

## REMEMBERING HOW TO DO EQUALITY

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Decades ago, equal protection law helped bring about great transformations in the status of African Americans, women, and other subordinated groups. Today, constitutional equality doctrine is mostly employed by a conservative judiciary to preserve the status quo. To restore a progressive constitutional vision, we must understand how equality law was hijacked in the first place. And we must recall the forgotten doctrinal tools courts *and* legislatures employed to vindicate equality norms in the civil rights era. Refreshing our collective memory will help us imagine the shape of the next reconstruction.

### I. REDEMPTIVE CONSTITUTIONALISM

The Reconstruction-era Amendments were aptly named—they were truly reconstructive. Their framers sought to bring to an end the understandings and arrangements sustaining chattel slavery in order to make equal citizens of newly freed slaves. The great purpose of the Fourteenth Amendment was transformative; “to put the citizens of the several States on an equality with each other as to all fundamental rights” and to “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.”<sup>1</sup> The Amendment’s framers believed that all members of the political community were entitled to equal freedom, that law should not be used to create or maintain social caste, and it should not single out groups for special burdens or benefits unrelated to important public purposes—the prohibition on so-called “class legislation.” Congress viewed itself as the first line of defense for these constitutional values. In section 5, Congress gave itself not only the power but also the responsibility to protect and enforce the Amendment’s guarantees of equal citizenship.

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The Fourteenth Amendment grew out of generations of abolitionist

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<sup>1</sup> Cong. Globe 39th Cong., 1st Session at 2766 (May 23, 1866) (remarks of Senator Howard).

criticism of the founders' Constitution for its failure fully to guarantee basic rights and equality for all members of the political community. The Amendment was an act of redemptive constitutionalism—it claimed to fulfill the greater purposes of the Constitution and the Declaration of Independence. The same constitutional text that made former slaves full citizens still demands equal freedom for all, announcing its commitments in a language of general applicability that each inheriting generation must decide how to honor.

Americans making new claims on the Fourteenth Amendment reenact its origins. They invoke the Amendment's text—as well as the Declaration—to dramatize the gap between our ideals and our practices. Sometimes the Court responds to these intergenerational claims and helps vindicate the Amendment's transformative commitments, while, at others, the Court resists. Each generation builds on previous interpretations, preserving some and challenging others, with the goal of realizing equal freedom in its own time.

The post-ratification history of the Fourteenth Amendment is rich with examples of redemptive constitutionalism. Women in the abolitionist movement who worked for ratification of the Thirteenth Amendment in turn claimed equal rights under the Fourteenth Amendment. When the Court rejected their claims, women sought and ultimately gained the right to vote through the Nineteenth Amendment, ratified in 1920, and, fifty years later, secured guarantees of equal citizenship through new interpretations of the Fourteenth Amendment. Popular mobilizations of workers and others who needed government's help led the New Deal Court to reject the vision of liberty expressed in *Lochner v. New York*.<sup>2</sup> A long struggle for black civil rights led the Court in *Brown v. Board of Education*<sup>3</sup> to reject its previous apology for racial inequality in *Plessy v. Ferguson*.<sup>4</sup> In our own day *Lawrence v. Texas*<sup>6</sup> overturned the Court's pinched vision of human freedom in *Bowers v. Hardwick*.<sup>7</sup> Over time, certain interpretations of the Fourteenth Amendment have come to symbolize great wrongs that the American public has decisively rejected. *Plessy* and cases like it function as negative precedents. Their repudiation expresses our contemporary ideals of justice. They symbolize the country's continuing task of constitutional redemption.

As it was in the past, so it is in the present. After years of political retrenchment, the Court's equality doctrines now betray the Fourteenth Amendment's great promises. Increasingly, equality doctrine does not guarantee Americans equal liberty, but instead, promotes the liberty of the privileged. Increasingly, equality doctrine does not challenge state action that preserves social caste but instead, prevents government efforts to dismantle

<sup>2</sup> 198 U.S. 45 (1905).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> 163 U.S. 537 (1896).

