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Christina Lee

TOWARD A TRANSFORMATIVE EQUALITY: A COMPARISON OF SOUTH AFRICA'S AND THE UNITED STATES' CONSTITUTIONAL EQUALITY DOCTRINES

CHRISTINA LEE*

* Harvard Law School Class of 2014; associate at Shearman & Sterling in New York City. The author extends special thanks to Dean Martha Minow for invaluable advice and support and Teresa Saint-Amour for excellent research guidance. The author also thanks Jonathan Whisenhunt and the editors at *The Scholar* for their meticulous editorial skill. Any views express in this Article are the author's personal views and do not reflect opinions of any other person or institution.

I. INTRODUCTION

Affirmative action policies pose unique challenges for the equal protection doctrine. Cases such as *Regents of the University of California v. Bakke*[1] and *Grutter v. Bollinger*[2] touch on the relationships between and among equality, race, history, and the role of the law in a constantly changing society. In so doing, these cases reveal the U.S. Supreme Court's struggle in addressing the complexities of affirmative action under the equal protection doctrine. These challenges culminated in the recent case *Fisher v. University of Texas at Austin*.[3]

In *Fisher*, the University of Texas at Austin ("UT Austin") rejected Abigail Fisher, a Caucasian, for admission into the University's 2008 entering class.[4] Fisher sued the University and school officials, alleging UT Austin's admissions policy violated the Equal Protection Clause.[5] The University utilized a race-conscious admissions program that "included a student's race as a component of the PAI [Personal Achievement Index]," which measures "a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances . . . ."[6] Further complicating the admission policies, Texas also subscribes to a program known as the "Ten Percent Plan," which grants any student in the top ten percent of his or her high school class automatic admission to any state college, including UT Austin.[7] The District Court granted summary judgment for the University, and the Fifth Circuit affirmed.[8]

1. 438 U.S. 265 (1978).
2. 539 U.S. 306 (2003).
3. 570 U.S. __, 133 S. Ct. 2411, 2413 (2013).
4. *Id.* at __, 133 S. Ct. at 2415 (2013).
5. *Id.* at __, 133 S. Ct. at 2417 (2013).
6. *Id.* at __, 133 S. Ct. at 2415–16 (2013).
7. *Id.* at __, 133 S. Ct. at 2416 (2013).
8. *Id.* at __, 133 S. Ct. at 2417 (2013).

The Supreme Court vacated the Fifth Circuit's decision and remanded for further proceedings.[9] Rather than issuing a sweeping decision on affirmative action, the Court held the Fifth Circuit erred by applying an incorrect level of scrutiny to the University's race-conscious admissions policy, finding the lower court must only determine whether UT Austin's decision to use race as a factor in admissions was in "good faith."[10] In so doing, the Court limited its holding to the level of scrutiny for racial classifications and bypassed the opportunity to settle the affirmative action debate. As a result, the controversy over affirmative action and the use of race in formulating equal opportunities continues.

As the debate over affirmative action persists, scholars have found alternatives do exist. Most notably, South Africa's substantive equality doctrine considers the dignity of each individual when using race-conscious affirmative action policies.[11] Under this approach, the *Fisher* would have been uncontroversial. The UT Austin policy could have been upheld under the notion of substantive equality, because the University's policy sought to uphold the dignity of each person under individualized review.

This Article compares the United States' equal protection doctrine with South Africa's substantive equality doctrine. First, it chronicles the history of affirmative action in the United States and the development of the Equal Protection Doctrine. Next, it maps the history of affirmative action in South Africa and the substantive equality doctrine. Finally, it considers the applicability of substantive equality in the United States and potential obstacles.

II. AFFIRMATIVE ACTION IN THE UNITED STATES

America's history has been fraught with challenges to equality since its inception. The Declaration of Independence—which arguably defined the most fundamental principles at the outset of the founding of the United States—declared, "[A]ll men are created equal."[12] However, "the assertion . . . was noble but hollow."[13] The Constitution subsequently contemplated the notion of slavery as consistent with the founding principles.[14] In addition to implicitly continuing to allow the existence of slavery, Article 1, Section 3 explicitly addressed the enslaved,

9. *Id.* at __, 133 S. Ct. at 2422 (2013).

10. Fisher v. Univ. of Tex. at Austin, 570 U.S. __, 133 S. Ct. 2411, 2421 (2013).

11. *See generally* S. AFR. CONST., 1996, § 9 (outlining the fundamental legal standard for basic human equality in South Africa).

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

13. Adila Hassim, *Affirmative Action Policies in the United States and South Africa: A Comparative Study*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 119, 129 (2000).

14. *See id.* (identifying ways in which the U.S. Constitution endorsed slavery).

counting them as "three fifths of all other Persons" for political representative purposes in taxation and apportionment of the House of Representatives.[15]

After the bloody and divisive Civil War, Congress addressed the issue of slavery by adopting the Thirteenth Amendment, outlawing all forms of slavery.[16] Congress followed with the Fourteenth Amendment, promising full rights to American citizens—including guarantees of citizenship, due process, and equal protection of the laws.[17] The last amendment of this tripartite, the Fifteenth Amendment, guaranteed the right to vote for all citizens regardless of race, color, or previous servitude.[18]

While these Reconstruction amendments provided formal guarantees of equal protection and full citizenship to blacks, translating these constitutional guarantees into practice proved far more difficult. Soon after ratification of these amendments, the infamous *Plessy v. Ferguson*[19] decision established the separate-but-equal doctrine, interpreting the Fourteenth Amendment as allowing segregation in the country.[20] *Plessy*'s separate-but-equal doctrine served as the foundation for Jim Crow laws that systematically implemented hurdles for blacks who attempted to assert constitutional rights guaranteed by the Thirteenth, Fourteenth, and

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15. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

16. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

17. *Id.* ("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."). The Fourteenth Amendment was implemented to ensure the constitutionality of certain race conscious measures beginning under the Freedmen's Bureau Acts and further affirmed in the Civil Rights Act of 1866. Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 295 (1996).

18. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

19. 163 U.S. 537 (1896).

20. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (The Justices "consider[ed] the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it [was] not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."). The Supreme Court in 1896 believed "[l]egislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically." *Id.* at 551–52.

Fifteenth Amendments.[21] Soon after the Civil War, state and local governments enacted myriad systems of new laws, requiring separate facilities in places of public accommodation, poll taxes, grandfather clauses, literacy tests, and other measures obstructing political participation.[22]

Despite some early twentieth century attempts at deeming segregation unconstitutional,[23] the Supreme Court did not fully address the separate-but-equal doctrine until *Brown v. Board of Education*.[24] In *Brown*, the Court held separate facilities were "inherently unequal" and violated the protections guaranteed by the Fourteenth Amendment.[25] A few years after *Brown*, Congress passed the Civil Rights Act of 1964, which prohibited discrimination on basis of sex, race, color, or national origin, effectively ending the era of the Jim Crow laws.[26] Although it is unclear whether *Brown* was the true impetus sparking change during the Civil Rights Movement in the 1960s or whether *Brown* indicated a change in society's perspective on race, *Brown*'s historical significance is beyond question.

Initial efforts led by Martin Luther King, Jr. and President Lyndon Baines Johnson sought a color-blind remedy that would naturally integrate African Americans.[27] The major shift from color-blind ideas toward color-conscious solutions emerged in the mid-to-late 1960s.[28] As a race-conscious remedy, affirmative action came to the forefront of the

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21. *See* John Fobanjong, Understanding the Backlash Against Affirmative Action 4 (2001) (describing the history of Jim Crow laws and concluding, "The freedoms proclaimed in the Emancipation Proclamation had done little to improve their lot.").

22. *Id.*

23. *See generally* Buchanan v. Warley, 245 U.S. 60 (1917) (finding a Kentucky law could not require residential segregation); Morgan v. Virginia, 328 U.S. 373 (1946) (finding a Virginia law requiring segregation on interstate busses unconstitutional under the interstate commerce clause).

24. 347 U.S. 483 (1954).

25. *Id.* at 495. The Supreme Court concluded:

> [I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Id.

26. *See generally* Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (providing federal non-discrimination policies with regard to voting rights, employment, federally assisted programs, and expressly desegregating public facilities, places of public accommodation, and public education).

27. RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 16 (1996).

28. *Id.*

civil rights movement and national policy debates on promoting and achieving equality in the United States.[29]

In his address to Howard University in 1965, President Johnson reiterated, "[F]reedom [was] not enough."[30] Equality of opportunity was needed to provide equality *in fact* instead of equality *in theory*.[31] Although President Johnson's address is considered to be supportive of a race-conscious approach to affirmative action, the tenor of his address implied that government and society should take an active role in ensuring equal opportunity for all races, rather than simply prevent preferential treatment for certain races.[32] More specifically, President Johnson's address identified a link between the United States' history towards blacks and their current state of economic hardship, which became the basis for alternative methods of addressing poverty and opportunity.[33]

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29. *See id.* at 16–17 (describing the association between affirmative action and profound shifts in public policy favoring "race-based, class-blind" preferences); *see also* Exec. Order No. 10,925, 26 Fed. Reg. 1977, 1977 (Mar. 8, 1961) (establishing President John F. Kennedy's committee on equal opportunity employment and more specifically directing the committee to "consider and recommend affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government").

30. President Lyndon B. Johnson, Commencement Address to Howard University: To Fulfill These Rights (June 4, 1965), *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

31. *Id.* President Johnson argued:

> [Americans] do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Id.

32. *See id.* (declaring the "chief" goal of the White House—at that time—was "to help the American Negro fulfill the rights which, after the longtime of injustice, he is finally about to secure"); *see also* KAHLENBERG, *supra* note 27, at 9 ("Johnson saw 'affirmative action' as social mobility programs combined with an antidiscriminatory effort in which employers would broaden the pool of applicants to ensure that members of all races had a fair chance to compete, rather than as a system of preferences in which members of different races were held to different standards.").

33. *See* President Lyndon B. Johnson, *supra* note 30 (distinguishing negro poverty from white poverty). President Johnson pointed out:

> The Negro, like these others, will have to rely mostly upon his own efforts. But he just cannot do it alone. For they did not have the heritage of centuries to overcome, and they did not have a cultural tradition which had been twisted and battered by endless

Under Johnson's Administration, Congress passed the Voting Rights Act of 1965,[34] and Johnson issued Executive Order 11,246, implementing a nondiscrimination policy for government employees and those employed by government contractors.[35] Affirmative action soon became a hotly debated policy item with executive agencies, state legislatures, schools, subsequent administrations, and eventually the courts, reigniting tensions in the relationship between race and equality.

III. AFFIRMATIVE ACTION IN SOUTH AFRICA

In recent history, South Africa experienced some of the most blatant and systematic racial segregation. Although slavery was abolished in the 1830s,[36] segregation legislation deeply institutionalized racism in South Africa beginning in 1913.[37] By the 1950s, apartheid laws took full force and freedoms for blacks were limited at every turn.[38] The "logic"[39] behind apartheid—an Anglo obsession with order and control, combined with fanatical fears about the mixing of races—informed creation of a system in which power was institutionalized and guaranteed for whites in every aspect of life.[40]

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years of hatred and hopelessness, nor were they excluded—these others—because of race or color—a feeling whose dark intensity is matched by no other prejudice in our society.

Id.

34. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437.

35. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

36. MICHAEL MORRIS, APARTHEID: AN ILLUSTRATED HISTORY 11 (2012).

37. Hassim, *supra* note 13, at 121–22. Starting with the Lands Rights Act of 1913, blacks lost their rights to land, ominously signaling the multitude of restrictive legislation that would come in future decades. *Id.* at 121. From the 1920s, the Parliament began implementing a series of laws that further deepened and institutionalized any preexisting inequalities between whites and non-whites, setting the nation up for the apartheid that would come in the 1948. MORRIS, *supra* note 36, at 21–24. Some of the most notorious laws included: the Mixed Marriage Act of 1949, which prevented interracial marriages; the Population Registration Act of 1950, which required all inhabitants to be registered and classified under a specific race; the Reservation of Separate Amenities Act, which required segregation of places of public accommodation; and the Group Areas Act of 1950, which determined ownership of land and occupation of land by color. *Id.* at 48–51.

38. *See* NANCY L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID 67 (2d ed. 2011) ("[T]he South African government had enacted legislation that controlled every aspect of its citizens' lives based on race.").

39. The author uses the term "logic" loosely, considering any perceivable rationale to qualify.

40. *See* MORRIS, *supra* note 36, at 45 ("By the mid-1950s, apartheid's legal framework was complex and comprehensive. At work and play, South Africans were divided by the scrupulous observation of an anachronistic distinction between 'Europeans' and 'Non-Europeans.'"); *see also* Hassim, *supra* note 13, at 122 (referencing apartheid legislation—expressly classifying South Africans in separate racial groups, forcing removal of

Throughout the 1950s and 1960s, black activists—often students—protested against apartheid laws and policies. At first, they utilized non-violent methods of civil disobedience, opting for marches or protests using signs.[41] As protestors gained momentum, the South African government implemented legislation to suppress activists.[42] The Suppression of Communism Act made any criticism of government policy illegal and the Terrorism Act of 1967 allowed government detention without a trial.[43]

Apartheid only deepened as a result of economic development in South Africa during the 1960s and 1970s.[44] However, after a series of protests by black high school students in the late 1970s resulting in student deaths at the hands of police (Soweto),[45] the liberation movement was at a turning point.[46] South Africa faced a moral crisis as a nation and could not ignore the cries of the liberationists any longer.[47] Seeking to capitalize on post-Soweto anger, the African National Congress organized a "swift and successful" movement seeking reform on behalf of blacks,[48] leading anti-apartheid efforts alongside other organized groups such as the United Democratic Front and the Congress of South African Trade Unions.[49]

Throughout the following decades, the liberationists engaged in a lengthy struggle to overthrow apartheid.[50] The movement's influence culminated in 1994 when Nelson Mandela became leader of South Af-

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black residents found to own or occupy land in "white" territory, and prohibiting interracial marriage—to support the idea that "South Africa's emergence from apartheid was one of last century's most notable political achievements").

41. Morris, *supra* note 36, at 42–43.

42. *See id.* at 43–45 (cataloging laws enacted shortly after non-violent protests began).

43. Hassim, *supra* note 13, at 122.

44. MORRIS, *supra* note 36, at 84.

45. *See id.* at 105–06 (describing the events surrounding the Soweto tragedy).

46. *See id.* at 109 (reporting Soweto inspired more death, violence, and protests over the following year). An eyewitness caught up in the protest said, "'[Soweto was] the most terrifying day of my life while I lay caught in the crossfire of police bullets and stones from enraged students in the rampage.'" *Id.* at 106. "'Apartheid was beginning to fail'" as Soweto "usher[ed] in a phase of low-level civil war in which townships eventually became battle zones, patrolled by armed troops and revolutionary-minded 'comrades.'" *Id.* at 109.

47. *See id.* at 112 (asserting "black political thinking and action" was an "inescapably central factor" after Soweto).

48. Id.

49. *See* CLARK & WORGER, *supra* note 38, at 98–99 (indicating collaboration among the three groups).

