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PERPETUATION OF PAST DISCRIMINATION

Eric Schnapper*

The evil men do lives after them,
The good is oft interred with their bones.¹

FOR a century² the Supreme Court has grappled with determining the constitutionality of several different kinds of conduct, all of which it has loosely described as "perpetuation of past discrimination."³ The frequency with which this subject has arisen indicates its practical importance to the elimination of racial discrimination; that it has been discussed more often in recent decades reflects both the increased sensitivity of the federal judiciary to the enduring effects of past discrimination and the multitude of harms that those effects have caused. Members of the Court have conflicting views about the meaning of its past decisions⁴ and have not agreed upon the legal consequences of perpetuation of past discrimination


¹ W. SHAKESPEARE, JULIUS CAESAR act II, scene ii, lines 80–81.


³ Although this Article explicitly treats only perpetuation of past racial discrimination, it is generally applicable to perpetuation of other prohibited forms of discrimination as well. The historical and legal backgrounds of these prohibitions are different, but the constitutional guarantee in each case seeks to prevent the continuation of past abuses, and violations of these guarantees have had enduring impacts.

⁴ See, e.g., Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that, contrary to the Court's holding, "[t]here are some indications" that discriminatory intent is not required in demonstrating an equal protection violation); Palmer v. Thompson, 403 U.S. 217, 221–23 (1971) (discussing the meaning of Griffin v. County School Bd., 377 U.S. 218 (1964)). Griffin v. County School Bd., 377 U.S. 218 (1964), condemned the closing of the Prince Edward County schools and other, related measures, on the ground that these actions perpetuated segregation. Five members of the Court in Palmer insisted that the existence of an intent to perpetuate segregation was irrelevant to the decision in Griffin. See 403 U.S. at 218–20. Justice White, on the other hand, thought that discriminatory motive was the critical factor. See id. at 241–43 (White, J., dissenting). Five years after Palmer, the three Justices from the Palmer majority who remained on the Court concluded that an intent to discriminate is a necessary element in an equal protection claim. See Washington v. Davis, 426 U.S. at 238–48.
in even the most frequently discussed circumstances. The Court has not attempted to develop a coherent explanation of this area of the law or even to distinguish among the very different meanings of the term "perpetuation." Scholars likewise are divided over whether perpetuation is always unconstitutional, never unconstitutional, or forbidden in some but not all cases.

The phrase "perpetuation of racial discrimination" is used in three different senses, the first two of which this Article does not discuss in detail. "Perpetuation of past discrimination" can refer to situations in which a state, acting out of racial malice, seeks to continue or revive the harms or practices created by earlier intentional discrimination. Such intentional perpetuation is an obvious violation of the fourteenth amendment.

For example, when the federal courts ordered the desegregation of the Prince Edward County schools in Virginia, the county supervisors closed the schools and offered tuition grants and property tax credits to support the segregated private schools that the white students attended. See Griffin v. County School Bd., 377 U.S. 218, 223-24 (1964). The Supreme Court condemned this scheme because it was "created to accomplish . . . the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or
similarity between the old forms of discrimination and the new practices whose purposes are in dispute would be substantial evidence of an illicit motive.\textsuperscript{10}

In a second and very different sense, "perpetuation of past discrimination" can be used to describe the occurrence of circumstances that involve no present intent to perpetuate and no causal connection with any earlier discrimination, but that coincidentally resemble an earlier state of affairs that was the result of discrimination.\textsuperscript{11} For example, in a school system that was once segregated de jure and subsequently integrated by a student assignment plan, population shifts could re-create all-white and all-black schools. Unlike intentional perpetuation of discrimination, such \textit{recurrent} perpetuation does not violate the Constitution.\textsuperscript{12} As long as the present situation is not the result of any prior intentional discrimination or of any present discriminatory purpose, the mere resemblance of current harms to some previous unconstitutionally motivated wrongs is not by itself of more than historical interest.\textsuperscript{13}

Finally, "perpetuation of past discrimination" can be used to describe present harms to minorities that are caused by past intentional discrimination but involve no present government discriminatory intent. The critical question regarding such \textit{causal} perpetuation is whether, and (if so) when,\textsuperscript{14} a present county funds." \textit{Id.} at 232. In such cases of intentional perpetuation, there may be no direct causal connection between the old and new forms of discrimination. Thus, in \textit{Griffin} the segregated private school system resulted from the school closings, governmental financial assistance, and the racist attitudes of white parents — only the last having in any way been caused by the earlier school segregation. In general, a claim of intentional perpetuation raises essentially the same legal and factual issues posed by other claims of intentional discrimination.

\textsuperscript{10} Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.


\textsuperscript{11} \textit{See} Fiss, \textit{supra} note 7, at 157 (using term in this sense).


\textsuperscript{13} \textit{See} Washington v. Davis, 426 U.S. 229 (1976).

\textsuperscript{14} Thus, Professor Fiss correctly argues that it would violate traditional standards of accountability and causation to recognize a cause of action for continuing harms suffered by blacks if the sole basis for that recognition is that blacks were "slaves for one century and subject to Jim Crow laws for another." \textit{See} Fiss, \textit{supra} note 7, at 145. The difficulty recognized by Professor Fiss is that, although present harms are
harm is so related to some past discrimination that it violates the Constitution. Part I of this Article offers several justifications for providing remedies for present harms that are caused by past acts of discrimination. Part II describes the different ways in which past discrimination can cause a present injury, and suggests for each way the appropriate legal standard for deciding when there is a present constitutional violation. Part III discusses the problems likely to arise in administering the suggested standards, and concludes that these problems are not inherently different from those involved in ordinary discrimination cases.

I. JUSTIFICATIONS FOR THE PERPETUATION DOCTRINE

Three distinct but interrelated considerations support the conclusion that the Constitution prohibits the causal perpetuation of past discrimination. The framers of the fourteenth amendment intended to prevent the perpetuation of the system of social injustice over which the Civil War had been fought. Today, as was true a century ago, remedying injuries caused by earlier discrimination is essential to prevent the achievement of the racist goals that underlie such invidious acts. Finally, perpetuation of past discrimination is sufficiently similar to, if not indistinguishable from, simple discrimination that the two forms of discrimination ought to receive the same legal treatment.\(^1\)

A. The Framers' Intent

The perpetuation of past discrimination was central among the problems that the fourteenth amendment was framed to eliminate.\(^2\) The amendment was adopted, like the 1866 Civil

\(^{15}\) The correct constitutional analysis of a complex discriminatory transaction must be based on the purpose of the 14th amendment and the nature of the abuses that the amendment was designed to eliminate. The purpose of the 14th amendment should also determine whether the passage of time between a discriminatory act and a resulting injury is to be deemed irrelevant, or whether such a time period removes from constitutional scrutiny conduct that causes harms long after the discriminatory purpose. The answers to questions about proximate cause, statutes of limitations, or equitable remedies will delineate the wrongs that the 14th amendment will in reality redress, and those questions are thus fundamentally constitutional in nature.

\(^{16}\) The slavery controversy that preoccupied the nation for its first century may be seen as a contest between "those who desired [slavery's] curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 68 (1872). It was a tour de
Rights Act,\textsuperscript{17} on which it was based, largely in response to the black codes enacted by the southern states after the Civil War.\textsuperscript{18} Congress was particularly concerned with the labor regulations contained in the black codes. The provisions to which Congress most repeatedly objected were the vagrancy laws;\textsuperscript{19} these laws defined "vagrant" in a way that included virtually any adult who was not gainfully employed, and provided that anyone convicted of vagrancy would be punished by up to one year of forced labor in the service of some private individual.\textsuperscript{20} Congress was also concerned with statutes that made it a crime to induce an employee to leave his or her present employer\textsuperscript{21} and that authorized forfeiture of all wages if a worker failed to complete the terms of his or her contract.\textsuperscript{22} All of these provisions tended to "lock" former slaves into the service of their old masters. Although most of these regulations were facially neutral,\textsuperscript{23} Congress knew that the burdens of these regulations would fall almost exclusively on the newly

\textit{force} of perpetuation that, five years before the Civil War began, underlay the decision in \textit{Dred Scott v. Sanford}, 60 U.S. (19 How.) 393 (1856), which, over the objection of the abolitionists, facilitated the spread of the enforcement of slavery. Public opinion and state legislation, the Court concluded, "show[ed] that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery." \textit{Id.} at 409. \textit{Dred Scott} held that blacks could not be made citizens of the United States in 1856, because the widespread discrimination against blacks in 1789 demonstrated that the framers of the Constitution intended permanently to exclude blacks from the benefits of American citizenship. The \textit{Dred Scott} decision was condemned during the debates on the 14th amendment. \textit{See Cong. Globe, 39th Cong., 1st Sess.} 1285 (1866) (remarks of Sen. Creswell); \textit{Id.} at 1181 (remarks of Sen. Pomeroy).

\textsuperscript{17} Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

\textsuperscript{18} The Civil Rights Cases, 109 U.S. 3, 21-22 (1883); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1872) (discussing purpose of the 14th amendment); \textit{See Jones v. Alfred H. Mayer Co.}, 392 U.S. 409, 432-33 (1968); \textit{Id.} at 458, 467 (Harlan, J., dissenting) (discussing purpose of the Civil Rights Act of 1866).