<sup>6</sup> 539 U.S. 558 (2003).

<sup>7</sup> 478 U.S. 186 (1986).

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caste. Increasingly equality doctrine does not protect subordinated groups from class legislation but, instead, fetishizes classifications and stimulates class resentments.

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## II. WHAT WENT WRONG?

Less than fifteen years after *Brown*, Americans began electing presidents who campaigned against the Warren Court and the Civil Rights Revolution. These presidents appointed Justices who changed the direction of equal protection law, claiming to condemn discrimination but defining it in increasingly narrow terms.

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In the 1970s, a newly constituted Court began to define discrimination as a problem of forbidden classifications in law—not social subordination through law. This body of doctrine divided the world into laws with forbidden classifications, which courts would closely scrutinize, and laws without forbidden classifications, which courts presumed wholly within the prerogative of the legislature. Reasoning in this fashion, the Court ruled that “equal protection” barred state action that expressly classified on basis of race, yet permitted facially neutral laws that foreseeably burdened minorities.<sup>8</sup> The Court held that facially neutral laws were unconstitutional if enacted with a purpose to discriminate, but defined discriminatory purpose extremely narrowly, as requiring evidence of state action akin to malice.<sup>9</sup> At the same time that the Court limited equal protection scrutiny of facially neutral laws with a disparate impact on minorities, the Court expanded equal protection scrutiny of laws designed to help minorities. It held that express classifications designed to help subordinated groups were as constitutionally suspect as those designed to keep subordinated groups down.

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At the dawn of the twenty first century, then, equal protection doctrine focuses on *deliberate classification by the state* as the main cause of inequality in American society, and *strict scrutiny by judges* as the main remedy. This framework entrenches inequality in at least four important ways.

*First*, the law defines inequality *underinclusively*, either as group classification or thinly concealed malice. But not all state action that subordinates employs group-based classifications, and not all inequality is produced by evil minds. Social stratification by gender and race has been sustained by many different kinds of public and private action. Bias in decisionmaking often plays a role, but so, too, do institutional arrangements and rules that entrench unequal resources and opportunities. Equal protection tends not to reach these forms of bias. Instead, doctrine prohibits the kinds of openly invidious laws that legislatures no longer enact—while allowing laws

<sup>8</sup> See *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>9</sup> See *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979).

whose hidden, unconscious, or structural bias is not openly expressed. In this way, equality law legitimates and immunizes laws that entrench structural inequalities that accumulated over the generations in which the United States openly enforced race and gender hierarchies.

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*Second*, doctrine's focus on group classifications defines inequality overinclusively, because not all group classifications subordinate. The Court now treats race-based classifications that try to remedy inequalities and break down social stratification with the same degree of scrutiny—and judicial hostility—as classifications that deliberately advantaged dominant groups in the past. As Justice Stevens has put it, the law professes not to know the difference between a welcome mat and a “No Trespassing” sign.<sup>10</sup>

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*Third*, because doctrines of heighten scrutiny deny judges discretion in evaluating group-based classifications, judges are extraordinarily resistant to extending heightened scrutiny to new groups, even groups widely acknowledged to have suffered invidious treatment. In fact, the Supreme Court has not conferred suspect status on any group since the 1970s.

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*Fourth*, current doctrine is based on a bifurcated framework of review that splits authority between legislatures and courts and discourages dialogue between them. Legislation is either presumptively unconstitutional and the Court decides what constitutional equality requires; or legislation bears an almost irrebuttable presumption of democratic legitimacy, and neither the Court nor the political branches has authority or obligation to promote the Fourteenth Amendment's guarantees.