50. *See generally The ANC: Stages of Struggle and Policy Foundations 1960–1994*, O'MALLEY: THE HEART OF HOPE, http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02303/06lv02304/07lv02305/08lv02311.htm (last visited Apr. 10, 2014) (describing steps taken by the African National Congress from 1960–1994 in its efforts to overcome apartheid).

rica's Parliament, and his party—the African National Congress—won a majority of votes in the Parliament.[51] Negotiations between the African National Congress and other parties to reform the apartheid system were held throughout the 1990s.[52] Reform discussions resulted in the formation of a new Constitution and Bill of Rights in 1996;[53] a new framework for the government; and a new social paradigm in South Africa.[54] In an unprecedented move, the South African government established a new formal body, called the Truth and Reconciliation Commission (TRC),[55] as a way for the nation to confront its gruesome past while moving forward without formal adjudications in courts of law.[56] The Truth and Reconciliation Commission ended in 2003.[57] The success of the Commission has always been controversial.[58]

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51. F. Michael Higginbotham, *Affirmative Action in the United States and South Africa: Lessons from the Other Side*, 13 TEMP. INT'L & COMP. L.J. 187, 213 (1999) (taking account of the fact that at this time "legislative and executive support for affirmative action [was] clear and unequivocal").

52. *See* MORRIS, *supra* note 36, at 167–70 (elaborating on the talks termed the Convention for a Democratic South Africa).

53. *See* S. AFR. CONST., 1996, § 2 (establishing the supremacy of the Constitution). Recognizing the supremacy of the new Constitution in South Africa marked a departure from "parliamentary sovereignty and . . . executive aggrandizement." G. E. DEVENISH, THE SOUTH AFRICAN CONSTITUTION 34 (2005).

54. Part V discusses the current Constitutional form.

55. *See* CLARK & WORGER, *supra* note 38, at 124 (describing the establishment and responsibilities of the TRC under the Promotion of National Unity and Reconciliation Act). An estimated 22,000 people testified before the commission recounting the suffering they experienced under apartheid or hearing the amnesty pleas of former government agents for the crimes they committed. *Id.*; *see* Hassim, *supra* note 13, at 125 (explaining the TRC was comprised of three committees that gathered information, recommended reparations to victims, and decided whether to grant amnesty to those who committed crimes).

56. MORRIS, *supra* note 36, at 176–77 ("[TRC] succeeded in embedding the idea that human rights is an indispensable condition of justice and democracy, and that truth, however hard it might be to acknowledge, is at once necessary and redemptive.").

57. *Id.* at 177.

58. *See* Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 768 (1999) (pointing out reasons some South African people do not feel vindicated by the TRC process; they feel deprived of their right to bring their cases before a court of law); *see also* Hassim, *supra* note 13, at 124 (noting some people believed that a reconciliation process would only rehash painful memories, and apartheid was better served to remain in the past). Others, such as Archbishop Desmond Tutu supported the process:

> I hope that the work of the Commission, by opening wounds to cleanse them, will thereby stop them from festering. We cannot be facile and say bygones will be bygones, because they will not be bygones and will return to haunt us. True reconciliation is never cheap, for it is based on forgiveness which is costly. Forgiveness in turn depends on repentance, which has to be based on an acknowledgement of what was

From the inception of the new democracy in South Africa, reforms contemplated measures like affirmative action. In addition to the Constitution and Bill of Rights, which includes measures for affirmative action,[59] Nelson Mandela publicly endorsed affirmative action measures:

> We are not asking for handouts for anyone, nor are we saying that just as a white skin was a passport to privileged past, so a black skin should be the basis for privilege in future. Nor . . . is it our aim to do away with qualifications . . . . [T]he special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination, are at last given their due . . . . The first point to be made is that affirmative action must be rooted in principles of justice and equality.[60]

The Employment Equity Act of 1998 exemplified this sentiment by addressing labor and employment inequalities apartheid's aftermath.[61] Specifically, the statute defined affirmative action as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."[62] The Act required substantial affirmative action requirements including measures to identify barriers for certain groups, further diversity the workplace based on equal dignity, and make reasonable accommodations to ensure equal opportunity.[63] Nevertheless, criticism of the Employment Equity Act existed on the basis of fear of quotas and economic concerns.[64] Notwithstanding this criticism, the Act is considered a cornerstone in South Africa's efforts to address the apartheid's legacies.

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done wrong, and therefore on disclosure of the truth. You cannot forgive what you do not know.

Archbishop Desmond Tutu, Statement on His Appointment to the Truth and Reconciliation Commission (Nov. 30, 1995), *available at* http://www.justice.gov.za/trc/media/pr/1995/p951130a.htm.

59. S. AFR. CONST., 1996, § 9(2).

60. FOBANJONG, *supra* note 21, at 149–50 (quoting Nelson Mandela).

61. *See* Employment Equity Act 55 of 1998 pmbl (S. Afr.), *available at* http://www.labour.gov.za/DOL/downloads/legislation/acts/employment-equity/Act%20-%20Employment%20Equity.pdf. The contours of the Employer Equity Act's effect on equality and affirmative action will not be discussed in great detail, as the constitutional implications do not raise any significant new questions other than the Constitution's equality provision.

62. *Id.* § 15(1).

63. *Id.* §§ 13, 15(2).

64. Hassim, *supra* note 13, at 137.

In subsequent years, South Africa adopted a comprehensive anti-discrimination law, the Promotion of Equality and Prevention of Unfair Discrimination Act in 2000, commonly known as the Equality Act.[65] Addressing discrimination and harassment cases, the Act created High Courts and Magistrate Courts as designated Equality Courts authorized to hear complaints falling under the statute.[66] Moreover, the Act recognized an affirmative duty of the state—based on the Constitution—to promote equality, outline affirmative action measures, and give constitutional institutions the authority to evaluate and require further action of the state with respect to this goal.[67] One of the most controversial aspects of the Act was Section Thirteen, placing the burden of proof on defendants in proving their innocence once plaintiffs present a *prima facie* case of discrimination,[68] though proponents maintained the statute avoided placing the risk of placing an unrealistic burden of proof on the alleged victim.[69]

Moreover, all affirmative action efforts faced fundamental criticism embodied in a single question: "Is it possible to use the racial categories of an unlamented past to create a more desirable non-racial future?"[70] As South Africa attempts to emerge out of a gruesome history of divisions and racism, new debates about the use of race and measures to achieve equality through legislative reforms have resulted in race returning to the forefront in a new and unexplored context for the country. Accordingly, despite the significant achievements of the South African

65. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.), *available at* http://www.gov.za/documents/index.php?term=equality&dfrom=&dto=&yr=2000&tps%5B%5D=1&subjs%5B%5D=0 [hereinafter Equity Act]. The Act prevented discrimination on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, belief, culture, language, and birth" by the government, private organizations, or individuals. *Id.* Similar to the Employment Equity Act, the Equality Act does not create or require any significantly different constitutional standards or inquiries and therefore will not be discussed separately in great detail.

66. *Id.* § 16.

67. *Id.* § 24–25. Chapter 5 of the Act outlines three major requirements of the state: (1) to develop awareness of fundamental rights; (2) to take measures to develop and implement programs of promoting equality; and (3) to develop plans to address unfair discrimination, enact further legislation, develop codes of practice or educate if necessary. *Id.* § 25.

68. *Id.* § 13.

69. *See South Africa Ushers in Controversial Equity Law*, *CNN.com*, Sept. 1, 2000, *available at http://archives.cnn.com/2000/WORLD/africa/09/01/racism.safrica.reut/*; *see also* Equity Act ch. 3 § 13.

70. MORRIS, *supra* note 36, at 180.

Constitution, questions persist about the legacies of inequalities engrained during the apartheid.[71]

IV. Affirmative Action and the Supreme Court of the United States

Several provisions, most notably the Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution, protect minorities' rights and contemplate actualization of equality and equal protection under the Constitution. Still, even in the years after the ratification of these amendments, the permissibility of discrimination based on race under the original conception of the Fourteenth Amendment remained unclear.[72] Despite cries for the abolition of slavery and the soaring rhetoric for equality for blacks, U.S. society during the Reconstruction Era remained heavily segregated even in the northern states. Moreover, segregation that persisted through continued deprivation of socioeconomic and political rights until the Civil Rights Movement and the Supreme Court's reluctance in holding racial categorization and discrimination violative of the Equal Protection Clause[73] contributed to the debate over whether the Fourteenth Amendment necessarily extended ideas of equal protection for minorities on the basis of separate being inherently unequal, as determined by *Brown*.[74]

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71. *See generally* Clark & Worger, *supra* note 38, at 126–30 (discussing income inequality, poverty rates, and health issues concerning HIV/AIDS that prevail even after the end of apartheid).

72. One interpretation is the distinctions drawn among these different amendments may be a product of Nineteenth century conceptions of rights. Some argue the understanding legal minds at the time would draw a distinction between fundamental or civil rights, social, and political rights, which the Thirteenth, Fourteenth, and Fifteenth Amendments sought to guarantee, respectively. Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 Cardozo L. Rev. 2225, 2227–28 (1996).

73. *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (stating even though "[t]he argument . . . assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of two races," the Court cannot accept that proposition). The *Plessy* Court narrowed down the inquiry to the "reasonableness" of the legislation, resulting in an extremely deferential standard to base racial classifications and denied the notion that racial identifications could impose a sense of inferiority onto people of different races. *Id.* at 550–51, 544. Nevertheless, early Supreme Court jurisprudence regarding the Fourteenth Amendment did contemplate the power of the new constitutional amendments in *Strauder v. State of West Virginia.* Strauder v. West Virginia, 100 U.S. 303, 306 (1879). The Court held a West Virginia law violated the Equal Protection Clause of the Fourteenth Amendment by denying blacks the right to serve on grand jury, because a law could not deny the possibility of being tried in front of people of color solely because of the color of skin. *Id.* at 305–06.

74. Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 495 (1954).

A. *The Antisubordination-Anticlassification Divide*

While *Brown* certainly established separate is not equal, a debate erupted about the scope and reach of *Brown's* proscription on racially-based classifications. This debate continued to plague the equal protection doctrine. The anticlassification principle's supporters argued, "[T]he government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race."[75] Conversely, the antisubordination principle's proponents contended, "[L]aws may not aggravate or perpetuate the subordinate status of a specially disadvantaged group."[76] While at first glance these two positions may not appear to be in conflict, Professors Balkin and Siegel aptly distinguished the practical effects of the two positions:

> If the Court read *Brown* as invalidating segregation on the ground that it violated an anticlassification principle, then facially neutral practices with disparate impact on racial minorities would be presumptively constitutional, while affirmative action would not. On the other hand, if the Court read *Brown* as invalidating segregation on the ground that it violated an antisubordination principle, then affirmative action would be presumptively constitutional, while facially neutral practices with a disparate impact on minorities would not.[77]

The Supreme Court's struggle in addressing the concerns of both antisubordinationists and anticlassificationists further illustrates tension between these two principles. In *Bakke* and *City of Richmond v. J.A. Croson, Co.*,[78] Justice Powell and Justice Scalia, respectively, expressed concern over arbitrary determinations of fairness using racial classifications and discomfort over the centrality of race in affirmative action policies. Writing for the *Bakke* majority, Justice Powell couched the Court's decision in the background of the Fourteenth Amendment for historical

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75. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

76. *Id.* (internal quotation marks omitted).

77. *Id.* at 11. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), for an extensive debate on the interpretation of *Brown* with respect to these two principles.

78. 488 U.S. 469 (1989).

context but generally rejected the antisubordination theory.[79] Justice Powell identified the Equal Protection Clause, the notion of discrimination under the Constitution, and justice as troubled by the notion of preference.[80] Classifications would "exacerbate racial and ethnic antagonisms rather than alleviate them."[81]

In *Croson*, Justice Scalia took the more decisive position that racial classifications should not be differentiated by past subordination.[82] Even the *Croson* majority argued mere use of racial classifications stigmatized individuals and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[83] Critics of current affirmative action policies similarly assert other factors such as class or socioeconomic status more accurately measure need and lack of resources in the United States today.[84]

Although, overall, the Supreme Court has adopted a framework closer to the anticlassification principle by deciding all race classifications are suspect under equal protection analysis, the Court has demonstrated antisubordination tendencies. Antisubordination arguments pervade race-based government actions aimed at providing some remedial aspect of the equal protection doctrine. Justice Brennan, along with Justices White, Marshall, and Blackmun argued the backdrop of America's history of slavery and segregation rendered a "colorblind" Constitution "aspiration[al]" rather than reality.[85] Justice Marshall separately wrote,

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79. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294–99 (1978) (refusing petitioner's request for the Court to adopt a stricter view of the Equal Protection Clause and accept "'benign'" preferences).

80. *Id.* at 298–99.

81. *Id.* Moreover, the Court denied the legitimacy of a remedial interest of the school, because the institution had never engaged in segregation, severely limiting the interest of remedying past discrimination. *Id.* at 300–02.

82. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520–21 (1989) (Scalia, J., concurring).

83. *Id.* at 493. Justice Thomas has expressed a similar sentiment. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."); Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

84. *See generally* Spencer Lindsey, *Status, Not Race, Should Be Basis of Affirmative Action*, HUFFINGTON POST POLITICS (Apr. 30, 2012; 9:16 AM), http://www.huffingtonpost.com/the-badger-herald/status-not-race-should-be_b_1455359.html (arguing for use of socioeconomic status as a basis for affirmative action).

85. *Bakke*, 438 U.S. at 327, 336 (Brennan, J., concurring in part and dissenting in part).

"The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated."[86] Moreover, he thought "this same Constitution [could not] stand[ ] as a barrier" for remedies to past discrimination.[87] Similarly, Justice Ginsburg's *Grutter* concurrence noted continuing inequities in educational opportunities for African-American and Hispanic students as a reason for continued affirmative action policies.[88]

The effect of this divide is a tenuous relationship with using racial preferences as a remedy for past discrimination. In *Bakke*, Justice Powell acknowledged the remedial role of race-based government actions for past discrimination but limited such action to institution-specific application.[89] Moreover, because the decisions *Bakke*[90] and *Grutter*[91] were qualified by numerous accompanying concurrences and dissents, the overall status of both the antisubordination and anticlassification principle remains unclear.

B. *A Fragmented Framework for Race-Based Classifications*

In the midst of the debate surrounding racial classifications, the Supreme Court developed a test of strict scrutiny, yet struggled to apply this highest level of judicial review in a consistent manner.[92] In *Loving v. Virginia*,[93] the Court held racial classifications survive scrutiny if, and only if, such classifications are necessary to a permissible state objective independent of racial classification.[94] The *Bakke* concurrences and dis-

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86. *Id.* at 394 (Marshall, J., dissenting).

87. *Id.* at 387.

88. *Grutter*, 539 U.S. at 345–46 (Ginsburg, J., concurring). Nevertheless, Justice Ginsburg did foresee an end date for affirmative action once equality of opportunity came to fruition. *Id.* at 346.

