup> Many of the Rehnquist Court decisions restricting federal power do, of course, invoke federalism.<sup>62</sup> But federalism exists in our constitutional history not just as an independent doctrine created by the Constitution and existing at the Framing. It comes to prominence in a particular context—notably, opposition to Reconstruction and to the race-equality decisions of the Warren Court. And Reagan's appeal to states' rights invokes this particular context more strongly than it does the Framing. The Philadelphia where he delivered his 1980 speech was not the Framers' Philadelphia, Pennsylvania,

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299, 310–11 (2009) (suggesting that Reagan's use of the phrase “states' rights” was code for “resistance to desegregation efforts”).

<sup>59</sup> *Id.* at 308.

<sup>60</sup> *Brown*, 347 US at 494.

<sup>61</sup> See, for example, Allison H. Eid, *Federalism and Formalism*, 11 Wm & Mary Bill Rts J 1191, 1196–98 (2003).

<sup>62</sup> See, for example, *New York v United States*, 505 US 144, 149 (1992) (“The constitutional question [here] consists of discerning the proper division of authority between the Federal Government and the States.”).

but Philadelphia, Mississippi, perhaps most famous for the 1964 murder of civil rights workers by Klan members.<sup>63</sup>

If we look at the work of New Federalism, we see a very uneven distribution of results. There are some relatively minimal restrictions on the federal commerce power.<sup>64</sup> There are very substantial restrictions on Congress's ability to enforce the Fourteenth and Fifteenth Amendments.<sup>65</sup> And there is a more or less total reinterpretation of the Equal Protection Clause itself.<sup>66</sup> This is not a jurisprudence addressed generally to the federal-state balance. It is the Reconstruction Amendments that are being reinterpreted; it is Congress's power to enforce those amendments that is being cut back. This movement looks less like a rebirth of Founding-era federalism than a Second Redemption reaction to the Second Reconstruction of the Warren Court.

One plausible way of looking at the struggle over the Equal Protection Clause and the composition of the Supreme Court, then, is as a continuation of the struggle between Reconstruction and Redemption. The Court pushed back against the first Reconstruction, in decisions like the *Slaughter-house Cases*,<sup>67</sup> the *Civil*

<sup>63</sup> See Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-conservative Backlash to the Civil Rights Movement*, 6 Ala CR-CL L Rev 81, 89–90 (2015).

<sup>64</sup> See, for example, *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2578–79 (2012) (“Our permissive reading of [the Commerce Clause] is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders.”); *Gonzales v Raich*, 545 US 1, 15–19 (2005) (concluding that Congress’s ability to regulate intrastate marijuana sales is “squarely within Congress’ commerce power”); *United States v Morrison*, 529 US 598, 618 (2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”); *Printz v United States*, 521 US 898, 922–23 (1997) (concluding that the Commerce Clause does not permit Congress to impede the police powers of the states); *United States v Lopez*, 514 US 549, 558–61 (1995) (explaining the evolution of the Court’s Commerce Clause jurisprudence and noting its broad scope); *New York*, 505 US at 156–59 (“The Court’s broad construction of Congress’ power under the Commerce . . . Clause [ ] has . . . been guided . . . by the Constitution’s Necessary and Proper Clause.”).

<sup>65</sup> See, for example, *Shelby County, Alabama v Holder*, 133 S Ct 2612, 2628–30 (2013) (striking down part of the Voting Rights Act and noting that the Fifteenth Amendment “is not designed to punish for the past”); *Morrison*, 529 US at 619–22 (concluding that Congress did not have the authority to enact the Violence Against Women Act because the Fourteenth Amendment does not apply to private actors); *City of Boerne v Flores*, 521 US 507, 516–20 (1997) (concluding that Congress did not have the authority to enact the Religious Freedom Restoration Act under the Fourteenth Amendment).

<sup>66</sup> Compare *Brown*, 347 US at 493 (interpreting the Fourteenth Amendment to require the state to make opportunities “available to all on equal terms”), with *Parents Involved*, 551 US at 746 (“It [is] not the inequality of the facilities but the fact of legally separating children on the basis of race [that is] a constitutional violation.”).

<sup>67</sup> 77 US 273, 297–98 (1869) (narrowing the scope of the Fourteenth Amendment’s Privileges and Immunities Clause).

*Rights Cases*,<sup>68</sup> *United States v Harris*,<sup>69</sup> and *United States v Cruikshank*.<sup>70</sup> It is pushing back now against the Second Reconstruction, in decisions like *City of Boerne v Flores*,<sup>71</sup> *Shelby County v Holder*,<sup>72</sup> *United States v Morrison*,<sup>73</sup> *Ricci*,<sup>74</sup> *Parents Involved*,<sup>75</sup> and *Fisher I*.<sup>76</sup> The open question now is whether history will repeat itself.

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<sup>68</sup> 109 US 3, 11 (1883) (invalidating the Civil Rights Act of 1875 as beyond the Section Five enforcement power).

<sup>69</sup> 106 US 629, 643–44 (1883) (reversing convictions of a lynch mob under the Force Act of 1871 on the grounds of a lack of state action).

<sup>70</sup> 92 US 542, 554–55 (1875) (holding that the Equal Protection Clause is only triggered by state action).

<sup>71</sup> 521 US 507, 520 (1997) (restricting Section Five legislation to that which is “congruen[t] and proportional[ ]”).

<sup>72</sup> 133 S Ct 2612, 2629–30 (2013) (invalidating Section Four of the Voting Rights Act as beyond Congress’s power to enforce the Fifteenth Amendment).

<sup>73</sup> 529 US 598, 625–26 (2000) (holding that the Section Five enforcement power could not be used to regulate private individuals).

<sup>74</sup> 557 US at 592–93 (finding the city’s “refusal to certify [test] results” because of “raw racial results” that disfavored minorities violated Title VII).

<sup>75</sup> 551 US at 746–48 n 3 (finding race-based primary and secondary school allocations unconstitutional even if they were serving a remedial purpose).

<sup>76</sup> 133 S Ct at 2421 (finding that the lower courts applied strict scrutiny standard too leniently when reviewing the university’s affirmative action program).