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This all-or-nothing vision is false to the original vision of the Fourteenth Amendment, which grants Congress the power to enforce the Amendment's provisions by appropriate legislation. These days Congress is no longer the first defender of equality; sometimes it seems to have no obligations at all. And when Congress does use its section 5 powers, the Court treats these acts of legislative constitutionalism as presumptively unconstitutional encroachments on the Court's own interpretive authority—all the more so if Congress tries to prohibit forms of discrimination the Court itself has not deemed suspect. There is little in current doctrine that encourages dialogue between courts and the political branches about the meaning of the Fourteenth Amendment; nor is there much recognition that different branches of government could bring their distinctive authority and competence to the great task of vindicating the Constitution's equality guarantee.

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### III. THE LOST TOOLS OF THE SECOND RECONSTRUCTION

By last year's *Parents Involved* decision,<sup>11</sup> the Court had come full circle—

<sup>10</sup> See *Adarand*, 515 U.S. at 245.

<sup>11</sup> 127 S. Ct. 2738 (2007).

wielding the power it once used to strike down laws enforcing segregation to strike down laws promoting integration. ~~True, Justice Kennedy was not prepared to invalidate as many laws promoting integration as the four justices led by Chief Justice Roberts; but Justice Kennedy agreed with the plurality's understanding of *Brown* as a case about strict scrutiny for all racial classifications. In *Parents Involved*, the majority misremembers *Brown*. It misstates the law of the case, and misunderstands its spirit.~~ *Brown* did not use the language of strict scrutiny—it held that racial separation caused stigmatic and emotional harm to minority school children. The Court did not embrace a general principle of strict scrutiny until it was finally ready to strike down laws against interracial marriage in the 1960s. ~~Even then, strict scrutiny applied only to race-conscious policies that enforced segregation. Only with a group of appointments to the Court, did~~ strict scrutiny began a new life in the 1970s and 1980s as a device to hold affirmative action programs unconstitutional.<sup>12</sup>

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Although courts now identify strict scrutiny with the goals and purposes of the civil rights revolution, other pathways for protecting equality during the opening decades of the Second Reconstruction were far more important. They included:

1. *Legislative and Executive Constitutionalism.* The model of strict scrutiny assumes that legislatures and executive officials lack the desire, the obligation, and the authority to promote equality values. Their only responsibility is to refrain from using suspect classifications. Yet, the political branches took the lead during the Second Reconstruction, just as the original Reconstruction Congress had intended. Congress prohibited discrimination through superstatutes like the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. At the same time Congress promoted equality for the poor through educational funding and through War on Poverty and Great Society programs like Head Start. In 1972 Congress applied the 1964 Civil Rights Act to government employers and sent an Equal Rights Amendment to the states, emphasizing its commitment to abolish sex discrimination as well as race discrimination. In the executive branch, administrative agencies implemented the new laws with regulations that promoted equality, including guidelines for school desegregation, rules to combat sex discrimination in the workplace, and anti-poverty programs that promoted local participation by the poor. The Court worked with Congress; it read the new civil rights statutes broadly to promote egalitarian goals, and it looked to the President and Congress to secure enforcement of its rulings.

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2. *Promoting Equality through Protecting Civil Liberties.* Dominant groups rarely give up their status willingly. Laws dismantling status hierarchies cannot redistribute opportunities to subordinate groups too transparently; they risk generating backlash, aggravating the very social dynamics they seek to abate. Indirection is often a friend of change. During the Second Reconstruction,

<sup>12</sup> See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470-1547 (2004).

subordinated groups often made gains through doctrines that promoted fair procedures and individual liberty for all. The Warren Court's revolution in criminal procedure protected racial minorities from police abuse, secured basic rights of legal representation and limited prosecution tactics that played on racial prejudice. Free speech doctrines protected the right of the NAACP to organize and student groups to protest Jim Crow. The rebirth of fundamental rights jurisprudence in *Griswold v. Connecticut*,<sup>13</sup> *Eisenstadt v. Baird*<sup>14</sup> and *Roe v. Wade*<sup>15</sup> not only protected women's autonomy but also their equality in civil society, and particularly benefited poor women.