89. *Bakke*, 438 U.S. at 300–01 ("Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed the extent of the violations.").

90. Justices Brennan, White, Marshall, and Blackmun argued race could be used as a factor in addressing chronic underrepresentation of certain minorities, while Chief Justice Berger, Justice Stewart, Justice Rehnquist, and Justice Stevens concluded the admissions program violated Title VI. *See generally id.*

91. While there was a majority opinion in *Grutter*, the decision was 5-4, with concurring opinions by Justices Ginsburg and Breyer and dissenting opinions by Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Thomas. *See generally Grutter*, 539 U.S. at 306.

92. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, (1967) (determining a state ban on interracial marriages involved racial classification that violated the Equal Protection Clause and Due Process Clause of Fourteenth Amendment).

93. 388 U.S. 1 (1967).

94. *Id.* at 11. The *Loving* test channeled the reasoning of *United States v. Carolene Products* footnote four:

sents[95] also highlight the Court's struggle to apply the strict scrutiny standard. Moreover, Justice Powell's acknowledgement of diversity as a possible compelling interest and alternative justification for affirmative action policies has further complicated the use of race as a classification.[96] By acknowledging diversity as a state interest, *Bakke* framed subsequent affirmative action debates with a baseline of proscribing rigid formulas of quotas, allowing exceptions for those promoting "diversity interests." As subsequent cases demonstrate, application of the strict scrutiny test has been questioned, as has the use and legitimacy of diversity as a compelling interest under equal protection analysis.[97]

> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' Korematsu v. United States, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Id.; *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (accepting the possibility of a more exacting standard than the rational basis test employed by the Court); McLaughlin v. Fla., 379 U.S. 184, 191 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose-in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.").

95. The University of California at Davis (UC Davis) Medical School had two separate admissions programs for a class of one hundred students. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272 (1978). A regular admissions pool for most students existed and a special program separated students of socioeconomically disadvantaged backgrounds or from underrepresented minority groups (including blacks, Latinos, Asians, and Native Americans). *Id.*

96. *Id.* at 313. According to Justice Powell, the diverse exchange of ideas was crucial to an education and had First Amendment implications:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id.

97. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726 (2007) ("[I]t is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."); Gratz v. Bollinger, 539 U.S. 244, 275 (2003) ("Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis."); Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (acknowledging problems with racial preferences but accepting the law school's program because "it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants").

Similar concerns about the use of race have emerged in opinions outside the education sector, resulting in an expanded application of the strict scrutiny standard. In *Croson*, the Court held the City of Richmond's ordinance requiring city contractors to have at least thirty percent minority subcontracts was unconstitutional under the Equal Protection Clause.[98] Justice O'Connor's opinion found the racial categorization was not significant to the government interest remedying past discrimination, thereby failing to meet strict scrutiny.[99] Additionally, the Court struck down the thirty percent requirement because it was not narrowly tailored and other race-neutral methods were available to the city.[100] Likewise, in 1995 the Adarand[101] Court, overturned *Metro Broadcasting*,[102] held that strict scrutiny applied to federal affirmative action policies.

A divided Supreme Court in *Grutter*, however, held the law school admissions program at the University of Michigan's law school admissions program did not violate the Equal Protection Clause by considering racial classifications.[103] While traditionally strict scrutiny was always considered "'strict' in theory, but fatal in fact,'"[104] Justice O'Connor, writing for the Court, held racial classifications used by the law school did not violate the Equal Protection Clause.[105] Although Justice O'Connor acknowledged the "'serious problems of justice connected to with the idea of preference itself[,]'" she sought to explain why University of Michigan's admissions policy was constitutionally permissible.[106] In so doing, Justice O'Connor expanded upon Justice Powell's conception of diversity as a compelling interest, while furthering present-day benefits of affirmative

98. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989).

99. *Id.* at 505. Justice O'Connor wrote:

> In this case, the city does not even know how many [Minority Business Enterprise's] in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. . . . Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city. To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms.

Id. at 502.

100. *J.A. Croson Co.*, 488 U.S. at 507.

101. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–38 (1995).

102. Metro Broad., Inc. v. FCC, 497 U.S. 547, 566 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding intermediate scrutiny applied to federal statutes using racial classifications).

103. *Grutter* v. Bollinger, 539 U.S. at 343.

104. *Id.* at 343, 326 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

105. *Id.* at 343.

106. *Id.* at 341 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

action as well as the remedial and compensatory justifications for affirmative action policies.[107] Justice O'Connor emphasized the flexible nature of an admissions policy that neither awarded points nor utilized quotas, valued diversity in an effort to create greater citizens, required individualized evaluation, and use of race as an identifier as a necessary factor in weighing students' admissibility.[108] While Justice O'Connor applied strict scrutiny in name, the opinion's substance has flavors of an apologetic defense for the affirmative action program, acknowledging the law school would "'like nothing better than to find a race-neutral admissions formula'" and prophesized that affirmative action would end in the foreseeable future.[109] Such an apologetic tone underscored the conflict of addressing concerns of racial classifications while being unable to ignore the history of segregation and discrimination and the current realities of the role in race in society.[110]

However, using diversity as a justification for affirmative action has caused controversy about racial classifications and the goal of equal protection. In *Grutter*, Justices Thomas and Scalia disagreed with using diversity as a compelling interest as the majority failed to fully explain how it was a compelling state interest.[111] Additionally, the dissent argued accepting diversity would significantly expand the use of race in affirmative action policies without a limiting principle.[112] Moreover, Chief Justice Rehnquist's dissent, joined by Justices Scalia, Kennedy, and Thomas, argued against the concept of diversity aimed at a "critical mass" on grounds that such balancing was "precisely the type of racial balancing that the Court itself calls 'patently unconstitutional.'"[113] According to those Justices, the concept of "critical mass" was without justification be-

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107. *See id.* (finding the university's policy did not "unduly harm nonminority applicants").

108. *See id.*

109. *Id.* (quoting Brief for Respondent).

110. Similar themes were discussed in the companion case *Gratz v. Bollinger*, in which the Court struck down the University of Michigan's undergraduate admissions policy, which added numbers for certain racial minorities on grounds that the lack of individualized evaluation did not meet strict scrutiny analysis. Gratz v. Bollinger, 539 U.S. 244, 270–75 (2003).

111. *Grutter*, 539 U.S. at 356 (Thomas, J., concurring in part and dissenting in part). The dissent also argued that Michigan failed to prove that the operation of the law school was a compelling state interest. *Id.* at 359.

112. *See id.* at 354 (Thomas, J., dissenting) (suggesting refusal to change the admission process and status broadens the state's compelling interest to include both diversity and educational benefits).

113. *Id.* at 386 (Rehnquist, J., dissenting).

cause this method, like quotas, relies on arbitrary choices with regard to minority representation.[114]

Indeed, the Court has further complicated use of diversity by determining it is not a compelling government interest in other contexts. In *Wygant v. Jackson Board of Education*,[115] a divided Supreme Court determined providing diverse role models for schoolchildren was not a compelling government interest.[116] The Court's division similarly reflected discomfort in considering racial classifications,[117] while others argued that the Equal Protection Clause race served as an important consideration in certain government policymaking, particularly in education where previously the Court held in *Grutter* and *Bakke* that diversity was important to one's education.[118]

The Supreme Court's struggles with affirmative action and racial classifications reached a pinnacle in *Fisher*.[119] Oral arguments revealed ongoing tensions and discomfort, especially among Justices Scalia, Roberts, Alito, and even Kennedy, with considering race at all and the notion of universities attempting to reach "critical mass" in diversity.[120] At the same time, Justices Breyer and Sotomayor seemed to suggest this case might fall into the *Grutter* framework, subscribing to the diversity as a compelling interest.[121] Nevertheless, the general attitude of the Court's general attitude reflected discomfort with this notion of "critical mass" and universities trying to achieve something close to numerical goals for representation of certain racial minorities.[122]

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114. *Id.* at 382–83. They particularly abhorred the diversity justification, for they found it an arbitrary rationale that often masked other preferences. *See id.* at 393–94 ("'[A]ffirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other ground.' . . . It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking.") (internal citations omitted).

115. 476 U.S. 267 (1986).

116. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–75 (1986).

117. *See generally id.* (indicating a division of the Court on the issue of providing diverse role models for students in schools).

118. *See generally id.*

119. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. __, 133 S. Ct. 2411, 2415–16 (2013) (involving a complex, two-tiered admission system, which accepted applicants in the top ten percent of every Texas high school and then had a separate application pool that considered race among other factors).

120. Transcript of Oral Argument at 43–49, 52–72, *Fisher*, 570 U.S. __, 133 S. Ct. 2411 (2013) (No. 11-345).

121. *See id.* at 16–20.

122. *See generally id.* (detailing the Court's uneasiness with the concept of a critical mass).

C. *Suspect Classifications and Equal Protection*

Using racial classifications in affirmative action cannot be considered alone in a day and age where affirmative action policies and equal protection often address other classifications such as gender, disabilities, and age. Traditionally, the basis of review for classifications has been a two-tiered system with deferential standard rational review for non-suspect classifications and a heightened standard for suspect classifications. The notion of heightened scrutiny is rooted in the famous *Carolene Products*[123] footnote four that carved special protection for "discrete and insular minorities," as such groups lacked meaningful political influence in the democratic system.[124] Since then, strict scrutiny has been applied in protecting individuals from "arbitrary and invidious" discrimination.[125]

However, consistently applying this framework has proved illusive. The Court has abandoned the "discrete and insular minorities" limitation, applying strict scrutiny to all racial classifications.[126] The Court rejected applying an intermediate level of scrutiny for racial classifications in *Bakke*,[127] yet in the context of gender classifications, the Court adopted intermediate scrutiny in *Craig v. Boren*.[128] Furthermore, with respect to remedies, the Court has suggested separate-but-equal facilities are a constitutional remedy as long as they pass intermediate scrutiny.[129] However, in the context of other classifications for arguably "discrete and

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123. 304 U.S. 144 (1938).

124. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

125. McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (involving a Florida statute which prevented interracial cohabitation between unmarried partners). In *McLaughlin*, the Court articulated:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose-in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.

Id.

126. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 296 (1978) ("There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not.").

127. *See id.* at 324–25 (Breyer, J., concurring in part and dissenting in part) (suggesting a standard that would allow race to be taken into account to remedy past prejudice when appropriate findings have been made).

128. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (adopting intermediate scrutiny for classifications distinguishing between males and females). Moreover, *Craig* and *Bakke* were decided only two years apart.

129. *See* United States v. Virginia, 518 U.S. 515, 517 (1996) (holding a male-only school unconstitutional and implanting a separate institution for women was not a sufficient remedy).

insular minorities" with histories of subordination, such as the mentally retarded,[130] the aged,[131] or the poor,[132] the Court has declined extending strict scrutiny analysis. Despite such categorical differences—not only the practical differences, but also their place in American history—the varying levels of scrutiny are perplexing, particularly considering the history of two-tiered system of review and the supposed deep commitment to *Carolene Products* in equal protection jurisprudence.[133]

V. SEARCHING FOR EQUALITY IN SOUTH AFRICA

A. *Constitutional Provisions and Analysis*

Forged as a way to heal a nation torn by the apartheid and to serve as the foundations of a new democracy, drafters of the South African Constitution sought to create a transformative document in light of the country's history.[134] Chapter 1, Section 1 of the South African Constitution states the core values under which all other provisions should be read: "(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms[;] (b) Non-racism and non-sexism[;] (c) Supremacy of the constitution and the rule of law."[135]

The structure of the Bill of Rights, found in Chapter Two, includes the all-important Equality Clause. The Constitution's Equality Clause provides a basic framework in considering equality:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative

130. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985) (declining to extend strict scrutiny for classifications of mentally retarded).

131. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 311–12 (1976) (holding age classifications receive rational basis review).

132. *See* James v. Valtierra, 402 U.S. 137, 141 (1971) (holding the poor as a class only receive rational basis review).

133. *See, e.g.*, Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002); Gerald Gunther, *The Supreme Court 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011), similarly questioning the suspect classification system.

134. *See* Sandra Liebenberg & Beth Goldblatt, *The Interrelationship Between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution*, 23 S. AFR. J. ON HUM. RTS. 335, 337 (2007) (describing South Africa's Constitution as being potentially transformative as to certain socio-economic rights). *See generally* DEVENISH, supra note 53 (discussing the Constitution's themes).

135. S. AFR. CONST., 1996, ch. 1, § 1(a)–(c).

and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[136]

Importantly, Section Nine not only includes a provision protecting against unfair discrimination but it also includes a provision that allows the government "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."[137] This embeds the Constitution with the notion that the government may take affirmative steps to aid certain groups of people to achieve equality, although it does not explicitly define those steps as affirmative action. This provision solidifies the Constitution's subscription to the substantive idea of equality, encouraging selectively aiding groups over others as consistent with promoting equality.

B. *Testing the Constitutional Limits*

i. Defining Equality under the Constitution

Soon after the Constitution's ratification, the Constitutional Court elaborated the meaning of equality. In *Prinsloo v. Van der Linde*,[138] the plaintiff brought an action for damages to farmlands allegedly caused by spread of a fire.[139] Prinsloo argued the presumption of negligence prescribed by the statute violated the Constitution's equality requirement.[140] The Constitutional Court held the Forest Act constitutional, ruling the

136. *Id.* ch. 2, § 9.

137. *Id.* § 9(2).

138. Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) (S. Afr.).

139. *Id.* at para. 1. The Forest Act of 1984 involved prevention and control of a forest and criminal penalties for people who failed to fulfill statutory obligations. *Id.* at 1.

140. *Id.* at paras. 10, 15.

presumption of negligence did not violate equality provisions.[141] Essentially, the Court determined "differentiation that is rationally related to [a] governmental purpose" is legitimate, but when it is arbitrary or based on favoritism, such purposes are illegitimate.[142] The Court also defined "unfair discrimination."[143] Based on South Africa's history, unequal treatment meant attaching attributes and characteristics to people that impaired their "fundamental dignity as human beings."[144]

Through *Prinsloo*, the South African Constitutional Court began shaping the equality doctrine in South Africa.[145] The Court crafted several interpretations which would shape equality doctrine analysis for years to come. First, the Court specifically gave power and credence to the Constitution's substantive equality doctrine by acknowledging some differen-

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141. *Id.* at para. 42.

142. Higginbotham, *supra* note 51, at 220 (noting this standard is similar to rational basis review in the United States, as it is very deferential to the government).

143. Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) at paras. 27–31 (S. Afr.).

144. *Id.* at para. 31 (S. Afr.).