\textsuperscript{20} \textit{See E. McPherson, The Political History of the United States of America During the Period of Reconstruction} 30 (1871) (Mississippi); \textit{Id.} at 33 (Georgia); \textit{Id.} at 39 (Florida); \textit{Id.} at 41 (Virginia); \textit{Id.} at 41-42 (Louisiana).

\textsuperscript{21} \textit{1 W. Fleming, Documentary History of Reconstruction} 287-89 (1906-07) (Mississippi); \textit{Id.} at 304 (South Carolina); E. McPherson, \textit{supra} note 20, at 31 (Mississippi); \textit{Id.} at 34 (Alabama); \textit{Id.} at 39 (Florida); \textit{Id.} at 43 (Louisiana).

\textsuperscript{22} \textit{See, e.g., 1 W. Fleming, supra note 21, at 301 (South Carolina).}

\textsuperscript{23} Vagrancy laws applied without regard to race in Georgia, Florida, Virginia, and Louisiana. Portions of the Mississippi vagrancy law were limited to blacks. The employment regulations in South Carolina, Alabama, and Louisiana applied to all laborers, but the statutes in Mississippi and Florida applied only to blacks. \textit{See sources cited supra} note 21.
PERPETUATION OF DISCRIMINATION 833

freed slaves because of the social and economic disadvantages that existed as a result of a lifetime of involuntary servitude.\(^\text{24}\)

In approving the fourteenth amendment, Congress condemned the black codes not simply as unjust, but also as a device that would continue the social and economic wrongs over which the Civil War had been fought and that the thirteenth amendment had been adopted to end. Representative Cook of Illinois argued that “under other names and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race.”\(^\text{25}\) Representative Thayer of Pennsylvania felt that the codes would “retain [freedmen] in a state of real servitude.”\(^\text{26}\) Many feared that, unless constrained, the former Confederate states would make “the legal status of . . . slaves and their posterity even worse than before.”\(^\text{27}\) Propo-
nents of the fourteenth amendment pointed to the similarities between the disabilities imposed by the black codes and those created by the old slave codes, and argued that the latter were “in substance still in force.”\(^\text{28}\) Deeply concerned with the danger that the unrepentant former rebel states would re-create the same injustices that the Civil War had been waged to end, Congress passed the fourteenth amendment in the hope of “securing and perpetuating the victories of the battle-field.”\(^\text{29}\)

The post-Reconstruction reaction feared by the thirty-ninth Congress in fact occurred. With the acquiescence of an indifferent federal judiciary and a politically immobilized federal legislature and executive branch, a system of laws, customs, and practices was erected that continued — to the extent consistent with the changing needs of the South — the economic and social subjugation of blacks that had existed before the Civil War.\(^\text{30}\) After Brown v. Board of Education\(^\text{31}\) sparked a revival of the effort to end racial oppression, racism became a struggle to continue the old but formally condemned Jim

\(^{24}\) See infra p. 835.


\(^{26}\) Id. at 1151 (remarks of Rep. Thayer) (emphasis added).

\(^{27}\) Id. at 1182 (remarks of Sen. Pomeroy); see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1866) (under the black codes, “the condition of the slave race would . . . be almost as bad as it was before”).

\(^{28}\) CONG. GLOBE, 39th Cong., 1st Sess. 740 (1866) (remarks of Sen. Lane); see id. at 1181 (remarks of Sen. Pomeroy); id. at 833 (remarks of Sen. Clark); see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–42 (1968) (black codes were “substitutes for the slave system”).


Crow system. As Justice Douglas observed after reviewing decades of Supreme Court decisions striking down discrimination in public schools, colleges, housing, public accommodations, trains, buses, beaches, parks, and libraries, the "[c]ases which have come to [the] Court depict a spectacle of slavery unwilling to die."32 Today, as was true a century ago, these diverse forms of discrimination are not isolated or spontaneous wrongs, but "badges," "incidents," and "relics" of the slavery whose trappings such discrimination still seeks to perpetuate.33

B. Perpetuation and the Nature of Discrimination

The central purpose of the equal protection clause of the fourteenth amendment is to prevent official conduct that discriminates on the basis of race and to protect minorities from injuries caused by invidious motives. Regardless whether those who caused an alleged injury acted recently and nearby or long ago and far away, if they acted for discriminatory purposes effective deterrence and full redress require that the resulting injury be remedied. Washington v. Davis34 does not require that injury and motive be contemporaneous, but only that the injury result from or be "ultimately . . . traced to a racially discriminatory purpose."35

Although American society has gradually moved away from the more blatant forms of racial injustice, the racist cause has generally sought to preserve or revive the abuses of the past and ensure their propagation into the future. Historically, discrimination that is aimed at subjugating a particular group has focused on causing harms of lasting impact. If, in a discriminatory society, all blacks daily sought the same economic, social, and political status that whites possessed, that society would face an intolerable level of unrest as well as an administrative burden well beyond its capabilities to bear. Neither Jim Crow nor apartheid could long exist if it were necessary to impose restraints and punishments daily on each member of the victimized group. Sustained discrimination requires the existence of devices, institutions, and circumstances that impose burdens or constraints on the target group without resort to repeated or individualized discriminatory actions. Only if one racist decision can affect large numbers of victims

33 See id. at 439, 443; The Civil Rights Cases, 109 U.S. 3, 20 (1883).
34 426 U.S. 229 (1976).
35 Id. at 240.
over an extended period of time is discrimination administra-

tively feasible.

For sound practical reasons, therefore, discriminatory so-
cieties have adopted forms of discrimination that have enduring impacts. For example, denying blacks education and skilled employment was central to the success of racism in the old South. If a young black lacked skills and training, the odds were excellent that he or she would be employable only as a laborer or maid. But if blacks went to college, keeping them “in their place” was likely to be a continuing problem. Brown v. Board of Education\(^36\) condemned segregated schools because they engendered a feeling of inferiority “in a way unlikely ever to be undone”\(^37\) and because a child denied the opportunity of an education could not “reasonably be expected to succeed in life.”\(^38\) These long-term effects of discrimination in education were the very reason that the South considered such discrimination vital to the preservation of Jim Crow.\(^39\) Perpetuation is thus central not only to the purpose of discrimi-
nation, but also to the means by which discrimination is achieved.

Although changing conditions and increasing federal inter-
vention have required alterations in the methods of discrimi-
nation, in many instances it has been sufficient merely to “freeze”\(^40\) the status quo in order to achieve a discriminatory

effect. At the end of Reconstruction, for example, it was necessary to remove hundreds of thousands of blacks from the rolls of registered voters in order to achieve white political supremacy; by 1960, however, that goal could be realized in many regions of the country simply by keeping the rolls all-
white.\(^41\)

Moreover, the nature of today’s complex industrialized so-
ciety facilitates such far-reaching discrimination. A discrimi-
natory act occurs in a world generally organized to amplify and extend the impact of official and private action. In order to achieve legitimate goals, modern economic, governmental,

\(^{36}\) 347 U.S. 484 (1954).
\(^{37}\) Id. at 493.
\(^{38}\) Id. at 494.
\(^{39}\) Compared to these forms of discrimination, random racial violence by the police was often relatively pointless. Thus, although southern society emphasized relegating black children to separate and unequal schools, its attitude toward police violence did not ordinarily exceed benign tolerance. See C. Vann Woodward, supra note 30, at 15–26.
and other institutions must establish rules and procedures for carrying the effects of a particular decision into the future and into the lives of large numbers of individuals. Such a network of practices can greatly extend the impact of a single discriminatory decision. Rather than interview and screen large numbers of job applicants with widely varying backgrounds and skills, for example, employers frequently rely on the decisions of public or private employment agencies; if such an agency for discriminatory reasons classified a trained carpenter as an unskilled laborer, that decision would bar the craftsman from a large number of possible positions.

Administrative convenience is not the only basis for the selection of discriminatory acts with enduring impact. Any governmental official of the last several decades would certainly know that repeated, overtly discriminatory acts are subject to legal challenge and run a high risk of failure. A "rational" segregationist school board thus would choose (for purportedly nonracial reasons) to build schools in the centers of black and white neighborhoods42 and thereafter to assign students to their "neighborhood schools," rather than build schools on the borders of those neighborhoods and assign students each year on the basis of race. The probable effect on race relations is also likely to incline racist officials to favor the discriminatory actions with the enduring effects that would obviate the need for continued overtly discriminatory conduct. Even before the civil rights movement, the need to avoid provoking black unrest and the desire to maintain a certain measure of civility in the midst of a deeply racist society counseled against unnecessary overtness. To the extent, now substantial, that blacks possess political power, white officials have even greater reason to prefer forms of discrimination with long-term and pervasive effects.