3. *Fundamental Interests and Protection of the Poor.* Finally, the Supreme Court recognized a set of fundamental interests protected by the Equal Protection Clause that provided poor Americans access to key institutions of civil society. These decisions removed resource-related restrictions on core forms of civic participation and limited some of the harsher expressions of class (and race and sex) inequality. They improved access to the criminal process,<sup>16</sup> lifted welfare-related burdens on the right to travel,<sup>17</sup> and guaranteed the right to vote without having to pay poll taxes.<sup>18</sup>

The executive, legislative, and judicial branches of government worked together during the civil rights era. Drawing on distinct forms of authority and competence, the different branches of government promoted equality in distinct ways. The Court interpreted the Constitution to prohibit unfair treatment on the basis of race and sex. But the Court also promoted equal rights for Americans by promoting their individual liberty and their practical freedom, constraining the use of general laws and discretionary law enforcement practices that bore harshly on the most vulnerable members of society.

In short, the Second Reconstruction promoted equality by promoting equal liberty. Equal liberty should not be confused with either formal liberty or formal equality. The practical reality of freedom matters as much as its formal possibility. The Second Reconstruction paid attention to the inequalities of resources and roles that shaped ordinary people's daily lives and their encounters with the law.

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#### IV. PROSPECTS AND POSSIBILITIES

In today's world, the language of constitutional equality has been hijacked

<sup>13</sup> 381 U.S. 479 (1965).

<sup>14</sup> 405 U.S. 438 (1972).

<sup>15</sup> 410 U.S. 113 (1973).

<sup>16</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 US 12 (1956).

<sup>17</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>18</sup> See *Harper v. Va. Board of Elections*, 383 U.S. 663 (1966).

and co-opted to protect those with privilege from the claims of those who lack it. How can we restore constitutional equality in the twenty-first century? Here are a few suggestions:

1. *Use liberty to promote equality.* The framers of the Fourteenth Amendment saw liberty and equality as deeply intertwined. They originally hoped to secure equality for freed slaves not only through an Equal Protection Clause but also by guaranteeing the privileges and immunities of national citizenship. A guarantee of equality can equality, just as a guarantee of equality can secure freedom. Sometimes securing liberties for all is an effective way of protecting minorities and unpopular groups from special impositions and affirming their equal citizenship. Gay rights is the most obvious contemporary example. *Lawrence v. Texas* protects the freedom of gays to enter sexual relationships, yet equality values suffuse the opinion's liberty and dignity language. *Lawrence* reasons that same-sex intimacy should be treated with the same respect the law treats opposite-sex relations.

Liberty models have proved particularly attractive for gay rights because they don't require that courts define a protected class. Sexual minorities do not have to understand themselves as part of a single group with a single identity in order to secure the right to laws that treat them with equal respect. Using liberty to help minorities also avoids the problem—most obvious in affirmative action cases—of appearing to favor one group over another.

Protecting women's choices about sex and reproduction helps secure their equality with men, as the Supreme Court has increasingly come to recognize. Rights to contraception and abortion serve liberty and equality. Giving women control over the number and timing of their children, and helping women to bear children without sacrifice of their employment prospects or their family's wellbeing is crucial to women's welfare and status. Once again, liberty and equality reinforce each other: Equality doctrines protect women's choices in life pursuits, while liberty doctrines promote women's equality in making those choices.

The Warren Court also pioneered the idea of protecting fundamental rights and fundamental interests—rights that once granted, must be granted equally. These rights and interests promote equality along class lines without using suspect classifications based on poverty or race.

Finally, criminal procedure guarantees and restrictions on state detention and surveillance demonstrate how protecting liberty also protects equality. It is no accident that the Warren Court revolutionized criminal procedure while it promoted black civil rights; it knew that mistreatment of blacks in the criminal process was a major method of keeping them down. In a post-9/11 world, where majorities seem only too happy to surrender other people's rights, we need civil liberties to limit the harassment of Muslims and immigrants and the misuse of racial profiling schemes.