145. *See* Harksen v. Lane 1997 (11) BCLR 1489 (CC) at para. 53 (S. Afr.) (enumerating the standards of inquiry necessary in assessing a constitutional attack). In *Harksen v. Lane*, the Constitutional Court outlined the nature of the equality inquiry but did not provide any substantial guidance on how to apply it:

> [I]t may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:
>
> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

Id.

tiation among people is constitutional.[146] The Court only required a rational relationship between the governmental means and ends to meet those needs to pass constitutional muster.[147] The Court reviewed the equality provision in the context of South African history in supporting the substantive equality concept and justifying acceptable differences in outcomes.[148]

Nevertheless, under the *Harksen* formulation, even when a statute passes the rationality test, a showing of unfair discrimination violates the Constitution.[149] This interpretation of the Equality Clause effectively foreclosed any possibility of future courts interpreting the clause in a formalistic way, ensuring literal equal treatment and protection as the baseline guarantee in the Constitution. The Court defined "unfair discrimination" as unequal treatment that impaired "fundamental dignity as human beings," further solidifying the concept of substantive equality.[150] More importantly, the Court demonstrated willingness to interpret the nature of rights broadly, but did not contemplate extending rights without limits or context.[151]

ii. Grappling with Differential Treatment

While the Constitutional Court initially defined unfair discrimination and equality in *Prinsloo*, the Court only offered general reasoning, providing few bright lines for difficult cases. This opportunity soon came in *President v. Hugo*.[152] Nelson Mandela granted presidential pardon to certain prisoners including those who were mothers of children under the age of twelve.[153] Hugo claimed discrimination on the basis of sex in violation of Section 8(2).[154] Although the Constitutional Court said this dif-

146. *See* Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) at para. 26 (S. Afr.) (accepting some differentiations between people are necessary in modern society).

147. Id. at para. 53.

148. *Id.* at para. 31. This was not the first time the Court engaged in this historical analysis. In *Makwanyane*, the Constitutional Court further supported its opinion by saying that "rights" were considered in light of the historical context of the Constitution's drafting. *See* State v. Makwanyane 1995 (6) BCLR 665 (CC) at para. 10 (S. Afr.) ("[T]he Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution . . . .").

149. Harksen v. Lane 1997 (11) BCLR 1489 (CC) at para. 53 (S. Afr.).

150. Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) at para. 31 (S. Afr.).

151. *See* Higginbotham, *supra* note 51, at 221 (viewing the Constitutional Court as broadly defining constitutional rights).

152. President of the Republic of S. Africa v. Hugo 1997 (6) BCLR 708 (CC) (S. Afr.).

153. *Id.* at para. 2.

154. *Id.* at para. 3. The Interim Constitution of 1993, in effect at the time the suit was initiated, addressed issues of equality and discrimination in Section 8 rather than Section 9 as in the current Constitution of the Republic of South Africa of 1996. However, the con-

ferential treatment was suspect, Justice Goldstone found the pardon constitutional, relying on the public interest to act mercifully, the impracticality of pardoning all men, and the special role of mothers.[155] According to Justice Goldstone, the "concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved."[156] The Court found this type of differential treatment did not constitute harm to personal dignity and the pardons were constitutional.[157]

By focusing on the "dignity" of each human being, the Court's reasoning was consistent with both the substantive equality conception in the Constitution and the meaning of equality in *Prinsloo*. However, the opinion did not answer what dignity means or what would harm dignity.[158] Declining to provide a general rule, the Court concluded denying a father an opportunity which a mother received because of the "special role" of mothers, did not violate equality under the Constitution.[159]

City Council of Pretoria v. Walker[160] remains perhaps the most doctrinally defining case on the subject. Walker, a resident of the formerly white suburb of Pretoria, challenged the constitutionality of a council's assigning different utilities fees for different municipalities.[161] He refused to pay a metered rate, contending the rate promulgated differential treatment and infringed on his protection from unfair discrimination.[162]

In a lengthy opinion, the Constitutional Court found it was unconstitutional for the Council to continue to implement an incoherent system of differential rates based on demographics that had little rational connection to the rates.[163] The Court provided greater insight into what consti-

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tent of the sections is substantively the same. *See* S. AFR. CONST., 1996, § 9 (addressing constitutional equality standards).

155. President of the Republic of S. Africa v. Hugo 1997 (6) BCLR 708 (CC) at paras. 45–46 (S. Afr.).

156. *Id.* at para. 41.

157. *Id.* at paras. 47, 52.

158. *See* Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1404 (2004) (discussing *Hugo's* implications).

159. President of the Republic of S. Africa v. Hugo 1997 (6) BCLR 708 (CC) at paras. 47, 52 (S. Afr.). *Cf.* Nyugen v. INS, 533 U.S. 53, 60–67 (2001) (utilizing similar reasoning).

160. City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) (S. Afr.).

161. *Id.* at para. 1.

162. *Id.* at paras. 1, 6.

163. *Id.* at para. 81. The Council charged Walker for water and electricity based on a consumption tariff but charged residents of other, predominantly black, areas based on a flat fee. *Id.* at para. 21. The Council then attempted to redress disparities with formerly white areas and upgraded services, and then charged flat rate until meters installed. *Id.*

tutes harm to one's dignity—no member of a racial group should be caused to feel they are undeserving of equal "concern, respect and consideration."[164] Writing for the majority, Justice Langa opined, "The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity."[165] Although the Council's actions relied on geography in drawing lines for the different rates, socioeconomic inequity between racial groups was true reason behind the difference in metered and non-metered rates.[166]

The Court determined "public policies that treat members of [a] group identifiable by color with less sympathy and solicitude than . . . other . . . groups" would potentially affront someone's dignity.[167] The case presented an interesting conceptual maneuver—while race and other classifications were deemed important, the analysis of equality turned on whether the person was treated with dignity with respect to the specific classification. Moreover, the Constitutional Court noted the inquiry focused not only on actual harm to personal dignity, but also on the potential for such harm.[168]

Justice Sachs dissented, arguing Walker was not discriminated against because of his race.[169] According to Justice Sachs, the Pretoria City Council asked Walker to pay exactly what he was always obligated to pay, and the effects of disparate impact were not enough to amount to actual discrimination.[170] While Justice Sachs disagreed with the *Walker* majority's specific analysis, he still subscribed to a sense of substantive equality. Justice Sachs' definition of equality is "something to be achieved through the dismantling of structures and practices which unfairly obstruct or un-

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164. *Id.* at para. 81 (internal quotation marks omitted).

165. *Id.* According to Professor Michelman, this was because whites were now the minority in South Africa and there were still remnants of issues of apartheid in the background context. Michelman, *supra* note 158, at 1407.

166. *See* Michelman, *supra* note 158, at 1407 (recognizing the influence of socioeconomic factors on judges' decisions).

167. *Id.* at 1410.

168. *See generally* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at paras. 30, 35 (S. Afr.) (holding the Constitution prohibits unfair discrimination, whether direct or indirect).

169. City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 105 (S. Afr.).

170. *Id.* at para. 103; *see* Michelman, *supra* note 158, at 1412 (noting Justice Sachs' dissent has flavors of the reasoning used in *Washington v. Davis*, a United States case in which the "Supreme Court rejected strict scrutiny of alleged de facto discrimination, expressing a concern that treating de facto racially differentiating laws as constitutionally suspect would bring too many ordinary, useful laws under suspicion.").

duly attenuate its enjoyment."[171] While he supported a substantive equality definition, violations of this substantive equality must be "overt or direct differentiation on . . . the . . . grounds . . . [of] sex, or where patterns of disadvantage based on such grounds are being reinforced without express reference but as a matter of reality."[172] Although Justice Sachs' test offers more clarity, the Constitution clearly states the government may not discriminate "directly or indirectly," indicating requisite inquiry beyond only overt discrimination.

The notion of fairness is central throughout the doctrine. While the South African Constitution does not outlaw all discrimination, it does outlaw *unfair* discrimination.[173] Therefore, the criterion distinguishing between prohibited and permissible discrimination under the Constitution is unfairness.[174] Furthermore, the Constitution defines unfairness more broadly than the typical theoretical conception of injustice or differential treatment.[175] The Constitution contemplates a variety of factors, including traditional suspect classifications such as race and sex, "immutable characteristics determined solely by the accident of birth, or a class saddled with disabilities, or subjected to a history of unequal treatment, etc." in South Africa.[176] Thus, the notion of unfairness attacks structural inequalities existing, or once existed, in South Africa. According to the South African Constitution, notions of substantive equality and the fundamental dignity of human beings are violated when discrimination is determined to be unfair.[177]

Moreover, the Constitution considers more than the neutral criterion of the existence of a classification. Importantly, not all classifications are *prima facie* invalid, nor do they necessarily require higher levels of scrutiny.[178] Rather the substance of the type of differentiation is important, allowing analogous types of categorization to be found unfair.[179] Under this constitution, the most dispositive factor for determining whether unfair discrimination exists is the impairment of human dignity.[180] The ultimate requirement, then, is the impairment of human dignity, because

171. City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 109 (S. Afr.).

172. *Id.*

173. S. AFR. CONST., 1996, ch. 2, § 9(3)–(4).

174. *Id.* § 9(5).

175. City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 35 (S. Afr.).

176. S. AFR. CONST., 1996 ch. 2 § 9(3); *see* ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW: ANALYSIS AND CASES 266 (2002) (describing in greater detail the various categories protected under the South Africa Constitution).

177. *Id.* at 269.

178. *Id.* at 267–68.

179. *Id.* at 267.

180. *Id.* at 268.

even in the face of different kinds of classifications, there may be no unfair discrimination. While there is a strong presumption in favor of unfairness within a classification, such presumption can be rebutted with a showing of no violation of human dignity.[181]

C. *Affirmative Action and Substantive Equality*

The first case to specifically address constitutional issues of equality, unfair discrimination, and restitution measures in the application of affirmative action policies was *Minister of Finance v. Van Heerden*.[182] The case involved complex rules of the Political Office-Bearer Pension Fund (the Fund), which guarantees full pensions for members of the ruling party whether or not they were re-elected, because they were members of the first democratically elected Parliament of 1994.[183] The pension was not based on employer or employee contributions, so the pension did not depend on whether a member returned to office or the member's degree of contributions to the Fund.[184] Opponents charged the Fund violated the Constitution's Equality Clause because there was no rational reason for the differentiation, which was based solely on race and class.

The *Van Heerden* Court laid out the relationship between Sections 9(1) and 9(2) of the Constitution concerning equality and affirmative action. First, the Court reiterated the overall purpose of the Constitution, the objective of substantive equality rights embedded into the constitutional principles, and the Court's contextual approach to resolving issues of fairness and inequality.[185] The majority wrote:

> This substantive notion of equality [recognizes] that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to [scrutinize] in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of

181. *Id.* at 269; *see also* Hoffman v. S. African Airways 2000 (2) SA 628 (CC) at para. 27 (S. Afr.) ("At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.").

182. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 2 (S. Afr.).

183. *Id.* at para. 4.

184. *Id.*

185. *Id.* at paras. 22–26.

> the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.[186]

The Court looked at the structure of the Constitution in reconciling Sections 9(1) and 9(2), stating, "A comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of [S]ection 9."[187] The Court clearly recognized equality under the Constitution must contemplate affirmative measures for addressing societal inequalities:

> [O]ur Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or [institutionalized] under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.[188]

The Court's approach sought harmony between affirmative action and equality. The majority recognized affirmative action as a tool to achieve equality.[189] However, the Constitutional Court implemented a limiting principle by recognizing certain affirmative action efforts may unfairly discriminate against others.[190] In so doing, the Court explicitly acknowledged these affirmative measures require a limit, or the very measures aimed at achieving equality could perpetuate or create new inequalities. Therefore, the differential treatment must have a rational connection to a government purpose. To the Court, a stronger connection is unnecessary because the nature of the differential treatment is to redress inequalities in society.[191]

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186. *Id.* at para. 6.

187. *Id.* at para. 2.

188. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 2 (S. Afr.).

189. *Id.* at para. 31.

190. *Id.* at para. 12. The opinion notes the High Court held "affirmative actions" were discriminatory, but the Constitutional Court reversed this idea, holding affirmative actions are consistent with the Constitution and an important part of equality protection envisioned by Section 9 of the Constitution. *Id.* The Constitutional Court also noted affirmative action cannot be presumed to be unfairly discriminatory. *Id.* at para. 33. "[D]ifferentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2)." *Id.* at para. 32.

191. *See* Liebenberg & Goldblatt, *supra* note 134, at 349 (arguing the Court should "develop a less deferential approach to Section 9(2) case . . . [and that] socio-economic

Writing for the majority, Justice Mosoneke identified the Section 9(2) analysis as the most important analysis for affirmative action and differential treatment.[192] If the measure at issue passes muster under Section 9(2), then the measure is not considered presumptively unfair.[193] Justice Mosoneke provided a three-part test to determine whether an affirmative action measure falls within Section 9(2):

> The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.[194]

While the Court did not assess the weight of these three prongs, it did require all three parts be met for the measure to be constitutional.[195] Additionally, the majority asserted the underlying consideration in the anal-

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rights should be an important factor in the level of scrutiny . . ."). Some academics argue the deferential standard of Section 9(2) under *Van Heerden* is problematic and prefer the more stringent standard of fairness under the Section 9(3) discrimination test. *Id.* This standard set out by the court has since received criticism in that it fails to protect the strict standard of fairness set out by Section 9(3). *See id.* (arguing this deferential standard was problematic in contrast to the more stringent standard of fairness under the discrimination test of Section 9(3)); *see also* S. AFR. CONST., 1996, ch. 2, § 9(3) (setting forth the protections against discrimination in South Africa).

192. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 36 (S. Afr.) (choosing not to apply the limitations clause under Section 36 of the Constitution, but rather Section 9(2)); *see* S. AFR. CONST., 1996, ch. 2, § 36 (providing the exact requirements for the limitation of rights). The formal analysis under Section 36 includes:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Id.

193. *Id.* at para. 36.

194. *Id.* at para. 37.

195. *See id.* at paras. 36–37 (explaining a measure that properly satisfies Section 9(2) does not constitute unfair discrimination and providing a threefold test for such compliance).

ysis of all these constitutional provisions was the dignity of the person.[196] Without much elaboration, Justice Mosoneke apparently adopted a concept of dignity similar to which the *Walker* majority proscribed—negative differential treatment based on certain characteristics that do not give the equal treatment to which every person is entitled. Negative treatment violating personal dignity, therefore, would only increase vulnerability and marginalization or aggravate past unfair exclusion or discrimination.

D. *Unanswered Questions Under the South African Constitution*

A clear doctrinal preference for substantive equality has emerged during the Constitution's short history. As seen in *Walker* and *Van Heerden*, the Court has taken a deferential stance toward government actions differentiating between people and groups. Indeed, Justice Sachs and Justice Ngcobo, through their respective dissents, continue to raise questions about the limits of the equality doctrine remain.[197]

i. Individualized Focus

The Equality Clause under Section 9(2) requires an individualized inquiry focusing on individual human dignity and unfair discrimination. Determining whether dignity has been deprived under Section 9(2) is fact-driven and context specific. The test focuses on individual dignity, which although it has a universal definition, has unique application to each situation in determining if dignity has been deprived.[198] The Court

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196. *Id.* at para. 14 ("[I]t is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be [recognized] and treated as a human being of equal worth and dignity."); *see* MOTALA & RAMAPHOSA, *supra* note 176, at 224 ("How do we begin to define human dignity? For Ackerman J, the starting point to human dignity is the individual, and the need to respect the 'uniqueness' of each individual.").