C. Perpetuation and Discrimination

In the most familiar cases of intentional discrimination, the individual with the discriminatory intent and the individual who actually inflicts the harm on the victim are the same person. This form of discriminatory action occurs, for example, when a city personnel officer, motivated by racial animus, rejects a fully qualified black applicant for a job. In a complex society, however, decisions are frequently made in a variety of other ways:

(1) A personnel officer rejects a black applicant, who is capable of doing the work involved, because the applicant lacks a high school degree — the high school degree requirement having been adopted by other city officials to exclude qualified blacks. 43

(2) A personnel officer rejects a black applicant because of the applicant’s low score on a written examination — the score having resulted from past discrimination in the public schools attended by the applicant. 44

(3) A personnel officer rejects a black applicant because another officer gave the applicant a low rating based on an interview with the applicant — the low rating having resulted not from any lack of qualification, but because the interviewing officer wanted to prevent the hiring of blacks. 45

(4) A personnel officer refuses to consider a black applicant because the city requires all applicants to have their qualifications approved by a private employment agency, and that agency refuses, for discriminatory reasons, to approve the qualifications of the black applicant. 46

(5) A black seeking private employment through a city employment service is rejected by private employers because his test scores have been lowered by racist city officials. 47

Although the person acting with the discriminatory motive and the person actually rejecting the applicant are not the same, each of these transactions involves intentional racial discrimination that clearly injures the victim. The involvement of several distinct actors is not unique to equal protection violations; in other areas of constitutional law, it is frequently necessary to direct remedial orders against officials other than those who initiated the constitutional violation. 48

43 See cases cited supra note 5.


48 Although a writ of habeas corpus is directed to the governmental official charged with custody of the petitioner, in the majority of cases the party responsible for the constitutional violation is not that official, but a judge, prosecutor, or police officer whose actions, possibly years earlier, led to the petitioner’s conviction. See Preiser v. Rodriguez, 411 U.S. 475, 485–86 (1973). In such cases, the action of the official in
If the two actions in the examples suggested above occur almost simultaneously, what is in fact a two-part transaction is described simply as "discrimination." There is no practical reason, however, why an act of intentional discrimination and the later conduct that brings that act to bear on its victim cannot be separated by weeks, months, or even years. For example, a low rating given a black applicant by a biased interviewer could continue to be used for a decade or longer to reject that applicant. When a substantial temporal separation exists, the entire occurrence is commonly characterized as "perpetuation of past discrimination," and the later act is described as "perpetuating the effect of past discrimination." But no rigid line, no constitutionally sanctioned time limitation, distinguishes "discrimination" from "perpetuation of past discrimination." The choice of terminology tells us only that the commentator considers the passage of time involved to be a long one. Perpetuation of past discrimination is simply discrimination in slow motion.

The common causal assumption that a discriminatory motive will coincide in time with the action that it animates derives in large measure from an unduly anthropomorphic view of the way that governments function. In the case of an individual, motive and action can be separated in time only by the microseconds required for the impulse to act to be transmitted from the brain to the relevant muscle. If a desire to hurt blacks was not on an official's mind at the moment that official signed a directive instituting a high school degree requirement, hurting blacks simply cannot be described as his goal.

A government, however, does not have a single mind and arm; both its decisionmaking process and its capacity for action are distributed in a complex manner among large numbers of employees who control and influence one another's behavior in complicated and often slow-moving ways. If a mayor, acting for discriminatory reasons, directs a personnel officer to institute a high school degree requirement and the officer does so, we properly describe the requirement as a racially motivated one. That characterization is correct even if the personnel officer acts months later and intends only to obey the mayor, and the characterization remains appropriate regardless whether, by the time the requirement is actually adopted, the retaining the petitioner in custody perpetuates the effect of the constitutional violation that invalidated the petitioner's conviction.

49 In the case of institutionalized discrimination, see infra pp. 855-58, there is frequently no such "perpetuating" subsequent act.
mayor may have forgotten about it, may have undergone a change of heart and joined the NAACP, or may have died.

In sum, vestiges of past discrimination do not exist gratuitously or only to a small degree — creating systematic, pervasive, and enduring vestiges is what effective discrimination was and is all about. Like a terrorist pouring poison into a city water system, an official who engages in racial discrimination intentionally sets in motion events that will cause harms that he cannot predict to victims whom he will never know. Because it is this evil that the fourteenth amendment was designed to halt, the equal protection clause should be construed to provide redress for present injuries caused by past discrimination. The passage of time between the discriminatory intent and the resulting harm is irrelevant both to the purpose and to the effect of that discrimination and thus cannot be permitted to limit the protection afforded by the Constitution.\textsuperscript{50}

Centuries of governmentally enforced and practiced racial discrimination have brought about enduring harms to racial minorities in ways that are beyond our capacity to trace in detail. That official discrimination has also played a major role in creating, nurturing, and legitimating the private acts of discrimination that have contributed to the present plight of the black community. These generalized connections between past official discrimination and present harms should be central to discussions of social policy and should bear heavily on assessing the wisdom, and perhaps the constitutionality, of affirmative action.\textsuperscript{51} Such broad interrelationships may in the final analysis be one of the most effective ways in which past discrimination is perpetuated. The law, however, must prescribe with some degree of precision when a particular harm is sufficiently connected with the act of a specific individual or institution to warrant affording a judicial remedy. Such connections, as Part II explains, can occur in a variety of ways.

\textsuperscript{50} See Keyes v. School Dist. No. 1, 413 U.S. 189, 210–11 (1973) ("If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'").

II. THE VARIETIES OF CAUSAL PERPETUATION OF RACIAL DISCRIMINATION

A past act of racial discrimination may cause a present injury in several distinct ways. First, the discrimination could be "bifurcated," involving two or more separate acts by one or more officials of the same governmental entity. Second, it could be "bipartite," involving related actions of two or more distinct parties. Finally, it could be "institutionalized," a situation that occurs when a single discriminatory act creates physical or social circumstances that endure and cause injuries in the future. The distinctions among these forms of perpetuation are critical to determining the appropriate remedy for particular instances of causal perpetuation of past discrimination.

A. Bifurcated Discrimination

Bifurcated discrimination occurs when a government official bases a present action directly or indirectly on a prior discriminatory governmental decision. In its simplest form, such discrimination transpires, for example, when official A rejects a black job applicant because official B, acting out of racial animus, had earlier given the applicant a low rating or denied the applicant the job training needed for the work. Most actual cases are considerably more complicated.

1. Prior Government Decisions. — An official action may give new life to past government discrimination by attaching some present significance to a past discriminatory decision. The most infamous examples of such perpetuation are the grandfather clauses enacted in the late nineteenth century, which exempted from onerous voter registration requirements descendents of men eligible to vote before the adoption of the fifteenth amendment.52 In the wake of Washington v. Davis,53 one would not hesitate to assert that the manifestly discriminatory purpose of these statutes rendered them unconstitutional. In 1915, however, when these laws came before the Supreme Court in Guinn v. United States,54 a statute valid

52 The law overturned in Guinn v. United States, 238 U.S. 347 (1915), provided an exemption from the state literacy test. The ordinance in Myers v. Anderson, 238 U.S. 368 (1915), contained an exemption from a requirement that a voter own $500 worth of property.
54 238 U.S. 347 (1915); see also Myers v. Anderson, 238 U.S. 368, 377 (1915) (companion case assessing state law that exempted from requirement that voters own $500 worth of property citizens who, or citizens with ancestors who, were allowed to vote before the adoption of the 15th amendment).
on its face could not be attacked on the basis of the motives of the legislators who had enacted it.\textsuperscript{55} The Supreme Court nonetheless unanimously struck down the grandfather clauses because the racial criteria in effect before the Civil War were made "the controlling and dominant test of the right of suffrage" more than half a century later.\textsuperscript{56} Through a "revitalization"\textsuperscript{57} of the conditions that the fifteenth amendment sought to eliminate, the grandfather clauses thus "re-create[d] and reestablish[ed] a condition which the Amendment prohibits."\textsuperscript{58}

Discriminatory application of voter literacy tests raises problems similar to those addressed in \textit{Guinn}. Frequently, southern registrars not only applied literacy requirements with special strictness to black applicants,\textsuperscript{59} but also permitted illiterate whites to register despite their inability to pass the tests.\textsuperscript{60} A decision in 1968 to apply a literacy test only prospectively would have exempted from that test the all-white illiterate group that \textit{past} registrars had exempted on the basis of race. The Supreme Court has thus held that a state must choose either to abandon such a test entirely or to order a complete reregistration in which the test would apply equally to all.\textsuperscript{61} The Court reasoned that to continue to use the test would subject blacks in the future to a standard that, for discriminatory reasons, had not been applied to illiterate whites in the past, and thus would "freeze the effect of past discrimination in favor of unqualified white registrants."\textsuperscript{62} In so holding, the Court did not suggest that any present discriminatory intent either existed or was a necessary basis of its decision.