2. *Decalcify doctrine.* Although the Equal Protection Clause is not the only

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vehicle for securing equality, it is still a crucial one. It cannot serve its purposes until we undo some of the problems current doctrine has created.

Courts need to look beyond the fetishism of formal classification, which is neither a necessary nor sufficient marker of laws that threaten equal citizenship. We need new ways to decide which laws that burden women and minorities deserve closer scrutiny. One way to do this, borrowed from the law of employment, jury and voting rights law, is to make more use of rebuttable presumptions when policies have significant disparate impact, perpetuate traditional forms of inequality or significantly contribute to social stratification. Courts need not invalidate these arrangements; they can make the political branches politically accountable for them by requiring legislatures to explain why they chose policies that entrench historic forms of inequality or have strongly inegalitarian effects.

Courts should also allow the political process more latitude in deciding when asymmetry of treatment in remedial legislation is necessary to dismantle caste. Even the most determined advocates of colorblindness are usually willing to accept benign race-conscious motivations for facially race-neutral methods like Texas's "10 percent plan" or class-based affirmative action. That would make little sense if there really was no difference between benign and invidious motivation. The real issue isn't colorblindness; it is how the state allocates the burdens of remedial and integrative programs among beneficiaries and nonbeneficiaries. Courts should relax scrutiny for race conscious programs that are genuinely tailored to remedy past discrimination or promote present integration and that spread and diffuse burdens on members of dispreferred groups.

Finally, courts should replace the bifurcated model of responsibility for protecting equality. That means adopting a suggestion made long ago by Justice Thurgood Marshall—a sliding scale approach to judicial scrutiny.<sup>19</sup> As importantly, courts can use a variety of doctrinal moves to disturb existing structures and spur legislatures to act to promote constitutional values of equality, as described below.

3. *Share responsibility for guaranteeing equality.* Courts can be catalysts, shaking up existing political coalitions and social practices, requiring legislatures to give reasons and make hard choices when their policies exacerbate inequality and place disproportionate burdens on minorities or the poor. Among other things:

(a) Courts can *name inequalities* produced by existing policies and require the political branches to justify policies that exacerbate inequality in this way. Courts can employ discourse forcing methods that require the political branches to explain how their policies respond to specific constitutional values.

(b) Courts can *interpret statutes and regulations* to avoid entrenching

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<sup>19</sup> San Antonio Metro. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70, 98-110 (1973) (Marshall, J., dissenting).



inequality and require legislatures either to accept the interpretations or publicly renounce them.

(c) Courts can introduce *rebuttable presumptions*—already used in jury, voting, and employment discrimination law—under which disparate impact triggers a duty to explain and justify policies. For example, courts could order “equality impact statements,” that would require state actors to focus on and report on the effects of their policies on social stratification by race, gender, class or other criteria. Without absolving or condemning legislatures, courts could force the political branches to take the political heat for what they were doing.

(d) Courts can declare existing policies unconstitutional, explain the constitutional principles at stake, and *let the political branches craft a remedy* that honors those principles. Courts can give the outward boundaries of a constitutional remedy, state the parameters it will use in reviewing the remedy, or explain what kinds of reasons and justifications the legislatures must provide. For example, in *Baker v. State*, the Vermont Supreme Court declared the state’s marriage laws discriminated against gays but instead of creating a judicial right to gay marriage, it asked the legislature to craft a solution.<sup>20</sup> The legislature responded with the country’s first civil unions bill. State supreme courts protecting the right to education have also put the burden on state legislatures to craft workable guarantees of rights to education.