197. *See generally* Motala v. Univ. of Natal 1995 (3) BCLR 374 (D) (S. Afr.) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (bringing forth sensitive issues regarding race and affirmative action regarding admissions policies of a medical school that gave an advantage to black students over Indian students).

198. MOTALA & RAMAPHOSA, *supra* note 176, at 224 ("Respect for human dignity means that the exercise of power, particularly governmental power, must be based on the respect of human beings. The legality of government conduct is consistently evaluated in terms of whether human dignity is violated."). "Whether human dignity is impaired, resulting in a violation of equality also involves a normative judgment. The case-by-case analysis, though inevitable, presents great challenges to a litigant who is trying to establish that his or her dignity is affected by the classification." *Id.* at 280. *See generally* President of the Republic of S. Afr. v. Hugo 1997 (6) BCLR 708 (CC) at paras. 51–52 (S. Afr.) (applying the definition of human dignity and finding that a father who was not allowed to be released from prison was not deprived of his dignity). Although *Hugo* states that "[e]quality means that . . . society cannot tolerate legislative distinctions that . . . offend fundamental human dignity," developing a concept of human dignity that affords equal treatment based on equal worth and freedom cannot be achieved "by insisting upon identi-

has explained the Constitution's delineation of dignity under Section 10 as a founding value of the Constitution writing, "[R]ecognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution."[199] Whether a person has been treated as "worthy of respect and concern" is fundamental to "dignity" analysis.[200] According to the Constitutional Court, the notion of human dignity speaks to the need to "respect the 'uniqueness' of each individual."[201] In fact, Justice Chaskalson specifically identified dignity as synonymous with personal freedom.[202]

However, due to the complex structural component of racial inequality, the test also considers whether the measure is "designed to protect or advance . . . persons or categories of persons" against structures of inequality.[203] Therefore, the notion of affirmative action under Section 9(2) of the Constitution seeks to balance individual equality against the backdrop of structural inequality in the country, considering history and societal inequality across different categories of people.[204] Moreover, the third requirement that "the measure promotes the achievement of equality" seeks further balancing of individual equality with overall structural

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cal treatment in all circumstances." *Id.* at para. 41. Therefore, each case must be reviewed individually to determine the impact of a discriminatory action upon each person, because "[a] classification which is unfair in one context may not necessarily be unfair in a different context." *Id.*

199. State v. Makwanyane 1995 (3) SA 391 (CC) at para. 329 (S. Afr.).

200. *Id.* at paras. 328–29 ("[Recognizing] a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.").

201. MOTALA & RAMAPHOSA, *supra* note 176, at 224 (2002); *see* Ferreira v. Levin 1996 (2) SA 621 (CC) at para. 49 (S. Afr.) ("Part of the dignity of every human being is the fact and awareness of this uniqueness.").

202. Ferreira v. Levin 1996 (2) SA 621 (CC) at para. 49 (S. Afr.) ("Freedom and dignity are inseparably linked.").

203. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 37 (S. Afr.); *see* Liebenberg & Goldblatt, *supra* note 134, at 342–43 (describing the history of structural inequality in South Africa and the need to address it with substantive equality).

204. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 28 (S. Afr.) (stating the South Africa Constitution allows the use of restitutionary measures or "affirmative action" in order to advance equality); *see* Liebenberg & Goldblatt, *supra* note 134, at 342–43, 350 (describing the history of structural inequality in South Africa and the use of socio-economic jurisprudence to develop substantive equality).

equality.[205] In this way, the test supports a broader notion of substantive equality.[206]

As previously indicated, members of the Constitutional Court have since clarified the balancing of these three prongs and specified when individual inequality may trump structural inequality.[207] In *Van Heerden*, the majority considered a claim of race discrimination by applying the framework of Section 9(2).[208] Two concurring opinions, on the other hand, arrived at the same conclusion of constitutionality, but under Section 9(3), which outlines the analysis for unfair discrimination.[209] In his separate concurrence, Justice Sachs acknowledged both approaches had legitimate justifications but could be reconciled:

> I would go further and say that the core constitutional vision that underlies their separate judgments suggests that the technical frontier that divides them should be removed, allowing their overlap and commonalities to be revealed rather than to be obscured. If this is done, as I believe the Constitution requires us to do, then the apparent paradox of endorsing seemingly contradictory judgments is dissolved. Thus, I endorse the essential rationale of all the judgments, and explain why I believe that the Constitution obliges us to join together what the judgments put asunder.[210]

Justice Sachs' concurrence identifies the overall common commitment to the core principles of substantive equality and demonstrates even

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205. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 37 (S. Afr.); *see also* Liebenberg & Goldblatt, *supra* note 134, at 343 (arguing for a meaning of dignity that is not so individualistic and personality-linked but more expansive in that it seeks to "redress material and systemic forms of disadvantage"). Such an approach defines discrimination not just as stereotyping, but also encompasses the lack of socio-economic rights, such as a lack of access to meaningful education and adequate housing or any way ("disadvantaged groups are denied the social support necessary to survive and participate in society"). *Id.*

206. *See* Liebenberg & Goldblatt, *supra* note 134, at 342–43 ("Us[ing] the value of dignity within the unfair discrimination enquiry to show material impact on the . . . group as well as the harm to the group . . . alongside the value of equality, is capable of being . . . developed as an important interpretive vehicle for a substantive understanding of equality.").

207. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 37 (S. Afr.) (providing a three-part test for determining whether a measure to promote equality falls under Section 9(2)); President of the Republic of S. Afr. v. Hugo 1997 (6) BCLR 708 (CC) at para. 41 (S. Afr.) (discussing the need to examine the inequality an individual faces on a case-by-case basis in order to promote equality and human dignity).

208. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 36 (S. Afr.) (establishing Section 9(2) as the appropriate analysis for determining whether a means to right inequality is "unfair discrimination").

209. *Id.* at para. 97.

210. *Id.* at para. 135.

though the justices endorse different rationales, they still have the same underlying vision of the Constitution. Nevertheless, given disagreement in *Van Heerden* over the correct analysis, it remains unclear when this notion of substantive equality can outweigh individual formal equality.

In limited cases, courts have allowed evidence of past discrimination and structural inequality to trump individual unequal treatment.[211] In *Motala v. University of Natal*,[212] a lower court determined that preferential treatment for black students and not for Indian students was constitutional under the affirmative action doctrine.[213] However, in *Du Preez v. Minister of Justice and Constitutional Development*,[214] the equity court disallowed a policy expressly preferring minorities.[215] Therefore, it appears although there is a discriminatory threshold, the Constitutional Court will sometimes allow structural inequality to play a role in determining the constitutionality of an affirmative action policy.

ii. Defining Dignity and Harm to Personal Dignity

As previously discussed, the Constitutional Court has struggled in defining the relationship between dignity and equality.[216] Despite agreeing on the basic tenet that dignity is an important element under the South African Constitution, justices disagree on the precise definition of dignity and what will constitute violations of dignity.[217] In *Harksen*, five justices

211. *See* Liebenberg & Goldblatt, *supra* note 134, at 343–44 (asserting a small number of cases offer a broader understanding of equality that examines "the value of dignity within the unfair discrimination enquiry" by showing the impact and harm on the group, rather than just the individual); *see also* MOTALA & RAMAPHOSA, *supra* note 176, at 253 (stating "[t]he Court's treatment of equality is one of the more complex areas of the law" and seeking to provide a better understanding of such).

212. Motala v. Univ. of Natal 1995 (3) BCLR 374 (D) (S. Afr.) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

213. *Id.* at paras. 30–31.

214. Du Preez v. Minister of Justice & Constitutional Dev. 2006 (1) SA 1 (ECP) (S. Afr.) (finding the discrimination involved was unfair).

215. *Id.* at para. 44 (S. Afr.) (finding the discrimination involved was unfair).

216. *See* MOTALA & RAMAPHOSA, *supra* note 176, at 280 explaining a determination of when dignity has been impaired to the extent that it violates equity constitutes a normative judgment).

217. *See* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 81 (S. Afr.) (showing disagreement surrounding the definition of dignity under the interim constitution); Harksen v. Lane 1997 (11) BCLR 1489 (CC) at para. 50 (S. Afr.) (recognizing "[d]ignity [is] a notoriously elusive concept"); President of the Republic of S. Afr. v. Hugo 1997 (6) BCLR 708 (CC) at para. 41 (S. Afr.) (stating a broader concept of unfair discrimination needs to be developed in order to truly promote human dignity); *see also* MOTALA & RAMAPHOSA, *supra* note 176, at 280 (describing how different justices have defined dignity and that determining whether human dignity has been impaired requires justices to make normative judgments).

argued there was no violation of dignity because there wasn't past discrimination.[218] Scholars Motala and Ramaphosa argue because human dignity involves individual and personal characteristics, the proper inquiry is inherently subjective.[219] Because determining violations of dignity requires normative judgments, skeptics question whether the current formulation of substantive equality has overly relied on justices' subjective intuitions rather than objective factors.[220]

Additionally, scholars have questioned whether substantive equality should be so focused on individual dignity. Two of the most vocal critics, Professors Albertyn and Goldblatt, argue equality should be independent and separate from dignity.[221] Instead, Albertyn and Goldblatt argue that equality means allowing each person "to develop to his or her full human potential and to forge . . . relationships in the home, the community, the workplace and society as a whole."[222] "The laws, policies and practices of the state and society should promote" that conception of equality.[223] Albertyn and Goldblatt assert that there should be more emphasis placed on systemic and group discrimination when defining and developing equality.[224] Simplifying the right of equality to mean dignity diminishes the importance of the "disadvantage, vulnerability, and harm" associated with group-based prejudice.[225] This debate has also continued on the Constitutional Court between Justice O'Regan, who places more emphasis on group disadvantage and individuals' relationship to their group, and Justice Goldstone, who emphasizes individuals' rights and dignity.[226]

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218. MOTALA & RAMAPHOSA, *supra* note 176, at 280 (examining the *Harksen* case).

> [I]n *Harksen*, five of the justices (namely Chaskalson P, Langa DP, Goldstone, Ackermann and Kriegler JJ) concluded that the discrimination against solvent spouses was not unfair, based on their conclusion that neither did the solvent spouses as a group suffer past discrimination, nor was their dignity affected by the statute.

Id.; *see also* Harksen v. Lane 1997 (11) BCLR 1489 (CC) at para. 67 (S. Afr.) (holding the statute in question did not rise to the level of unfair discrimination).

219. MOTALA & RAMAPHOSA, *supra* note 176, at 279.

220. *See id.* (recognizing the "Court considers three primary factors to determine whether the discrimination is unfair," but professing concern that "it is not always clear which of the three factors the Court is going to give greater weight to in any specific challenge" and arguing it is difficult "to evaluate the prejudices that influence the individual justices in giving these factors expression.").

221. Cathi Albertyn & Beth Goldbatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. ON HUM. RTS 248, 254 (1998) (arguing substantive equality should be "primarily informed by the value of equality," not dignity).

222. *Id.*

223. *Id.*

224. *Id.* at 256–57.

225. *Id.* at 258.

226. *Id.*

Although dignity is firmly entrenched in the substantive equality doctrine, the continued debate over its extent and specific meaning seems to create some uncertainty.[227]

iii. A Sunset to South African Affirmative Action?

The South African Constitution's framers were surely cognizant of South Africa's history,[228] but it is unclear how the substantive equality doctrine reflects the nation's history and equality's role in shaping a future society. By considering structural inequality, the substantive equality doctrine implicitly envisages the future of different groups of people in a pluralistic society. However, the doctrine's long-term, future trajectory remains unclear.

U.S. Supreme Court justices have openly envisioned and contemplated a world in which racial divisions are no longer a detrimental—a future in which affirmative action is no longer necessary.[229] Conversely, the South African Constitutional Court has never indicated a similar sentiment. Under the current doctrine, however, a possible end date for affirmative action could be contemplated, when structural inequalities and programs denying dignity to people no longer exist, as those criteria are the major factors when considering the constitutionality of affirmative action programs.[230]

Nevertheless, recent South African affirmative action policies may be inching closer to the aforementioned tipping point. In 2012, the Labour Appeals Court in *South African Police Services v. Barnard*[231]—a case examining affirmative action quotas for an administrative post in the South

227. Albertyn & Goldbatt, *supra* note 221, at 259–260 (arguing to resolve this uncertainty the Court should "give a specific and transformative content to the values of equality, dignity and freedom" and also "centre the value of equality within the equality right," which would "in turn, require[ ] a restatement of the equality test").

228. *See generally* Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) at para. 21 (S. Afr.) ("The Court [emphasized] that section 8 is the product of our own particular history . . . [thus] the interpretation of section 8 must be based on its own language and that our history was particularly relevant to the concept of equality.").

229. Grutter v. Bollinger, 539 U.S. 306, 346 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

230. *See* S. AFR. CONST., 1996, ch. 2, § 9(2) ("Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."); *see also* Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 31 (S. Afr.) ("Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or [institutionalized] under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.").

231. S. Afr. Police Servs. v. Barnard 2013 (3) BCLR 320 (LAC) (S. Afr.).

African Police Service—split over the constitutionality of rejecting a well-qualified, white female candidate in favor of opening the position for future qualified black candidates.[232] Similarly, in *Du Preez v. Minister of Justice and Constitutional Development* the Equity Court held a hiring policy for court magistrates allocating points for members of certain minority groups, such as women and blacks, was an absolute barrier for other individuals violating the Constitution.[233] Nevertheless, how the Constitutional Court would rule on such an issue remains unclear. Until the Constitutional Court explicitly addresses the likelihood of a sunset provision ending the use of affirmative action policies or a more clearly defined limiting principle, the limits and the ultimate goals of affirmative action under the South African Constitution will remain uncertain.

VI. SUBSTANTIVE EQUALITY IN THE UNITED STATES?

To be sure, South Africa's emerging equality doctrine cannot and nor should not be directly transplanted to the United States' equal protection doctrine. Immense differences between the two countries' legal and socioeconomic histories complicate simplistically placing South Africa's substantive equality doctrine into the United States' Fourteenth Amendment interpretation, particularly for an issue as sensitive as affirmative action.[234] Moreover, shifting toward a substantive equality doctrine will not necessarily resolve all the issues regarding race, affirmative action policy implementation, or societal inequalities. Indeed, South Africa similarly grapples with drawing lines in tough cases.[235] However, substantive equality offers certain doctrinal advantages which, if applied to the United States' equality doctrine, resolve some of the tensions and difficulties plaguing affirmative action and the equal protection doctrine.

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232. *Id.* at paras. 4–6. As an employment case, the case was brought under the Employment Equity Act, but the constitutional standards remain the same. *Id.* at para. 32.

233. Du Preez v. Minister of Justice & Constitutional Dev. 2006 (1) SA 1 (ECP) at para. 39 (S. Afr.). Although the case was brought under the Employment Equality Act, the constitutional principles are consistent. *Id.*

234. *See* Higginbotham, *supra* note 51, at 189 ("Although there are similarities in the racial histories of South Africa and the United States . . . [t]here are vast contrasts in the two countries' populations, demographics, economics, religions, cultures, and governments."). Section VII further discusses these challenges.