The principle recognized in \textit{Guinn} is that the same legal standard that applies to the division of authority among contemporaneous officials should also be applied to officials acting at different times. A state should not be able to reduce its constitutional obligations by fragmenting its decisionmaking and restricting judicial scrutiny to the most recent government

\textsuperscript{55} See \textit{Guinn}, 238 U.S. at 360.
\textsuperscript{56} Id. at 364–65.
\textsuperscript{57} Id. at 364.
\textsuperscript{58} Myers, 238 U.S. at 380.
\textsuperscript{62} South Carolina v. Katzenbach, 383 U.S. at 334 (upholding under Civil Rights Act an injunction against the use of a literacy test).
If official \( A \) maintains a practice of hiring only applicants approved by official \( B \), who for discriminatory reasons approves only whites, the resulting rejection of a qualified black by \( A \) would violate the equal protection clause. The division of responsibility among several officials should not affect the underlying constitutional obligations of the state that employs, and acts through, all of them.

Any division of responsibility ordinarily involves at least some separation in time; \( B \)'s decision cannot control \( A \)'s action unless that decision precedes the action. If it is constitutionally impermissible to base a present official action on a discriminatory official decision that occurred a day before, only a “peculiar necromancy”\(^63\) could lead to the conclusion that it is somehow permissible to ground the later action on a discriminatory governmental decision that occurred a decade or a century earlier. Indeed, the history and purpose of the fourteenth amendment support the conclusion that reliance on decisions made in the distant past, when discrimination was more widespread and virulent, should be scrutinized even more closely than conduct based on more recent events. When official conduct is shaped by a constitutionally forbidden purpose, it is irrelevant whether the person whose decision embodied that purpose is present to witness its final implementation or lies in some long-forgotten grave.

The most common example of a past decision that is given subsequent operative effect is the decision of a legislature to adopt a particular statute. Officials implementing such a law are simply giving present effect to a legislative decision made in the past. It should be constitutionally irrelevant whether the contemporary officials have no personal racial animus, are unaware of the motives behind the statute, or mistakenly implement an improperly motivated law when they should have implemented a different, nondiscriminatory law.\(^64\)

\(^{63}\) *Guinn*, 238 U.S. at 365.

\(^{64}\) Although it may today seem self-evident that the government cannot enforce a statute adopted in the past for an impermissible purpose, it was only in 1976 that the Supreme Court applied this doctrine to past legislative decisions and thus effectively overruled its decision of five years earlier in Palmer v. Thompson, 403 U.S. 217 (1971); see Washington v. Davis, 426 U.S. 229, 239-48 (1976). *Palmer* upheld the closing of certain municipal swimming pools, despite allegations that the decision to close them was motivated by a desire to avoid integration. See *Palmer*, 403 U.S. at 219. The Court, in refusing to consider the city's motives, was troubled by uncertainty concerning how far into the future a tainted 1963 decision would reach, see *id.* at 230 (Blackmun, J., concurring), and by the prospect that, although present officials might be forbidden to close the pools on the basis of that 1963 decision, they could nonetheless close the pools for different reasons. See 403 U.S. at 225. These problems are inherent in any rule forbidding present application of some past decision because
2. Consequences of Prior Government Actions. — (a) The Principle of Liability. — The action of an official that attaches additional consequences to circumstances created by past official discrimination is equivalent to a decision by that official to allocate burdens or benefits according to the discriminatory preferences of earlier officials. Causal perpetuation of this kind, however, raises issues not presented by action that relies directly and expressly on the past decision as such.

Following the invalidation of the Oklahoma grandfather clause, that state enacted an onerous requirement that every voter eligible to register in 1916 do so within a twelve-day period or be disenfranchised for life.65 Those who had voted in 1914 (when the grandfather clause was in effect) — most whites — were exempted from this provision. Thus, the burden of the 1916 law fell primarily on black citizens. In Lane v. Wilson, the Supreme Court struck down the 1916 statute because it “partook too much of the infirmity of the ‘grandfather’ clause to be able to survive.”66 Rather than base its decision on any current discriminatory purpose, the Court condemned the law because its inevitable result was to perpetuate the consequences of an earlier unlawful discriminatory act. Even though the statute was facially neutral, “the opportunity . . . given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined.”67 Lane thus recognized that action that perpetuates the consequences of a past discriminatory decision suffers from the same constitutional infirmity as action, such as that in Guinn, that simply perpetuates the past discriminatory decision itself.

A present practice that is closely analogous to the grandfather clauses condemned in Lane — and that at times should be equally condemned — is the use of seniority to determine the conditions of employment for public employees. Unlike a policy based on actual skill or relevant experience, a seniority system bases the terms and conditions of employment at least partly on whether the government was willing to hire an individual or members of a particular group at some earlier time.68 At least in the case of workers denied employment at

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67 Id. at 276.
68 Although the seniority systems that private employers use have a similar impact,
that earlier time, the motives and practices of, for example, 1963 personnel officers are made the "controlling and dominant test" of how employees are treated in 1983. If only individuals hired during an era of discrimination are eligible for higher salaried positions, the seniority system "re-creates and reestablishes" the earlier racial criterion for filling those desirable positions.

Another example of bifurcated discrimination of this type is the use of literacy tests by a state that earlier had denied blacks the educational opportunities that would have enabled many of them to pass the tests. In such a case, the consequences of past discrimination in education determine who may vote; control of registration is thus placed in the hands of past education officials rather than in those of present election officials. The Supreme Court has recognized that, if a state had "systematically deprived its black citizens of the educational opportunities it granted to its white citizens," "impartial' administration of the literacy test today would serve only to perpetuate those inequities in a different form." The Court has repeatedly held that the perpetuation of discrimination in this manner provides a basis under the fifteenth amendment for a congressional ban on such literacy tests; in addition, the four Justices who have reached the constitutional issue agree that such perpetuation violates the fourteenth or


For discussion of the impact that eliminating this reliance on past racial criteria has on past discrimination's white beneficiaries, see infra p. 847. United Air Lines v. Evans, 431 U.S. 553 (1977), held that under title VII a private employer engaging in racial discrimination may, after the brief period for filing title VII charges has ended, "treat the past act as lawful." Id. at 558. This holding is precisely the "ancient history" argument spurned by the Court in Lane v. Wilson. See supra p. 843. Whatever basis this much-debated interpretation of title VII may have in legislative history, see The Supreme Court, 1981 Term, 96 HARV. L. REV. 62, 286-88 (1982), the interpretation embodies a doctrine that is anathema to the purpose of the 14th amendment.

The 1963 employment practices would have a similar impact on individuals who were deterred from applying because of an employer's notorious policy of discrimination or on individuals who were prevented from applying by a discriminatory recruitment policy that, for example, notified only whites when vacancies arose. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 362-64 (1977).

Gaston County v. United States, 395 U.S. 285, 295-96 (1969); see also Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (stating that the use of a literacy test in Gaston County served to "abridge the right to vote indirectly on account of race").

fifteenth amendment. 73 Similarly, in cases in which the literacy test of one city perpetuates the effects of discrimination in education by another city, that perpetuation is actionable if both cities are located in, and are thus agencies of, the same state. 74

These principles are particularly applicable in desegregation cases involving school systems that were never segregated by law. A “neighborhood school policy” does not by itself dictate which students will go to which schools. Under such a policy, the assignment of students to particular schools is, in effect, made by the officials who decide where “neighborhood” schools will be built 75 and by zoning or other officials who may exercise control over which families will live in which neighborhoods. 76 If past school officials in a residentially segregated city, acting for discriminatory reasons, located one school in the center of an all-black neighborhood and another in the center of an all-white neighborhood, a present “neighborhood school policy” would as a practical matter be a policy of letting past officials decide, on the basis of race, that white and black students will attend separate schools. In a case of officially induced residential segregation, a neighborhood school policy delegates pupil placement decisions to past housing or zoning authorities. There is nothing unlawful about delegating student assignment decisions to past officials or to officials of other agencies, but if those decisions are or were made on a discriminatory basis, 77 delegation of this kind violates the fourteenth amendment.

(b) Remedial Issues. — Equitable considerations that would not arise in a case of reliance on a prior decision will at times limit or shape the relief available in a case involving

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73 See Oregon v. Mitchell, 400 U.S. at 133 (opinion of Black, J.) (14th amendment); id. at 232 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part) (15th amendment).

74 Although the 14th amendment prohibits only “states” from denying equal protection of the laws, cities and counties are both subject to the same prohibition because they are regarded for 14th amendment purposes as mere agencies of the state. See, e.g., Cooper v. Aaron, 358 U.S. 1, 17 (1958).


77 A similar problem occurs when present jury commissioners use lists of prospective jurors prepared by predecessor officials who systematically excluded blacks. See, e.g., Labat v. Bennett, 365 F.2d 698, 715-16 (5th Cir. 1966) (“The Commission inherited a card index that for years had succeeded in producing only white jurors on the grand jury and the petit jury in Orleans Parish. Its failure to change the system amounted to a deliberate decision to continue the systematic limitation of Negroes on the venires.”).
reliance on the consequences of past discrimination. The government may have given such consequences present controlling effect because, however tainted their origin, they involve physical, social, or economic circumstances that are related to the achievement of legitimate government policies. Thus, if a state chooses or is compelled to frame its policies to ensure that blacks are treated in the same way that they would have been treated "but for" past discrimination, the present consequences of that discrimination may harm, or impose costs on, parties other than the original black victims. When, for example, schools have been situated for racial reasons only in predominantly black and white communities (rather than in racially mixed areas), a neighborhood school policy that has the beneficial effect of minimizing student travel time will also result in segregated schools; integrating the schools will necessarily involve transporting some students to more distant schools.