(e) Courts can *create safe harbors* that give incentives for political branches to reform their current practices in order to avoid liability. For example, in sexual harassment law courts have given employers safe harbors for vicarious liability if they produce mechanisms for preventing harassment and resolving disputes. Safe harbors change the balance of incentives, giving the political branches reasons to be proactive in promoting equality values.

These strategies share responsibility and make the practice of equality a more dialogic enterprise between the courts and the political branches. Consider how this might work in the area of criminal law. Doctrines of strict scrutiny are ill suited to remedying the inequalities of race and poverty in our criminal justice system. Courts can’t oversee the entire criminal justice system, yet the system’s unequal impact on the poor and racial minorities is everywhere. Indeed the system uses racial classifications in suspect descriptions and racial profiling, and the facially neutral rules of criminal law are vivid in racial impact. The proper response is not to insist, as the Supreme Court repeatedly has, that there are no constitutional issues of equality at all. That gives law enforcement officials carte blanche and takes the political branches completely off the hook. Instead courts should try to make the political branches take political responsibility for the decisions they make, creating a politics where lawmakers and law enforcement officials feel pressure to take equality issues into account.

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<sup>20</sup> 170 Vt. 194 (1999).

Or take welfare policy. In *Dandridge v. Williams*,<sup>21</sup> the Court upheld a draconian family size cap on welfare benefits. Justice Stewart, hemmed in by the bifurcated system of equality law, threw up his hands. He did not want to treat poverty as a suspect classification, but believed that the alternative, rational basis, foreclosed doing anything at all. He noted that regulating “the most basic economic needs of impoverished human beings” was clearly different from “state regulation of business or industry” upheld during the New Deal. “We recognize the dramatically real factual difference . . . but we can find no basis for applying a different constitutional standard.”<sup>22</sup> Stewart was disabled by an unworkable doctrinal structure. Yet this is not a case of either-or. Without making poverty a suspect classification, courts could use statutory interpretation or rebuttable presumptions to send the problem back to legislatures. They could require legislatures to explain why their policies do more good than harm.

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4. *Take advantage of jurisdictional redundancy.* Our federal system of separated powers gives many different actors an opportunity to declare what the Constitution means. Equality law can benefit from having courts, legislatures, and executive officials take responsibility for promoting equality. For similar reasons, we should not forget the role that federalism can play. Although the standard story of the civil rights revolution is that it fought against states’ rights, it’s worth remembering that much of the early progress in black civil rights came from enlightened state laws and judicial decisions and spread nationally. Long before the 1964 Civil Rights Act many states already had passed public accommodation laws, and by the time of *Brown* the majority of states had banned de jure segregation either through statute or judicial decision. Many of the equality issues of the future will be worked out in state and local governments first. Similarly, decisions of state constitutional courts often pave the way for later interpretations of the federal Constitution.

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Many of the most important tools for protecting equality in the twenty first century will be dialogic. We are hardly alone in this conclusion. Many other countries already achieve the similar dialogic effects through very different constitutional structures, including, most prominently, Canada’s notwithstanding provision and the United Kingdom’s use of declarations of incompatibility with the European Convention on Human Rights. Indeed, American constitutionalism has used these dialogic practices for generations without fully acknowledging them. Our official model of strict scrutiny may be sterile and useless, but there are other practices in our traditions worth remembering and bringing to the surface. With a richer account of our own past practice, we might recognize commonalities between these constitutional traditions and our own.

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Several of the essays in this volume emphasize how legislative and

<sup>21</sup> 397 U.S. 471 (1970).

<sup>22</sup> *Id.* at 485.

executive constitutionalism can safeguard social and economic rights like housing, education, and health care. ~~Courts cannot mandate specific institutional reforms in these areas, but they can spur them on, helping to shape how these se, policies are constructed, and reviewing ing them for arbitrariness. The path to greater equality in the twenty-first century will require the cooperation of all the branches of government. And it will bring us back to a vision of egalitarian liberty that redeems the promises of the Fourteenth Amendment.~~

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