235. *See* S. Afr. Police Servs. v. Barnard 2013 (3) BCLR 320 (LAC) at para. 42 (S. Afr.) (holding the police discriminated against a white female police officer by promoting a lesser qualified black police officer from another district, but this discrimination was justified by the Employment Equity Plan).

A. *Moving Beyond the Antisubordination–Anticlassification Division*

South Africa's substantive equality doctrine does not suffer from the antisubordination[236]–anticlassification[237] divide to the same degree as does the U.S. Equal Protection doctrine.[238] Adoption of a similar substantive equality doctrine would resolve formalists' concerns over using race as well as the antisubordinationists' concerns of redressing inequalities.[239]

Currently, presumptively unconstitutional classifications such as race do not consider the fairness of the classification.[240] Rather, the inquiry turns on whether the government justification is compelling and necessary for the use of the classification.[241] As a result of the classification's importance, the debate has focused on the presumptions of the classification.[242] The subordination and antisubordination debate centers on whether race *per se* should be a suspect classification, or whether a past history of subordination should be requisite in deeming a classification as suspect.

A departure from the United States' current pure classification approach would integrate consideration of fairness into each case, regardless of the type of classification.[243] Acknowledging equality under the South African Constitution, the South African Equality Clause derives

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236. The antisubordination principle embraces the concept that "it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups." Siegel, *supra* note 77, at 1472–73.

237. The constitutional principle established by *Brown* declaring "the government may not classify on the basis of race." Siegel, *supra* note 77, at 1470.

238. "American equal protection law has expressed anticlassification, rather than antisubordination." *Id.* at 1473.

239. *Compare id.* at 1476–78 (explaining American courts often struggle over which principle to apply—antisubordination or anticlassification) *with* Michelman, *supra* note 158 (explaining the determining factor in South Africa to determine if the discrimination is unfair is the impact the discrimination had on the rights of dignity or equality of those affected).

240. The anticlassification principle seeks to "protect individuals against all forms of classification." Siegel, *supra* note 77, at 1473. This "commitment to protect individuals rather than groups . . . explains why [U.S.] constitutional law does not treat as presumptively discriminatory facially neutral practices that have a disparate impact on historically excluded groups." *Id.*

241. Michelman, *supra* note 158, at 1392 n.70 ("The [U.S.] Supreme Court noted in *Davis* . . . that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another . . . .").

242. Siegel, *supra* note 77, at 1476–78 (explaining the U.S. Supreme Court "embraced the doctrinal presumption that racial classification was unconstitutional").

243. *See* Michelman, *supra* note 158, at 1418 ("The South Africans are well on the way to producing a doctrine that flies universalist colors-one rule, the same for everyone-while replicating the very same 'benign'/'invidious' distinction that American doctrine to date has found unassimilable.").

from a completely different premise than the U.S. Constitution.[244] The South African Equality Clause acknowledges that the guarantee of equal enjoyment of rights does not necessarily translate into equal treatment for every citizen. As a result, the South African substantive equality doctrine does not conceptualize equality as a zero-sum game in which different treatment automatically presumes unequal treatment.[245] Rather, the South African equality doctrine explicitly encompasses remedies for past subordination while ostensibly preventing future subordination.[246] In so doing, the equality doctrine under the South African Constitution avoids the dilemma of addressing past subordination of groups to the exclusion of addressing suspect classifications.

Unfair discrimination is the object prohibited by the South African Constitution.[247] The South African approach still considers classifications as a part of the equality analysis, as certain classifications create the presumption of unfairness,[248] but unlike equal protection analysis in U.S. jurisprudence, the entire analysis does hinge on the existence of racial classification or the level of scrutiny imposed by courts.[249] In short, the

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244. *See generally* President of the Republic of S. Afr. v. Hugo 1997 (6) BCLR 708 (CC) at paras. 51–52 (applying the definition of human dignity and finding that a father who was not allowed to be released from prison was not deprived of his dignity). Although *Hugo* states that "[e]quality means that . . . society cannot tolerate legislative distinctions . . . that . . . offend fundamental human dignity," developing a concept of human dignity that affords equal treatment based on equal worth and freedom cannot be achieved "by insisting upon identical treatment in all circumstances." *Id.* at para. 41. Therefore, each case must be reviewed individually to determine the impact of a discriminatory action upon each person, because "[a] classification which is unfair in one context may not necessarily be unfair in a different context." *Id.*

245. *See* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at paras. 18–19 (S. Afr.) ("What is clear is that not all differentiation amounts to discrimination as envisaged in section 8.").

246. *See* S. AFR. CONST., 1996, ch. 2, § 9 (emphasizing the importance of equality and the need to protect the rights of those "persons . . . disadvantaged by unfair discrimination"); *see also* Dennis Davis, *Transformation: The Constitutional Promise and Reality*, 26 S. AFR. J. ON HUM. RTS. 85, 85–86 (2010) (discussing the South African Constitution in the context of the country's apartheid period and the Constitution's role as a "bridge" to a democratic future).

247. S. AFR. CONST., 1996, ch. 2, § 9.

248. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 84 (S. Afr.) ("[I]f it were not for section 9(2), a restitutionary measure would invariably attract a presumption of unfairness."). However, the South African Constitution "allows for measures to be enacted which target whole categories of persons" or classify a person based on their membership of a group. *Id.* at para. 85.

249. *See* Grutter v. Bollinger, 539 U.S. 306, 353 (2003) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 297 (1978)

fairness analysis in South African jurisprudence is a hybrid anticlassification and antisubordination test, incorporating elements of suspect classifications and past discrimination. While the South African Constitution provides some presumptively prohibited categories, the analysis necessarily requires further inquiry into whether, in context, considering past history and social standing, along with structural inequalities surrounding the discriminatory measure, the categorization rises to the level of unfairness.[250] Unfairness ultimately relies on the fundamental dignity of the individual affected by the form of discrimination.[251] As previously discussed, the Constitutional Court declines questioning every single piece of legislation, but rather seeks to contextualize discrimination to gauge whether a violation of the Constitution exists.[252]

The substantive equality doctrine acknowledges that at some point, differential treatment can infringe on equality rights—it thus offers an objective test to appease formalists demanding neutral principles.[253] The South African equality doctrine strikes such a balance by requiring specific inquiry into harm to personal dignity. The equality doctrine requires all people to be treated with dignity, preventing groups and individuals

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("Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny.").

250. *See* Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 36 (S. Afr.) (establishing Section 9(2) as the appropriate analysis for determining whether a measure to right inequality is "unfair discrimination"); *see also* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 109 (S. Afr.) (discussing violations of substantive equality must be "overt or direct differentiation on . . . the . . . grounds . . . [of] sex, or where patterns of disadvantage based on such grounds are being reinforced without express reference but as a matter of reality"); Harksen v. Lane 1997 (11) BCLR 1489 (CC) at para. 45 (S. Afr.) ("The determination as to whether differentiation amounts to unfair discrimination under section 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts to 'unfair discrimination.' It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8(2), which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.").

251. MOTALA & RAMAPHOSA, *supra* note 176, at 259 ("The mere fact that a law treats different people in dissimilar ways is not necessarily discriminatory. Legislation that differentiates between people in a way which impairs their fundamental dignity as human being *is* discriminatory.").

252. *Id.* at 258–59.

253. *See* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 32 (S. Afr.) ("The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race.").

from being stripped of all their rights and equal protection.[254] The Constitutional Court has characterized dignity as a founding value that all "human beings are entitled to be treated as worthy of respect and concern."[255] This standard allows greater equality jurisprudence focus upon whether or not a person or group is treated in a particular manner without justification.[256]

Anticlassificationists—who are concerned about the differentiation between "benign"[257] and "invidious classifications"[258]—can look to the so-called "harm to personal dignity" standard in crafting a test for determining individual harm.[259] By not relying on classifications as indicators of violations of equal protection, the South African substantive equality doctrine has flexibility to focus on actual inequalities independent of classifications, thereby avoiding tension between anti-subordination and anti-classification camps.[260]

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254. State v. Makwanyane 1995 (3) SA 391 (CC) at para. 328 (S. Afr.) ("The right to dignity is enshrined in our Constitution.").

255. *Id.*

> The Constitutional Court considers human dignity to lie at the core of the prohibition against unfair discrimination. In *Prinsloo v. Van der Linde* the Constitutional Court held that the infringement of human dignity by virtue of unequal treatment amounts to *prima facie* unfair discrimination for the purposes of the right to equality.

DEVENISH, *supra* note 53, at 62; *see also* Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) at para. 31 (S. Afr.) ("Unfair discrimination . . . means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.").

256. *See* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 33 (S. Afr.) ("To ignore the racial impact of the differentiation is to place form above substance.").

257. Siegel, *supra* note 77, at 1473.

258. *Id.* at 1499.

259. Michelman, *supra* note 158, at 1418. There is some debate about the nature of the inquiry into harm to one's dignity, but in general it is an objective inquiry based on "what the national goals require, feeling—dignity—embraces." *Id.*

260. DEVENISH, *supra* note 53, at 49.

> The Constitution . . . makes provision for more than mere formal equality, that is for that kind of jurisprudentially substantive equality and for the application of the 'anti-subjugation principle'. . . [which] accepts the reality of present injustice, caused by past discrimination, with the result that those discriminated against in the past and presently disadvantaged as a result, are entitled to preferential or advantageous treatment so that genuine equality for all will ultimately emerge in society in the future.

Id. The formal concept of equality, anticlassification, not antisubrogation, "is superficial since it is premised on the simplistic assumption that all manifestations of inequality are deviant, and can be remedies effectively merely by treating all persons in an identical way." *Id.* This approach has the potential to exacerbate the real inequalities. *Id.*

B. *Affirmative Action Rationales*

Under the U.S. Supreme Court's affirmative action jurisprudence, particularly affirmative action in the educational context, diversity is a common rationale for affirmative action programs. However, notions of diversity and racial considerations, their relation to a formalistic conception of equality, and the subtle complexities of achieving diversity through affirmative action policies, present challenges for diversity as a compelling interest for racial classifications.[261]

The South African Constitution's approach to affirmative action—with the backdrop of substantive equality and the fairness standard based on harm to personal dignity—addresses concerns of affirmative action without justifications abusive of equality. By placing past discrimination and changing patterns of discrimination in an evolving society at the forefront of affirmative action doctrine, the South African doctrine explicitly allows consideration of racial classifications for the purpose of addressing racial or other inequalities and achieving substantive equality.[262]

By adopting a substantive conception of equality, the South African affirmative action doctrine avoids the *Grutter* problem in justifying affirmative action with an independent interest, mainly diversity.[263] Moreover, the South African affirmative action doctrine ensures consideration of the individual, central to the constitutionality of *Grutter*,[264] by considering harm to one's dignity.[265]

Additionally, utilizing a doctrine similar to the South African model prevents *Fisher's* doctrinal difficulties. The affirmative action measures used by the University of Texas at Austin in *Fisher* would likely be considered constitutional under the South African equality doctrine. Under

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261. *See generally* Transcript of Oral Argument, *supra* note 120, at 43–49, 52–72 (questioning whether universities may use affirmative action in their admissions process).

262. *See* Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 37 (S. Afr.) (implementing a three part test to determine whether a measure falls within the Section 9(2) equality provision of the South African Constitution). The three-part test first inquires whether the affirmative action measure "targets persons or categories of persons who have been disadvantaged by unfair discrimination; second [,] whether the measure is designed to protect or advance such persons or categories of person; and . . . third [,] whether the measure promotes the achievement of equality." *Id.*

263. *See* Grutter v. Bollinger, 539 U.S. 306, 354–56 (2003) (Thomas, J., dissenting) (demonstrating the problems surrounding the justification of "diversity" as a factor for affirmative action).

264. *See id.* at 309 (explaining how an "individualized, holistic review of each applicant[ ]" makes the policy of affirmative action constitutional in the college application setting).

265. *See* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 81 (S. Afr.) (considering an "invasion of . . . dignity" in determining whether discrimination was unfair).

the substantive equality policy, incorporating the University of Texas at Austin's holistic approach to admissions: does not disrupt the dignity of an individual; permissibly uses race as simply one criterion "promote[s] the achievement of equality;"[266] and does not bar admission based on race, as it just one of many factors to be examined by its admission board.[267] Under Section 9(2) of the South African Constitution, the individual dignity prong would find the admissions policy constitutional, because the two-tiered system that incorporated a holistic approach to admissions would not go against the dignity of an individual.[268] The University of Texas admissions policy is distinct from the unconstitutional *Du Preez* policy because race would not be a complete bar to admissions.[269] Moreover, under *Motala*, the Equity Court has held a similar type of admissions policies favoring certain minorities was held to be constitutional.[270] The rationale underlying *Motala* and the affirmative action doctrine goes to the aim of addressing structural inequalities in South Africa, which the notion of diversity and the consideration of minorities in affirmative action policies would aim to serve. In this way, the South African substantive equality doctrine would allow these types of affirmative action policies seen at University of Texas to be constitutional.

C. *Incorporating Dignity into the Equal Protection Doctrine*

Dignity is central to South African substantive equality and the South African Constitution as a whole.[271] Any effort to incorporate aspects of South African equality doctrine requires including dignity in proportion to equality. The concept of human dignity has been less prominent in U.S. jurisprudence until recent years. The notion of intangible but real harm is discussed in cases such as *Brown*, but such discussion is subtle and implicit in discussions of unequal treatment in the educational context.[272]

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266. S. AFR. CONST., 1996, ch. 2, § 9(2).

267. Du Preez v. Minister of Justice & Constitutional Dev. 2006 (1) SA 1 (ECP) at paras. 39–44 (S. Afr.) (analyzing the effects of a policy that creates an absolute bar to considering race and holding such a bar is "unfair").

268. *See id.*

269. *See Id.* at ¶ 39.

270. MOTALA, *supra* note 176.

271. *See* S. AFR. CONST., 1996, pmbl. (stating some of the reasons for adopting the South African Constitution are to "establish a society based on democratic values, social justice and fundamental rights" and "improve the quality of life of all citizens and free the potential of each person").

272. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (referencing a feeling of inferiority but connecting it to tangible psychological effects).

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law;

Emerging references to human dignity in U.S. law denote a growing, explicit commitment to dignity as a basis for protecting rights and ensuring equal treatment under the Constitution's Equal Protection doctrine. Justices have expressed concern about racial classifications and preferences in general as being dangerous to human dignity. In *Bakke*, Justice Powell expressed concern about preferences placing "impermissible burdens in order to enhance the societal standing of their ethnic groups," when those preferences "hav[e] no relationship to individual worth."[273] Similarly, in *Parents Involved in Community Schools v. Seattle School District*,[274] Chief Justice Roberts noted, "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[275]

While there is a smattering of references to human dignity or a similar type of intangible value or justification for equal protection, areas outside of affirmative action shed light on growing jurisprudential reliance on human dignity, particularly espoused by the key swing voter on the United States Supreme Court, Justice Anthony Kennedy. For Justice Kennedy, liberty is a means to achieve dignity, which in turn is essential to being human.[276] Justice Kennedy's philosophy on dignity is readily

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> for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation . . . therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id.; *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 705 (2007) ("Government action dividing people by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility.'").

273. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

274. 551 U.S. 701 (2007).

275. *Id.* at 746 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring) (discussing the importance of human dignity in the equal protection doctrine and the Civil Rights Act).

> The primary purpose of . . . [the Civil Rights Act] . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.

Id. at 291–92. *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 623–29 (1984) (discussing individual dignity in the context of sex discrimination in places of public accommodation and associations, organizations, etc.).

276. HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 42 (2009).

observable in *Lawrence v. Texas*, reasoning limitations on one's personal liberty to make choices or define one's sexual relationships is an unconstitutional affront to an individual's dignity as a free person.[277] More recently in *Brown v. Plata*,[278] Justice Kennedy similarly asserts, "Prisoners retain the essence of human dignity inherent to all persons" and "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[279] Despite Justice Kennedy's clear commitment to dignity, he is willing to balance liberty with the government's significant interest in public welfare.[280]

Similarly, Justice Stephen Breyer has demonstrated commitment to protecting dignity, albeit through a slightly different conception of dignity than Justice Kennedy. In *Florence v. Board of Chosen Freeholders of the County of Burlington*, Justice Breyer's dissent admonished encroachment upon human dignity in arguing strip searches without evidence of potential violence or contraband violates the Fourth Amendment's prohibition against unreasonable search and seizure.[281] Justice Breyer's conception of dignity manifests in his *Indiana v. Edwards*[282] opinion, wherein he argues the "right of self-representation will not 'affirm the dignity' of a de-

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277. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."). In *Lawrence*, Justice Kennedy relied on *Casey*'s formulation of the relationship between personal dignity and liberty. *Id.* at 567, 571. ("Our obligation is to define the liberty of all, not to mandate our own moral code."); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851. Justice Kennedy joined Justice O'Connor in the *Casey* opinion. *Id.*

278. 563 U.S.__, 131 S. Ct. 1910 (2011).

279. Brown v. Plata, 563 U.S.__, 131 S. Ct. 1910, 1928 (2011). In *Plata*, the Supreme Court upheld an order requiring the state of California to reduce prison populations to cure overcrowding in order to prevent cruel and unusual punishment under the Eighth Amendment. *Id.* at 1911.

280. *See* Florence v. Bd. of Chosen Freeholders of the Cnty. Of Burlington, 566 U.S. __, 132 S. Ct. 1510, 1518–20 (2012) (arguing strip searches in jail, even without evidence of danger, are constitutional).

281. *Id.* at __, 132 S. Ct. at 1525 (2012) (Breyer, J., dissenting); *see also* Washington v. Glucksberg, 521 U.S. 702, 790 (1997) (Breyer, J., concurring) (arguing "the right to die with dignity," or the "right to commit suicide" with a physician's assistance, is a liberty interest that at its core implicates a person's right to control their manner of death and avoid physical suffering).

282. 554 U.S. 164 (2008).

fendant who lacks the mental capacity to conduct his defense without aid of counsel."[283] Justice Breyer reasoned such self-representation would be humiliating, undercutting the goals of criminal law.[284]

Despite lack of extensive discussion of dignity under equal protection jurisprudence, particularly in the affirmative action context, Justices Breyer and Kennedy's treatment of dignity demonstrates the possibility of dignity's potential consideration within the equal protection doctrine. Both Justices Breyer and Kennedy describe dignity similarly to the South African Justices.[285] Justices Breyer and Kennedy, although harboring different conceptions of self-reliance and liberty, consider those concepts central to dignity. State actions depriving individuals of choice and liberty affront their dignity and value as human beings.[286] This relationship between liberty and dignity is analogous to that seen in South African equity jurisprudence.[287] Particularly, Justice Kennedy's willingness to balance individual dignity with state interests coincides with the South African conception of individual dignity in relation to social justice—or *ubuntu*—and society.[288] Accordingly, dignity's continued relevance in constitutional law indicates individual liberty and dignity may be incorporated into the U.S. Equal Protection doctrine in some fashion.

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283. Indiana v. Edwards, 554 U.S. 164, 176 (2008) (holding the notion of dignity allows states to constitutionally insist on representation for those who are competent to stand trial, but suffer from severe mental illness).

284. *Id.* at 176–77.

285. *Compare* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.") (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)) *and Edwards*, 554 U.S. at 176 (implying an affirmation of dignity is need in such analysis of constitutionally given rights as self-representation and, quoting Justice Brennan, if an affirmation of dignity is not met then the "Constitution would protect none of us") *with* MOTALA & RAMAPHOSA, *supra* note 176, at 224 (highlighting South African Justice Ackermann's view that "dignity is the equivalent of personal freedom and individual autonomy" and Justice Mokogoro's concept of dignity being concerned with the individual, but also being a part of a larger community).

286. *See generally Lawrence*, 539 U.S. at 567 (discussing state action against the personal choice of sexual partners as a violation of dignity and liberty provided by the Fourteenth Amendment).

287. *See* DEVENISH, *supra* note 53, at 61–64 (discussing the notion of liberty in South African jurisprudence and noting dignity is a pre-eminent value in its Constitution and lies at the core of its prohibition of unfair discrimination).

288. *See* MOTALA & RAMAPHOSA, *supra* note 176, at 224 (explaining the connection of *Ubuntu* with the concept of dignity); *see also* DEVENISH, *supra* note 53, at 63 ("*U*buntu is characterized as social justice and emanates from the communal nature of traditional African societies.").

D. *Addressing Suspect Classifications*

As previously discussed, avoiding the suspect classification system alleviates tension between different classifications and standards of review.[289] The South African approach has the advantage of simplicity, but also allows an affirmative action inquiry encompassing other categories, such as socioeconomic status and gender, and doesn't rely on the "discrete and insular minorities" conception of equal protection.[290]

The suspect classification system, particularly the *Carolene Products* formulation of suspect classes as "discrete and insular" minorities, was traditionally concerned with protecting politically vulnerable black minorities.[291] In modern applications of this standard, other non-white minorities also traditionally experiencing similar political obstacles are protected under the *Carolene Products* formulation.[292] However, clearly identifying the criteria for suspect classes under this framework eludes contemporary courts,[293] with its framework largely relying upon historical conceptions of race and political vulnerability.[294] Indeed, the lack of discussion of minorities outside traditional classifications of blacks, Latinos, Native Americans, and Asians poses a challenge in an increasingly

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289. *See* DEVENISH, *supra* note 53, at 56 (discussing how other categories of persons who have experienced unequal treatment, such as the disabled or members of the LGBT community, could benefit from the doctrine).

290. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *see also* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976) (distinguishing advanced age from other classifications that call for "strict judicial scrutiny").

291. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715, 744–45 (1985) (discussing *Carolene Products*' relation to the Jim Crow legislation and its impact on black Americans in democratic politics); *see also* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 167 (2004) (pointing out the "discrete and insular" language of *Carolene Products* was the Court's way of protecting minorities' civil liberties).

292. *See* Strauss, *supra* note 133, at 144 ("[T]he Court did refer to religious, racial, and ethnic minorities.").

293. *Id.* (noting with *Carolene Products* "courts slowly began to develop a more elaborate framework for determining which groups deserved heightened scrutiny . . . [but that] the Supreme Court did not articulate any real criteria for determining suspectness until the early 1970s").

294. *Id.* at 145 (noting the term "suspect class" for discrete and insular minorities and establishing the criteria as those who have experienced "a history of purposeful unequal treatment or relegated to . . . political powerlessness"). *See generally* Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1, 23 (1991) (asserting the context of race has varied throughout history, but has been constant in its uses as a means of classification and as a social divider).

multicultural and heterogeneous nation, particularly in articulating a coherent justification for affirmative action in the United States which relies on a theory of diversity and inclusion.[295] Moreover, changing demographics, the current U.S. political climate, and the evolution of the equal protection doctrine perhaps necessitate departure from the *Carolene Products* footnote, which reserves strict scrutiny for "discrete and insular" minorities.[296] Considering demography alone, a "discrete and insular minorities" model may not adequately protect groups that cannot find redress in the political process.[297]

Predicated on the fact that a small, privileged minority may have access to political power, the South African system offers a method of reconciling the reality that increasing numbers of minorities in the United States alone may not translate to greater political power in the American political system seemingly based on interest politics and complex campaign funding.[298] Adopting a conception of equality acknowledging majority of people can be disadvantaged in society, even in a democracy is necessary.

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295. *See* DAVID A. HOLLINGER, *Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action*, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 97, 99 (Robert Post & Micheal Rogin, eds., 1998) (explaining "[a]ffirmative action was never formulated as a coherent policy" and that it became more unclear once entangled with multiculturalism, and therefore arguing for the use of the ethno-racial pentagon, which keeps the focus of the protections of affirmative action on the physical attributes of the various races instead of the cultural ones, as a means of creating a viable theory of affirmative action).

296. *See* Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation Half Century from Now (Dec. 12, 2012), *available at* https://www.census.gov/newsroom/releases/archives/population/cb12-243.html ("The U.S. population will be considerably older and more racially and ethnically diverse by 2060 . . . [and] the U.S. will become a plurality nation, where . . . no group is in the majority . . . .").

297. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

298. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. __, 130 S. Ct. 876, 962 (2010) (Stevens J., dissenting) (explaining how large financial contributions made by private interest groups can exert control over politicians and corrupt the electoral system); *see also* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 148 (2010) (arguing if left unchecked, corporate political expenditures will limit and drown out the voices of natural persons); William Julius Wilson, *Socioeconomic Inequality: Race and/or Class*, *in* RACE IN 21ST CENTURY AMERICA 435, 437 (Curtis Stokes et al. eds., 2001) (noting political power is concentrated among the elite members of society and that recent years have seen monetary, trade, and tax policies deepen this imbalance).

VII. CHALLENGES[299]

A. *Different Historical Contexts*

Several obstacles impede adopting a substantive equality doctrine under U.S. Equal Protection jurisprudence. Despite similar histories of

299. Of course, outside pressures that influence both the United States Supreme Court and the South African Constitutional Court may affect changes in the doctrine for each respective nation. Indeed, both courts face formal political pressure through the appointment system. Similar to the U.S. Supreme Court, the president of South Africa appoints the justices of the Constitutional Court with the approval of the "Judicial Service Commission and the leaders of the parties represented in the National Assembly." DEVENISH, *supra* note 53, at 337. However, the historical background and multi-party system shows the South African political climate is markedly different from the United States' stable two party system. *South Africa's Political Parties*, SOUTHAFRICA.INFO, http://www.southafrica.info/about/democracy/polparties.htm#.UzjhBzdOXIU (last visited Mar. 30, 2014) (summarizing the history and policies of South Africa's major political parties). Affirmative action policies in the workplace and higher education similarly are politically salient topics in South Africa as in the United States, with similar arguments concerning fairness, economic status, and race relations. *See* Celia W. Duggar, *Campus that Apartheid Ruled Faces a Policy Rift*, N.Y. TIMES, Nov. 22, 2010, http://www.nytimes.com/2010/11/23/world/africa/23safrica.html?pagewanted=all&_r=0 (echoing similar conflicts in the United States, the University of Cape Town is debating how affirmative action should be used to achieve racial redress); *see also* Richard D. Kahlenberg, *South Africa's Affirmative Action Debate*, CHRON. OF HIGHER EDUC. (Nov. 24, 2010), http://chronicle.com/blogs/innovations/south-africas-affirmative-action-debate/27938 (comparing the use of affirmative action in university in South Africa to the United states); Anders Kelto, *Inequalities Complicate S. Africa College Admissions*, NPR (May 10, 2011, 2:58 PM), http://www.npr.org/2011/05/10/136173961/inequalities-complicate-s-africa-college-admissions (stating South African universities are starting to have similar debates as the United States on the use of affirmative action). Nevertheless, the level of political unrest regarding the effectiveness of welfare policies, political corruption, and the legacy of apartheid in South Africa render the affirmative action issue markedly more potent for the political stability of South Africa than the United States. *See, e.g.*, Susan Booysen, *Protesters Tighten Grip on Power*, IOLNEWS (Apr. 14, 2013, 11:20 AM), http://www.iol.co.za/news/politics/protesters-tighten-grip-on-power-1.1499907 (noting mismanaged and corrupt municipalities; incidences of police brutality; service protests and demarcation issues; wages, living conditions, and community services issues; political corruption; poverty; inadequate education; and chronic unemployment as issues that have sparked recent citizen protests in South Africa); Lydia Polgreen, *In South Africa, Lethal Battles for Even Smallest of Political Posts*, N.Y. TIMES, Nov. 30, 2012, http://www.nytimes.com/2012/12/01/world/africa/south-africa-corruption-fuels-battle-for-political-spoils.html (noting an increase in politicians being killed, poverty, inequality, political corruption, and unemployment in South Africa); Mandy de Waal, *SA's Messy Tapestry of Community Protests, Political Intimidation, and Police Brutality*, DAILY MAVERICK (Mar. 13, 2013, 1:58 PM), http://www.dailymaverick.co.za/article/2013-03-13-sas-messy-tapestry-of-community-protests-political-intimidation-and-police-brutality/#.Uvr-kjeYbmI (noting the use of using state security to "intimidate, detain and harass activists" and a general increase of violence against society and protestors). While acknowledging the influence of politics on the outcomes of affirmative

segregation, differing modes and temporal aspects of subordination pose challenges in applying a substantive equality doctrine.

The U.S. experience informs context, revealing an elongated struggle for equal rights far after emancipation. Congress ratified the Thirteenth, Fourteenth, and Fifteenth Amendments in the aftermath of a bloody civil war and against the background of a fragile nation still heavily divided by slavery and race.[300] Despite the Fourteenth Amendment's nominal guarantee of equal protection, a majority of the American public, as well as the Supreme Court of that era, resisted efforts to actualize equal treatment in everyday life.[301] During the Jim Crow era, blacks in the United States faced limitations on certain fundamental rights, such as grandfather clauses and poll taxes; however, ratification of the Fourteenth Amendment caused lawmaker reliance on different kinds of limitations on rights.[302] As a result, serious efforts at enforcing the constitutional guarantee of equality stretched across two centuries, culminating with the Civil Rights Movement in the 1960s—almost an entire century after the Fourteenth Amendment's ratification.[303]

South Africa's segregated history is more recent and far more vivid in people's memories, thus allowing for its more historically oriented inter-

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action policies, this paper limits its focus on the doctrinal issues and contexts that might affect the analytics of the equality jurisprudence.

300. *See* Amar, *supra* note 72, at 2226–27 (noting Georgia, which was readmitted to the Union under the agreement that they would "not . . . discriminate in the vote on the basis of race," immediately and contradictorily "decided to exclude blacks from holding office").