Ordinarily the imposition on the government of costs incident to avoiding perpetuation of past discrimination is not a matter of concern; the burdens caused by unlawful conduct properly belong on the wrongdoer rather than on the victim. Thus, the fact that a school board will have to acquire, operate, and maintain the buses needed to transport students does not weigh against a busing remedy. It is not necessarily undesirable if the harm that a remedy causes to the wrongdoers exceeds that originally suffered by the victims; on the contrary, the fear that the ultimate cost to the government will far exceed any "benefits" accruing to whites from discrimination would tend to deter that discrimination. Only when the cost to the government of avoiding the perpetuation of the consequences of its past discrimination is grossly disproportionate to any harm suffered by the victims should a court shrink from ordering that relief.78

Courts must, however, consider the adverse impact on innocent third parties that potential remedies might have. Whenever feasible, the consequences of past discrimination should be cancelled out in a way that places all of the burdens on the original wrongdoer, but doing so will not always be possible. An inability to place all remedial burdens on the wrongdoer, however, should not preclude a remedy. Any claim of innocent third parties to be free from harmful consequences rooted in past discrimination is not superior to the constitutional rights of equally innocent black victims. When the burdens of past discrimination cannot be eliminated en-

tirely, they should be distributed as equitably as possible among blacks and whites alike. Limiting a remedy is appropriate only when that remedy would inflict an injury on third parties that substantially exceeds the harms suffered by the black victims. In school desegregation cases, for example, white children should share equally in the inconvenience of any busing, but neither they nor black children should be bused so far that their safety or the effectiveness of the educational process would be endangered.79

In applying this limiting principle, however, claims that the third parties involved are "innocent" must be carefully scrutinized. Ordinarily discrimination is intended not merely to harm blacks, but also to advantage whites. Neutralizing the consequences of past discrimination will usually harm some whites by eliminating that intended advantage. Rather than being an undesirable side effect, eradicating such advantages is the purpose of forbidding the perpetuation of past discrimination. For example, when a racist personnel officer gives jobs or promotions to white applicants instead of better qualified blacks, the whites have no more right to keep the positions than they had to obtain them in the first place.80 Any inconvenience the whites will suffer by reason of losing the jobs to which they were never entitled will ordinarily be outweighed by the benefits that accrued while the jobs were held.81 To the extent that such is not the case, any recompense for the whites must come at the expense of the employer, not at that of the black victims.

80 In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), Justice Powell, dissenting in part, argued that white employees hired into positions from which blacks were illegally excluded were "innocent" third parties and thus would be unfairly penalized if blacks were given the seniority rights that the blacks would have enjoyed had the employer obeyed the law. See id. at 781–99 (Powell, J., concurring in part and dissenting in part). In Franks, a typical employment discrimination case of its time, the employer (as of 1968) had hired 464 whites and not a single black for the lucrative "over the road" driver positions that were the object of the litigation. See Brief for Petitioners at 7, Franks (No. 74-728). The employer's explanation was that its white drivers refused to work with blacks and would not share bunk facilities or showers with them. Id. at 7–9. Few white employees could have been unaware that the law was being violated. The equitable position of the white employees in Franks is the moral equivalent of that of a fence who objects to returning stolen property on the ground that he expected he would be able to keep it because the thief would not be caught. The majority in Franks concluded that white employees had no legitimate basis for objecting to seniority relief that merely restored the victims of discrimination to the status the victims would have enjoyed had the law not been broken. See 424 U.S. at 774–77.
B. Bipartite Discrimination

A somewhat different set of issues arises when a complex discriminatory transaction involves the related actions of two distinct parties. Cases in which present government conduct is controlled by past private motives are familiar. In *Shelley v. Kraemer*, for example, the Supreme Court reviewed the decision of the Missouri courts to enjoin Mr. and Mrs. Shelley from buying a house in violation of a thirty-seven-year-old private restrictive covenant prohibiting sale of property to blacks. In *Pennsylvania v. Board of Directors of City Trusts (Girard College)*, the Philadelphia city board operating a college excluded blacks in conformity with the 126-year-old will of the school’s benefactor, which directed that admission be limited to orphaned whites. In *Evans v. Newton*, the city of Macon, Georgia, was involved in the operation of a public park that excluded blacks, as required by a fifty-five-year-old will bequeathing the land for use as an all-white park.

Although all of these cases were held to involve state action because public officials took steps that injured blacks, whether the discrimination should be characterized as state action was, and remains, a more difficult question. The Supreme Court has repeatedly held that, when “the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement,” that state enforcement violates the fourteenth amendment. These decisions, however, were handed down before *Washington v. Davis* made clear that discriminatory intent is an essential element in an equal protection claim. Although it held that harm to blacks must “reflect” or “be traced to a racially discriminatory purpose” to violate the equal protection clause, *Washington v. Davis* did not involve bipartite discrimination and therefore did not indicate whether the discriminatory purpose must have

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82 334 U.S. 1 (1948).
84 382 U.S. 296 (1966).
86 *Shelley*, 334 U.S. at 20.
87 *Washington v. Davis*, 426 U.S. at 239.
88 *Id.* at 240.
PERPETUATION OF DISCRIMINATION

existed in the mind of a public official, rather than in that of the related private party. This recurring problem can be analyzed as one of the several varieties of causal perpetuation of past discrimination.

1. Prior Third-Party Decisions. — Shelley, Girard College, and Evans v. Newton can best be understood as attempts to delegate to private individuals control over the sort of substantive activity in which governments themselves often engage for public purposes. Girard College and Evans v. Newton involved educational and recreational facilities, both of which governments regularly provide to the public. In each case, public officials would ordinarily have decided who would enjoy government services of the kind at issue. Instead, those choices had been placed in the hands of long-dead, private individuals who acted for reasons forbidden to the government itself.

If Philadelphia permitted a contemporary private citizen named Stephen Girard to veto the admission of every black applicant to a city-operated school, the discriminatory conduct would unquestionably be unconstitutional.89 It is the exercise of effective control over state conduct, not inclusion on the public payroll, that makes such a veto state action. The case is not different merely because the Stephen Girard to whom authority was actually delegated was a dead man who communicated his decisions by a last will and testament, rather than a living man who conveys his choices over the telephone. Similarly, the city of Macon could no more permit a deceased Senator Bacon to decide on a discriminatory basis who could use a city park than it could authorize a live Senator Bacon to do so. Such an individual is, even if unaware of it, clothed with the authority of the state, and his or her conduct is as much state action as is that of a mayor. To ascertain the motive behind state action, it is not sufficient to investigate only the salaried official who, possibly acting in a purely ministerial or even clerical capacity, inflicts the actual harm; one must look as well to the individual who exercises effective control over the nature of that action, regardless whether that individual is on the state payroll or is still alive.

In Shelley what appeared to be a mere agreement between the Kraemers and the prospective seller was in fact an effort to establish a system of private land use zoning. The restric-

89 See Meredith v. Fair, 298 F.2d 696, 701–02 (5th Cir. 1962) (public college's requirement that applicants provide a letter of recommendation from alumni, all of whom were white and unlikely to recommend a black, held unconstitutional); Bell v. Georgia Dental Ass'n, 231 F. Supp. 299 (N.D. Ga. 1964) (conduct of private organization in nominating members of state agency constituted state action).
tive covenant in Shelley did more than limit the ability of the white homeowners to sell their house to a black; if enforced, it would effectively have forbidden all blacks from buying that house. Covenants running with the land are analogous to government land use controls, and sometimes resemble such controls in their substantive requirements. Government authorities traditionally regulate how land is to be used, who may own it, and even who may live in a house. By enforcing covenants that impose comparable controls, the government places the zoning power in the hands of private parties rather than in those of public officials.

It is not unconstitutional perpetuation, however, for the state to assist in enforcing traditionally private decisions. For example, the police could evict the Shelleys if they showed up uninvited to a dinner party held by the Kraemers. In deciding whom to invite, the Kraemers would not be engaging in a form of regulation analogous to normal governmental activity. Governments do not ordinarily control decisions concerning who associates with whom, regardless of the reasons — racial or otherwise — that underlie these private decisions. In enforcing the Kraemers' decision, the government would merely be protecting private activity and discretion traditionally free from intrusion by either the government or other individuals.

2. Consequences of Prior Third-Party Action. — Governmental conduct that perpetuates the effects of past private discriminatory acts presents a problem very different from the government's perpetuation of past private decisions as such. As is true of the perpetuation of past private decisions, the governmental action perpetuating the consequences of past private decisions is shaped by a discriminatory purpose. But removing that discriminatory taint is more difficult when such consequences are involved. A city that perpetuates past private decisions by basing its hiring of bus drivers on the recommendations of a discriminatory private agency can end the constitutional violation involved simply by making its own employment decisions. But if the city needs trained drivers, and the only training school has a history of excluding blacks,

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90 When a contract between two private individuals that controls only those two individuals limits conduct by one that would ordinarily be constitutionally protected, enforcement is not necessarily invalid: the privilege of exercising constitutional rights may, at least under some circumstances, be bargained away in return for other considerations. See, e.g., Snepp v. United States, 444 U.S. 507, 509 n.3, 513 n.8 (1980) (per curiam).


the consequence of the private discrimination may be that there are no trained blacks to hire. Only by itself assuming the costs of training bus drivers can the city avoid perpetuating the effects of the training school's discrimination. Imposing such costs on the city would obviously be appropriate if the city were responsible for the earlier discrimination in training, but in this example the city is by definition an innocent third party.

The government's status as an innocent party does not mean, however, that a city or state is free in all cases to perpetuate the consequences of past private discrimination. The perpetuation of such consequences remains a constitutional violation; a government's status as an "innocent" party does not legalize its conduct, but merely provides an equitable limitation on the available remedy. In a case of bifurcated discrimination, the past invidious intent of the government warrants imposition of any remedy whose cost is not grossly disproportionate; here, however, the government's innocence means that its interests are entitled to no less, but no more, consideration than are the interests of the individuals who are suffering from the effects of that earlier discrimination.

The problems that arise in this area do not lend themselves to a simple rule, but instead require an ad hoc balancing in which a state's asserted interests as well as the costs and feasibility of alternative methods are carefully scrutinized. Thus, the interests of the black victims in being free from the consequences of such past discrimination must be weighed against several factors: (1) the extent that abandonment of the perpetuating practice would prevent, or increase the cost of, the achievement of the government policy involved; (2) the importance of that underlying policy; and (3) the interests of any other genuinely innocent parties that might be affected by abandonment of the perpetuating practice.

Bipartite perpetuation of this kind occurs when jury commissioners select grand or petit jurors from among their personal friends. If those commissioners, acting in their private capacities, had long chosen to socialize only with whites, such a personal acquaintance "test" would perpetuate the effects of their earlier, private, racial decisions. Although maintaining the competence and integrity of grand juries is a legitimate state concern and might be fostered by this personal acquaintance standard, the burden imposed upon that concern by requiring jury commissioners to take affirmative steps to meet and learn the qualifications of blacks is trivial. Accordingly, the Supreme Court has repeatedly held that a list compiled
from a commissioner's all-white circle of friends cannot be used as the basis for selecting grand jurors.93

Imposition of voter literacy tests on blacks educated outside the state requiring the test also poses a problem of bipartite discrimination.94 A state may have some interest in ensuring that voters are well informed. But because a large number of voters obtain most of their information about current events from radio and television, literacy will often add little to a voter's actual knowledge. Illiterate but politically concerned citizens may well know more about the issues of the day than do apathetic college graduates. Blacks disenfranchised by the combination of a literacy test and past discrimination in education would lose not only the right to vote, but also the ability to protect other interests through the political process.95 The substantial harm imposed by literacy tests in such circumstances would clearly outweigh any marginal good that the tests might achieve.

If a city needs to hire a lathe operator for a few weeks and all available lathe operators are white because, unbeknownst to the city, the union that runs the necessary two-year training program excludes blacks, the city may constitutionally be permitted to hire from that all-white labor pool. If the city is filling a full-time permanent position, however, and only two weeks of training are necessary to run the machine, the Constitution requires the city to train blacks. As the cost and delay required to train lathe operators decreases and the importance of the jobs to black applicants increases, the obligations of the city change. No precise line can be drawn, however, to determine the number of days of training that are so few that the city must provide them.

This balancing process is unnecessary when a state can remove the taint from government practices affected by private discrimination by preventing that discrimination in the first

93 See Cassell v. Texas, 339 U.S. 282, 289 (1950) (commissioners in their official capacities had a "duty to familiarize themselves with the qualifications of the eligible jurors of the county without regard to race or color"); Hill v. Texas, 316 U.S. 400, 404 (1942) (use of such a list violates a duty "not to pursue a course of conduct . . . which would operate to discriminate in the selection of jurors on racial grounds"); Smith v. Texas, 311 U.S. 128, 132 (1940) (same).

94 See Gaston County v. United States, 395 U.S. 285, 293 n.9 (1969) ("It would seem a matter of no legal significance that they may have been educated in other countries or States also maintaining segregated and unequal school systems."); see also Oregon v. Mitchell, 400 U.S. 112, 233–34 (1970) (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part) (same).

95 See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (political franchise is fundamental right because it is "preservatives of all rights") (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
place. In some situations, such as those in which potential voters are the victims of educational discrimination in another state, this simple remedy will not be feasible. In the case of the lathe operators, on the other hand, forbidding third-party discrimination is clearly possible. When prevention of certain private discrimination can eliminate the discriminatory impact of state practices, this solution will ordinarily be virtually cost free and should thus be constitutionally required. Although a state may have no duty to forbid private discrimination, it cannot ask a court to limit a remedy in order to avoid costs caused by the state's own inaction. Therefore, if a state knew or should have known that its actions were being controlled by the effects of private discrimination, it cannot complain of remedial burdens that would not exist if it had acted to prohibit that discrimination. 96

3. Private Perpetuation of Prior Government Discrimination. — Just as a past private intent may control a present governmental act, so too past official discrimination can shape present private actions. Such effects can occur in several ways:

(1) *Private reliance on a government decision.* For example, an employer refuses to hire an applicant, because the applicant was not referred by the state employment service, that referral having been denied on account of race.

(2) *Private reliance on the consequences of government discrimination.* For example, an employer refuses to hire an applicant, because that applicant lacks certain training or ed-

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96 The circumstances under which the Constitution forbids state reliance on the consequences of third-party discrimination are not the same as those under which that third party itself would face liability because of the state's reliance. When the third party acts solely for its own purposes and violates no law by doing so, that party cannot be held liable merely because a state chooses to rely on the party's conduct. On the other hand, when a private party acts partly or wholly in the hope that the state will so rely, or when the party, having acted for other reasons, subsequently seeks that reliance, the overall transaction becomes joint activity; such a relationship renders the party's conduct state action and results in liability for damages caused by the state reliance. See, e.g., Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2756–57 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150–52 (1970) (merchant and police acted in concert to refuse admission of blacks to lunchroom); United States v. Price, 383 U.S. 787 (1966) (police and private citizens assaulted blacks after release from custody). Such joint activity would occur, for example, if a union refused to train blacks in order to prevent a city from hiring minority lathe operators. This theory may mean that a third party will at times be financially liable even though the state itself is not. When the third party's conduct is itself unlawful for reasons unrelated to the subsequent state reliance, that party's financial liability includes any foreseeable state reliance regardless whether the reliance was sought or desired. Of course, if the present private conduct is coerced or required by the government, the "private conduct" is state action.
ucation, that training or education having been denied to black students by the public schools on account of race.

(3) Government action that increases the risk of injury by a third party. For example, a city bus driver ejects a black passenger in the middle of a highway at night, because that passenger refuses to sit in the rear of the bus; as a result, the passenger is run down by a car.

In each of these cases, a private party inflicts the actual injury. Although unconstitutional state action clearly occurred, it ended before the actual infliction of the harm.

If the victim in such a case brings an action against the government, the existence of a constitutional violation is clear; the critical issue is which of the resulting injuries will be redressed. In light of the common law background against which the fourteenth amendment was fashioned, the minimum area of liability and remedy for a discriminatory act causing harm in this manner should be no less than would exist for any other intentional tort. At a minimum, it is clear that relief must be provided for any foreseeable injury and that only the type of harm that might occur, not the precise manner of occurrence, must have been foreseeable.

These rules of foreseeability and proximate causation also apply to the previously discussed types of bipartite discrimination. In those cases, however, a governmental act causes the actual injuries and is itself a discrete constitutional violation; foreseeability is thus measured from the time and place of this later act and rarely limits the available relief. But when liability is imposed because of private action perpetuating prior government discrimination, the government's action by definition ended with its prior act, and it is from this vantage point that foreseeability must be assessed.

98 The question of which resulting injuries could be redressed is, at least on occasion, one of constitutional magnitude. If Congress had the power to deny all remedies for harms occurring in this way, it could effectively immunize, and thus encourage, the discrimination involved.
100 See F. Wharton, A Treatise on the Law of Negligence § 74 (1874). It is for Congress, in prescribing statutory remedies, to decide in which other circumstances a state might incur liability for harms caused by a combination of its discrimination and some later private action.
101 The difference between foreseeability at the time of government action and that at the time of private action may occasionally be of substantial importance. The alteration of a black worker's test scores by a state official, for example, could affect whether the worker is assigned to a well-paying white-collar position or to a less lucrative blue-collar job. The resulting loss in wages would be foreseeable at the time.
The nature of discrimination and the policies and problems discussed in Part I dictate that each new harm caused by private conduct based on past government action be deemed to create a separate cause of action against the government. In an ordinary tort case, the statute of limitations does not begin to run until the tortious conduct has actually injured the plaintiff, and if (as will usually be true when discrimination is involved) the violation has been intentionally concealed, the statute does not begin to run until the victim knows, or should know, that the violation has occurred. Frequently these rules alone will suffice to toll the relevant statute of limitations. But because the purpose of discrimination is to create future, perpetuated injuries, limitations principles must be adapted to ensure the failure of, and thus to deter, such unlawful activity.