301. *See* Gerald Horne, *Whither Affirmative Action? Historical and Political Perspectives*, *in* RACE IN 21ST CENTURY AMERICA 313, 316 (Curtis Stokes et al. eds., 2001) (quoting international lawyer Gay McDougall in the December 1998 edition of *Crisis*, the NAACP's journal: "As state and federal courts are becoming more hostile to affirmative action programs . . . , the civil rights struggle may gain added value and momentum from a return to the court of international public opinion" and arguing discrimination against minorities hinders U.S. foreign relations); FOBANJONG, *supra* note 21, at 2–4, 13–15 (comparing the two reconstruction eras and summarizing the "emancipation, reconstruction, and nullification" processes of each, which all received a great deal of backlash).

302. FOBANJONG, *supra* note 21 (explaining the measures taken to prevent black political participation, such as "literacy tests, the poll tax, the 'grand father clause,' [and] 'white primary'"). The Jim Crow Laws required separate facilities and accommodations for blacks and whites, including "schools, hotels, restaurants, theaters, buses, waiting rooms, public toilets and public parks." *Id.*

303. *See* Horne, *supra* note 301, at 317 ("1965 marked a turning point in the battle for affirmative action."). In 1863, during the American Civil War, the Emancipation Proclamation abolished slavery and "the U.S. Congress passed three constitutional amendments and several civil rights laws to protect the rights of the newly emancipated blacks." FOBANJONG, *supra* note 21, at 2.

pretation of the Constitution.[304] Moreover, the contexts of South African apartheid and U.S. segregation were vastly different not just in terms of historical periods, but also in terms of the order of oppression experienced. For example, South African Blacks lost basic human rights such as the right to own land or mobility throughout the country during apartheid.[305]

However, transitioning from apartheid to the constitutional democracy occurred without a formal civil war like the American Civil War.[306] This peaceful transition was the result of government committees and members of the African National Congress meeting in a series of negotiations, building on active efforts at implementing a democratic government.[307] The strikingly peaceful transition culminated with the formation of a new Constitution after the 1994 elections,[308] one framed and implemented to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."[309]

Despite broad similarities of the United States and South African experiences of segregation and racial inequality, the historical contexts of these two nations reveal deep differences in their efforts to desegregate and their reactions to desegregation. Accordingly, variations of mode, era, and aftermath of segregation may pose challenges of degree in applying a substantive equality doctrine in the United States.

B. *Different Legal Traditions and Agendas of the Constitutions*

Importantly, the South African Constitutional Court affirmatively distinguishes equality under the South African Constitution from the United

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304. *See* Hassim, *supra* note 13, at 121, 124 (stating emergence from apartheid did not begin until 1991 when Nelson Mandela was released from prison and formal negotiations began that ushered in a new democratic order, and, ultimately, the 1996 adoption of the South African Constitution).

305. CLARK & WORGER, *supra* note 38, at 22–23 (explaining the Natives' Land Act of 1913 restricted the blacks' ownership of land and that the Natives (Urban Areas) Act in 1923 restricted blacks to live and work in segregated townships and locations for limited periods of time); Hassim, *supra* note 13, at 120 (noting differences in U.S. and South African racist policies, which in South Africa affected a majority of the population and were exerted nationwide, where as in the U.S., discrimination affected the minority and was exerted in varying degrees by state).

306. Hassim, *supra* note 13, at 122 ("South Africa steered itself through the transition from parliamentary sovereignty to constitutional supremacy without bloodshed.").

307. *Id.* ("[The] transition resulted from years of negotiating between the old regime and of the oppressed majority."); CLARK & WORGER, *supra* note 38, at 111, 118–19 (noting negotiations commenced in July of 1989 and by 1994, South Africa elected its first democratic government).

308. CLARK & WORGER, *supra* note 38, at 123.

309. S. AFR. CONST., 1996, pmbl.

States' formalistic equality jurisprudence.[310] Despite its young history, the South African Constitution's framers sought creation of a socially transformative document.[311] Indeed, one of the South African Constitution's main goals is to effectuate social change through liberal democracy while healing and remedying the past.[312] Indeed, by acknowledging past inequalities and divisions, the South African Constitution serves as a tool for transformative social justice.[313] This commitment to a transformative constitution reaches beyond formalistic equality, allowing hand-in-hand existence of social rights and substantive equality[314] With this transformative structure utilizing concepts of dignity and systematic discrimination, evaluating violations of substantive equality is far more digestible than a constitution dedicated to liberal principles and negative rights such as U.S. Constitution.[315]

In distinguishing equality jurisprudence from the United States' formalistic equality jurisprudence, the South African Constitutional Court warned against importing foreign notions into South African practice.[316] Contextualizing its equality doctrine in light of South Africa's historical experience, the Court acknowledged use of terms such as "equality" and "affirmative" action could result in unique problems.[317]

Moreover, the South African Constitution is barely two decades old, and is still in the early stages of forming concrete constitutional principles, rules of interpretation, and consistent application.[318] Therefore,

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310. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 29 (S. Afr.) ("Our equality jurisprudence differs substantively from the U.S. approach to equality. Our respective histories, social context and constitutional design differ markedly.").

311. Liebenberg & Goldblatt, *supra* note 134, at 338 (identifying the "dismantling of systemic forms of disadvantage and subordination" and "creat[ing] a new society based on social justice, democracy and human rights" as main goals of South Africa's Constitution).

312. Albertyn & Goldbatt, *supra* note 221, at 248 (quoting the South African Constitution's intention to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights").

313. *Id.* at 248.

314. *See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 153–54 (1998) ("The Constitution . . . draws a close connection between political and socio-economic rights . . . and contains a pervasive and overriding commitment to equality, specifically comprehending a substantive . . . not just formal, conception of equality.").

315. U.S. CONST. amend. I–X.

316. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 29 (S. Afr.) ("The American jurisprudence has, generally speaking, rendered a particularly limited and formal account of the reach of the equal protection right. . . . Our equality jurisprudence differs substantively from the U.S. approach to equality. Our respective histories, social context and constitutional design differ markedly. . . . We must therefore exercise great caution not to import . . . inapt foreign equality jurisprudence . . . .").

317. *Id.*

318. DEVENISH, *supra* note 53, at 36.

while there might be disagreement over methodology and overall constitutional philosophy, those interpreting the Constitution have experienced South Africa's history, allowing for greater understanding of constitutional goals and societal needs.

By contrast, the United States' legal history exhibits a longstanding common law tradition and certain constitutional principles, particularly neutral principles,[319] negative rights, and determining the applicable level of scrutiny. The Bill of Rights and the Reconstruction Amendments transformed U.S. society, yet the overarching U.S. tradition has been one of negative rights and protection from government overreach in individual lives.[320] In the aftermath of the Reconstruction Era, the Supreme Court backtracked on the transformative mission of the Fourteenth Amendment and equal protection, limiting enforcement of the Fourteenth Amendment to state and local officials, not private citizens.[321] The *Plessy* decision highlighted reluctance of adopting a more transformative mission under the Fourteenth Amendment.[322] While the U.S. Supreme Court eventually developed a framework of suspect classifications, this framework remains rooted in the concept of neutral principles of classifications and standards of review.[323] Despite nuanced issues surrounding suspect classes, departing from normative reliance on strict scrutiny and suspect classifications would likely garner hesitation and discomfort.

Such differences in constitutional commitments may affect application of the South African equality doctrine to another constitutional system. The South African equality doctrine is tailor-made to the unique situation and concerns arising in South African society. Indeed, the U.S. Constitution's jurisprudential legacy may be traced as far back as the 1790s. Some

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319. *See* Wechsler, *supra* note 77, at 19 (emphasizing neutrality based on reasoned principals should guide the Supreme Court's decisions in order to retain authority). *But see* Dan M. Kahan, *The Supreme Court 2010 Term–Foreward: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 57 (2011) (stating there is a neutrality crisis among the members of the Supreme Court in their decision making).

320. U.S. CONST amend. I–X.

321. Civil Rights Cases, 109 U.S. 3, 6 (1883).

322. *See* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (holding Louisiana's separate but equal statute reasonable under the Fourteenth Amendment).

323. *See, e.g.*, Pyler v. Doe, 457 U.S. 202, 226 (1982) (justifying classification based on alienage requires a state to show the classification is reasonably adapted to purposes for which the state intends to use it); Craig v. Boren, 429 U.S. 190, 197 (1976) (explaining gender classifications are subject to scrutiny under the Equal Protection Clause and must serve important government objectives, as well as being substantially related to achieving those goals); Loving v. Virginia, 388 U.S. 1, 11 (1967) (stating racial classifications are subject to rigid scrutiny, and must be necessary to accomplishing a state objective to be upheld).

commitments have already been made[324] and deviating will prove difficult as an updated doctrine of equal protection, in the context of all the other constitutional doctrine, may have ripple effects on our historical understanding of the Constitution and the overall constitutional framework.

Nevertheless, the substantive equality doctrine does not necessarily require abandoning U.S. constitutional commitments. South African justices have contemplated a higher form of review for affirmative action cases,[325] meaning American equal protection jurisprudence could still require the highest form of scrutiny in place of rational basis review, while maintaining a substantive equality. Moreover, even in the face of judicial scrutiny and a liberal tradition, the U.S. Supreme Court has assumed the role of ensuring equality under the equal protection doctrine and has expanded it beyond the tradition of formal equality, particularly in the area of gender, LGBT rights, and individuals with disabilities.[326] Thus, the United States legal tradition's commitment to neutrality and liberty is not fatal to the adoption of substantive equality.

C. *Majority v. Minority Status*

For both the U.S. and the South African equality doctrines, the status of those afforded higher protection by the equality clauses is a crucial aspect for consideration. Because the U.S. Equal Protection doctrine and the South African equality doctrine are founded on different equality premises, a gap in the framework and rationales exists, particularly for affirmative action. In the United States, status as a minority plays a pivotal role in the equal protection doctrine, blacks have been the historically oppressed minority. This judicial commitment has been deeply rooted in its formulation in footnote four of *Carolene Products*.[327]

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324. Strict scrutiny has been a bedrock of judicial review beyond affirmative action jurisprudence or the equal protection doctrine. *See generally* Romer v. Evans, 517 U.S. 620, 635 (1996) (applying strict scrutiny in civil rights context); Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 (1990) (applying strict scrutiny in First Amendment context).

325. Minister of Fin. v. Van Heerden 2004 (6) SA 121 (CC) at para. 30 (S. Afr.).

326. *See generally* Romer v. Evans, 517 U.S. 620, 635 (1996) (concluding statute based on sexual orientation violated Equal Protection Clause); City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (applying the rationally related standard to those with mental illnesses); *Craig*, 429 U.S. at 204 (stating an Oklahoma statute discriminated against males aged 19–21).

327. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (revealing statutes directed at particular minorities require a more extensive judicial inquiry); Graham v. Richardson, 403 U.S. 365, 372 (1971) (establishing classifications based on race are inherently suspect and are subject to heightened judicial scrutiny). *See generally* Ackerman, *supra* note 291 (discussing the legacy of *Carolene Products*' footnote four).

Initially, minority status and violation of equal rights lent credence to the Supreme Court's asserting need for extra protection in some cases.[328] Based on a rationale of democratic legitimacy, the *Carolene Products* footnote contemplated a higher level of scrutiny, because "discrete and insular" minorities did not have similar access to political process to protect their own interests.[329] Thus, for the equal protection doctrine, the political status as a minority serves a crucial role in determining the level of protection from the courts.[330] However, this emphasis on minority status does not readily translate into the context of affirmative action, where racial classifications are used to give an advantage compared to the majority, not to protect minorities from discrimination.[331]

South African equality doctrine arises from a completely different vantage point of protecting a majority repressed and oppressed under a social order established by a small, powerful white minority.[332] The constitutional doctrine of South Africa's Equality Clause considers such without differentiating between majority and minority status. Rather, the focus is on past subordination and human dignity, where constitutional inquiry depends not on a person's status as a minority, but whether in the past the person was deprived of equality in a manner triggering constitutional protection.[333] As a result, the South African substantive equality doctrine is not stymied by worrying whether the group without political power is necessarily "discrete or insular."[334]

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328. Ackerman, *supra* note 291, at 715–16.

329. *See Carolene Prods. Co.*, 304 U.S. at 153 n.4 (discussing the use of political process to protect minorities).

330. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) ("[T]he basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.").

331. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (addressing complications arising from affirmative action policies in the admissions process at University of Michigan Law School); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 200 (1995) (discussing problems resulting from affirmative action in federal agency contracting which provided financial benefits for the hiring of subcontractors when the subcontracting firm was controlled by a socially or economically disadvantaged individual); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978) (detailing the issues resulting from affirmative action in the admission process at the medical school at the University of California at Davis).

332. *See* City Council of Pretoria v. Walker 1998 (3) BCLR 257 (CC) at para. 27 (S. Afr.) (discussing South African differences between the right to equality and the right to equal protection); DEVENISH, *supra* note 53, at 36 (describing South African political history).

333. *See* S. AFR. CONST., 1996, ch. 2, § 9(2) (allowing for legislative and other measures to protect and advance persons or categories of persons disadvantaged); MOTALA & RAMAPHOSA, *supra* note 176, at 269 (stating the Court considers whether the complainant's human dignity has been impaired in determining unfair discrimination).

334. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (declining to find advanced age a suspect class for lack of status as a "discrete and insular" minority).

Contrastingly, the U.S. Equal Protection doctrine's limitations in accommodating disadvantages groups that have faced subordination is apparent in the Supreme Court's reluctance in extending *Carolene Products*-type protection beyond traditionally vulnerable minorities[335] and in finding middle ground in gender classification, where women are a slight majority only in number.[336]

Nevertheless, the Supreme Court measured willingness to expand beyond the minority classification system shows this difference eventually may be overcome. If so, the South African substantive equality model may very well solve such challenges by avoiding the majority-minority status.

VIII. CONCLUSION

Equality in a multiracial society with a past of subordination raises fundamental questions about the meaning of justice and equal treatment for all. Particularly for the United States, the concept of equal protection under the law has often failed in addressing deeply rooted inequalities perpetuated within society. Such issues have come to the forefront in the modern era, as the Supreme Court grapples with the contours of suspect classifications in the context of affirmative action policies.

The South African Constitution contemplates similar dilemmas and adopts a doctrine of substantive equality wherein human dignity is critical in considering violations of equal treatment.[337] In so doing, the South African substantive equality doctrine does not face similar divisions between antisubordination and anticlassification principles or struggles with questions of diversity. Rather, the South African Constitution offers a transformative approach to the fragile and complex relationship between race and equality. Despite the obstacles of adopting such a divergent approach, the South African framework bolsters the idea of alternative paths to equality.

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335. *See id.* (stating advanced age does not define a discrete and insular group that would require heightened scrutiny under *Carolene Products*); *see also* James v. Valtierra, 402 U.S. 137, 141 (1971) (holding the poor as a class subject to rational basis review); Neil Gotanda, *supra* note 294 (declaring "the unconscious, deeply contextualized character of race in society" effects the thinking of the Supreme Court).

336. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (requiring intermediate scrutiny for gender classifications).

337. MOTALA & RAMAPHOSA, *supra* note 176, at 269.