C. Institutionalized Discrimination

A past governmental act can affect the present even in the absence of a present act that activates or amplifies that past act or its results. The physical, social, and economic consequences of governmental discrimination may endure and continue to affect the same or new victims without any intervening governmental or third-party action. If, for example, a city builds well-lit, paved roads in its white neighborhoods but leaves streets in black areas unpaved and unlit, these physical differences will persist and continue to harm the members of minority communities indefinitely. A similar ongoing injury will likewise occur solely because of continuing physical circumstances if the city builds its only hospital in the center of a white neighborhood and thus imposes great inconvenience of the alteration and thus should be actionable regardless whether a city agency or a private employer relied on the test scores. A different result might follow if, after the test score alteration, the shop in which those with lower scores came to work were discovered to have a carcinogenic asbestos ceiling; some conditions may affect workers in unpredictable ways unrelated to their salaries or the nature of their work. Any claim of unforeseeability must be considered in light of the likelihood that particular discriminatory actions were selected precisely because of their great capacity for harm.


104 See supra pp. 834–36.

105 See, e.g., Hawkins v. Town of Shaw, 437 F.2d 1286, 1289–91 (5th Cir. 1971) (holding discrimination in street paving, lights, sewers, drainage, water mains, fire hydrants, and traffic control signs to violate equal protection), aff'd per curiam on reh'g en banc, 461 F.2d 1171 (5th Cir. 1972).
on routine patients and greater risk on emergency patients from predominantly black areas.\textsuperscript{106}

These cases of institutionalized discrimination differ from bifurcated and most bipartite discrimination\textsuperscript{107} because the harm continues to be inflicted after,\textsuperscript{108} often long after, all government activity has ceased. The Supreme Court nevertheless has consistently recognized an affirmative obligation on the part of the government to "dismantle" or "disestablish"\textsuperscript{109} the tainted realities for which it is responsible. These realities, like a hole maliciously dug in a road or a spring gun,\textsuperscript{110} are "perennial violations"\textsuperscript{111} continually working new harms and injuring new victims. As with the third category of bipartite discrimination, the government is liable for any foreseeable injuries, whether immediate or delayed, caused in this way by unconstitutional discrimination.

The most familiar and important decisions in this area of the law concern the disestablishment of segregated school systems. Although \textit{Brown v. Board of Education}\textsuperscript{112} decided only that black students could not be assigned to separate schools on the basis of race, \textit{Green v. County School Board \textit{(New Kent County)}}\textsuperscript{113} held that a school system formerly segregated de jure could not satisfy its constitutional obligations merely by permitting black and white children to attend the schools of their choice. Such a school system was required instead to reassign students on the basis of race in order to create racially neutral attendance patterns. As Justice Rehnquist later ob-

\textsuperscript{106} Cf. NAACP v. Wilmington Medical Center, 491 F. Supp. 290 (D. Del. 1980) (holding unconstitutional the moving of a hospital from heavily black inner city to predominantly white suburbs), \textit{aff'd en banc}, 657 F.2d 1322 (3d Cir. 1981).

\textsuperscript{107} In the third category of bipartite discrimination, in which subsequent private conduct perpetuates the effect of past governmental action, the government action may also have ended long before the infliction of any injury. \textit{See supra} pp. 853-56.

\textsuperscript{108} A subsequent governmental action could, of course, preserve the conditions created by the past discrimination or enhance their capacity to injure the victim group. When government actions would prevent fashioning an effective remedy for the institutionalized discrimination, the courts should prohibit such actions. \textit{See} United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972) (division of school district into two districts impermissibly impedes complete desegregation); Wright v. Council of City of Emporia, 407 U.S. 451 (1972) (same).

\textsuperscript{109} \textit{See}, e.g., \textit{Green v. County School Bd.}, 391 U.S. 430, 437-40 (1968).

\textsuperscript{110} \textit{See} 1 F. HARPER & F. JAMES, \textit{LAW OF TORTS} 252 (1956). A spring gun is a rifle or pistol that has a trip wire attached to the trigger and that is aimed at the location at which an intruder is likely to be standing when he or she touches the trip wire.

\textsuperscript{111} Cf. Standard Oil Co. v. United States, 221 U.S. 1, 74 (1911) (conditions created by antitrust violation).

\textsuperscript{112} 347 U.S. 483 (1954).

\textsuperscript{113} 391 U.S. 430 (1968).
served, Green represented a major though far from self-evident gloss on Brown.\textsuperscript{114}

The result in Green follows from the fact that systematic de jure segregation involves two distinct harms. The assignment of a single black child on the basis of race to a particular school is ordinarily a constitutional violation;\textsuperscript{115} in addition, the fear and hatred generated by past segregation may deter such a student from later transferring to a more convenient integrated school even if given the chance.\textsuperscript{116} The assignment of large numbers of black students to a particular school works still another wrong: it labels that institution as a "Negro school"\textsuperscript{117} in the eyes of its students and of the community. Even if a student newly arrived in New Kent County were assigned to such a school without regard to race, that student's rights would still have been violated. Like a physical sign affixed to the school building reading "Negro School," this officially sponsored racial identification is a constitutionally impermissible badge of inferiority.\textsuperscript{118} That label, having once been placed on the school and its black students by systematic de jure segregation, can be removed only by altering the composition of the student body. When isolated acts of discrimination have assigned some students on the basis of race, it is a sufficient remedy merely to reassign the affected students and thus to undo the "incremental segregative effect"\textsuperscript{119} of the violation. When open, notorious, and widespread practices of racial assignment result in racial identification, however, there exists a distinct violation requiring its own remedy.


\textsuperscript{116} Green, 391 U.S. at 440 n.5.

\textsuperscript{117} Id. at 442. As the Court elaborated in Green:

Racial identification of the system's schools was complete, extending not just to the composition of the student bodies at the two schools but to every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro."

\textsuperscript{118} See Brest, supra note 6, at 33-36 (explaining Green on other grounds, but using similar reasoning to account for the decision three years later in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

\textsuperscript{119} Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). The retention of students in the schools to which they were originally assigned on the basis of race would be a case of bifurcated discrimination. See supra pp. 840-47.
When governmental discrimination creates continuing social or physical conditions, each injury caused by those conditions is a fresh constitutional violation. The appropriate remedy in such cases is not merely to redress specific injuries, but also to disestablish whatever ongoing state of affairs produced those injuries and threatens future harms. The applicable remedial principles are the same as they are for bifurcated discrimination involving reliance on the consequences of past discrimination.\(^\text{120}\) The cost that the remedy imposes on the government will ordinarily be of no concern, because the government itself is by definition the original wrongdoer. In shaping remedies, however, consideration should be given to the interests of any genuinely innocent third parties\(^\text{121}\) who may be affected, although taking account of their interests should not result in leaving or placing them in a position superior to that of any black victims.

III. Administering the Suggested Standards

All claims of unconstitutional discrimination require findings of both a discriminatory purpose and a causal connection between the discriminatory action and the alleged injury.\(^\text{122}\) When a discriminatory transaction occurs over an extended period of time and may be described as perpetuation of past discrimination, the process of detecting the discriminatory purpose and the causal connection may well be affected. \(\text{Washington v. Davis}\) requires an inquiry into the purpose behind the governmental decision — whatever its age — alleged to be unconstitutional. The difficulty of ascertaining the motives behind a decision does not depend on the manner in which that decision allegedly caused the present injury.\(^\text{123}\) Whether, for example, a grandfather clause disenfranchises blacks relatively directly, as in \(\text{Guinn}\), or more indirectly, as in \(\text{Lane}\), the task of detecting its purpose is the same. The resolution of perpetuation claims may require determining the motivation behind a larger number of past acts, but only behind past acts that are similar to those presented by ordinary discrimination cases.

The chain of causation connecting the original discriminatory purpose with the alleged injury is of particular concern

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\(^{120}\) See supra pp. 843–47.  

\(^{121}\) See supra pp. 846–47.  


in a perpetuation case. This relationship between purpose and injury, however, is the same relationship that courts frequently analyze — prospectively rather than retrospectively — to determine in conventional discrimination cases the remedy appropriate to correct the initial act of discrimination. In instances of discriminatory applications of literacy tests, for example, the underlying lawsuits were aimed at that unequal application, and the bar to further use of the tests was ordered as a prospective remedy to prevent further harm. The problem of ascertaining prospectively why more blacks than whites would be disenfranchised by even a “fair” future application of the tests is precisely the problem that would arise retrospectively if, after a cessation of that discrimination, a plaintiff sued to invalidate a present “fair” use of the tests on the ground that such use perpetuated past discrimination. Often it will be easier to conclude with a reasonable degree of certainty that a harm that actually occurred resulted from a particular past violation than it is to show that a harm that may occur in the future will be the result of a present or recent violation.

The causation issue arising in perpetuation cases is whether a present injury results from past discrimination or would have occurred regardless of any such discrimination because of past events of no constitutional significance. Claims of bifurcated or bipartite perpetuation allegedly based on past decisions will usually not be difficult to resolve, because the intervening action causing the disputed condition will ordinarily identify the earlier decision on which that action is predicated. Two causation issues are raised by a claim that a present harm is the result of institutionalized discrimination or of bifurcated or bipartite perpetuation involving reliance on the consequences of prior discrimination. The first question is whether the past act of discrimination is capable of causing the type of harm involved — whether, for example, the denial of an adequate education in Gaston County v. United States could have resulted in a level of literacy so low that the victims could not pass a literacy test. The second question is whether it was that past act, rather than some other cause, that resulted in the harm — whether, for example, applicants are illiterate because of discrimination in education rather than because of some disability that would have prevented them from learning

126 Such a contention was in fact made by the plaintiff county in Gaston County. See 395 U.S. at 288.
to read even if they had been provided the same education afforded to whites.

The second question in turn presents four types of issues:

(1) Is there some circumstance other than the discriminatory conduct that is capable of producing the disputed condition? (For example, can an IQ of fifty cause illiteracy?)

(2) Did that circumstance actually exist at some point in the past when it could have caused the condition? (For example, did the applicant in fact have an IQ of fifty?)

(3) Did anything occur after the act of discrimination to mitigate or eliminate its effects? (For example, was the applicant given a remedial reading course?)

(4) What are the comparative probabilities that the discriminatory act, as modified by any mitigating event, and the neutral circumstance would produce the disputed condition?

These issues may occasionally present difficult evidentiary questions, but such questions are not inherently unanswerable. A lengthy delay between the act of discrimination and the present condition increases the possibility of an alternative cause or of some mitigating event; whether this delay will matter in a given case, however, will depend on the particular circumstances involved. The mere passage of years or even decades will not necessarily frustrate this inquiry into the causal relationship between the act of discrimination and the injury; it is easier to determine that the lack of black registrations in *Lane* resulted from the operation of the grandfather clause twenty-five years earlier than it might be to decide whether a delay in providing medical care to a black accident victim caused his death an hour later.

Nothing about this factual inquiry is inherently different from the issues that arise in deciding an ordinary tort case or in fashioning a prospective remedy for a present act of discrimination. Three considerations, all present in these other types of cases as well, alleviate the problems involved. First, the issue of causation must be decided not in the abstract, but in a lawsuit; the question is not so much whether the discrimination caused the present condition as whether the plaintiff proved that it did so. Historians or sociologists might have difficulty deciding whether discrimination in education caused black illiteracy, but a judge need not know the answer to decide a case. If the question were too speculative to answer

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128 Under certain circumstances, as in *Gaston County*, the burden of proof may shift. At least in school desegregation cases, the plaintiff establishes a prima facie case by proving the occurrence of a racially motivated action capable of causing the injury alleged. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211 n.17 (1973).
with a reasonable degree of certainty, an academic might find himself or herself in a quandary, but a judge would simply find for the defendant. Second, a court can fashion remedies that take account in an equitable way of any unavoidable uncertainties. Finally, in tracing the causal connection between an act of discrimination and a particular injury, judges can draw both on their personal experience in resolving problems in other areas of the law and on the specific precepts that have evolved over several centuries for dealing with analogous problems in tort.

IV. CONCLUSION

Perpetuation of past discrimination may involve one or more of three basic characteristics. It may be bifurcated, with the injury following directly from a governmental act relying on prior governmental discrimination, bipartite, with the injury caused by a combination of governmental and third-party action, or institutionalized, with the injury following some time after any relevant governmental or third-party action. Not every instance of perpetuation of past discrimination is unconstitutional or entitles the injured party to a remedy; rather, the defenses vary according to the type of perpetuation involved, as is indicated by the table on the following page. In a particular case, several instances of perpetuation, possibly of different kinds, can occur consecutively or even concurrently. An injury to any black individual that occurs in this manner violates his or her constitutional rights, regardless whether the original act of discrimination, or any subsequent perpetuating action, has an adverse impact on blacks as a group.

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129 A plaintiff should not be required to establish the absence of every conceivable alternative cause. Although the burden of persuasion remains with the plaintiff, evidence sufficient to create a reasonable inference that past discrimination caused the present harm should shift the burden of proof to the defendant. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284–287 (1977); Gaston County, 395 U.S. at 295–296.

130 In a Gaston County type of case, for example, rather than attempt either to disenfranchise all whites who would not have passed the literacy test had they received only the education that blacks received or to enfranchise all blacks who would have passed the literacy test had they received a "white" education, the courts could simply let everyone — black and white — vote.

131 Although almost never found, a compelling state interest is always a defense to a discrimination charge.

132 If, in a city agency, a single black were assigned to a poorly paid position
The constitutional requirement that courts "eliminate the discriminatory effects of the past" is simply the obligation to prevent the perpetuation of past discrimination viewed from a different point in time. The legal and causal relationships between a 1970 discriminatory act and a 1980 injury are the same regardless whether the relationships are examined by a 1975 court seeking to prevent that harm or a 1983 court undertaking to remedy it. Perpetuation of past discrimination remains an important and distinct area of law because of the impossibility of foreseeing and preventing all future injuries at

because of his or her race, that assignment, and a seniority system that perpetuated it, would violate the constitutional rights of that individual. Cf. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (affirmative action aiding certain blacks not a defense to claim of discrimination against other blacks).

the time of a given violation and because, as is true in the
case of bipartite discrimination, the initial act of discrimination
may not by itself be unconstitutional. Conversely, not all
continuing effects of past discrimination involve perpetuation.
If the victim of a past act of discrimination is left poor or
illiterate or physically impaired, much of the continuing suf-
fering will not be caused by some new act or continuing ex-
ternal circumstance\textsuperscript{134} that perpetuates the old violation. Such
injuries can be remedied only in an action to redress the
original constitutional violation.\textsuperscript{135}

The legal defense of perpetuation often involves a vigorous
effort both to deny the legal relevance of, and responsibility
for, the past discrimination that gives meaning and import to
a present practice and to insist that the harms befalling blacks
because of their race are "someone else's fault." In \textit{Lane v. W}ilson,\textsuperscript{136} Oklahoma had disenfranchised for life anyone who
had failed to vote in 1914 — a year in which blacks were
effectively forbidden to register — unless he or she had reg-
istered during a special twelve-day period in 1916. The state
sought unsuccessfully to defend this scheme by arguing that
the twelve-day registration period was adequate and by dis-
missing all of the events that preceded that period as "ancient
history."\textsuperscript{137} Today employers determine wages and jobs
through the use of seniority systems based on job assignments
made years earlier on the basis of race, but contend that those
original discriminatory assignments are too old to be action-
able.\textsuperscript{138} Such perpetuation is an attempt to give controlling
present effect to earlier events while simultaneously insisting
that those past events are legally irrelevant.

The essence of effective racial discrimination was and re-
mains the creation of rules and circumstances that minimize
the necessity for new acts of intentional discrimination. Once
such a system has been established, all that is accomplished
by forbidding further intentional discrimination is interference
with the ability of biased officials to fine-tune the system and
adapt it to unforeseen developments.

\textsuperscript{134} See \textit{supra} pp. 855–58.
programs ordered for victims of school segregation).
\textsuperscript{136} 307 U.S. 268 (1939).
\textsuperscript{137} Brief for Respondents at 67, \textit{Lane} (No. 460). Petitioners argued that the 12-
day registration period was a device to "perpetuate" the grandfather clause, which,
in turn, was said to be a device to perpetuate the legal conditions that preceded the
enactment of the 15th amendment. Brief Supporting Petition for Writ of Certiorari
at 15–16, \textit{Lane} (No. 460).
\textsuperscript{138} See, e.g., \textit{International Bhd. of Teamsters v. United States}, 431 U.S. 324
America’s second reconstruction occurred only after a century of discriminatory ingenuity had created circumstances and set in motion social and economic forces that needed little additional impetus to confine blacks to a subservient role. Preventing new acts of intentional discrimination in the 1960’s could no more eliminate the burden of government-imposed discrimination than forbidding the importation of slaves in 1808 ended the practice of slavery. Indeed, other recent changes have in many ways increased the effectiveness of the old system of oppression that remains. Education and technical skills, important at the time of Brown, have become essential to economic success and mobility; at the same time, opportunities for well-paid and secure blue-collar jobs, the route used by millions of whites to join the middle class, have steadily declined.139

Elimination of new acts of discrimination against blacks, as against women and other groups, will remain an important problem in the years ahead. But the central discrimination issue of the 1980’s will be to end the perpetuation of past discrimination. If this goal is not accomplished, the speeches, judicial decisions, and legislation of the past two decades may merely continue the string of broken promises of racial justice. The federal courts, which since Brown have repeatedly demonstrated their determination to eliminate intentional discrimination, must be equally vigilant and vigorous in ensuring that the effects of that constitutionally condemned discrimination, and the practices that perpetuate those effects, are also “eliminated root and branch.”140