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Bolling Alone

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Under the doctrine of reverse incorporation, generally identified with the Supreme Court's decision in Bolling v. Sharpe, equal protection binds the federal government even though the Equal Protection Clause by its terms is addressed only to states. Since Bolling, however, the courts have almost never granted relief to litigants claiming unconstitutional racial discrimination by the federal government. Courts have periodically found unconstitutional federal discrimination on nonracial grounds such as sex and alienage, and reverse incorporation has also limited the scope of affirmative action. But in the presumed core area of preventing federal discrimination against racial minorities, Bolling has virtually no successors.

This Article proposes an explanation for the absence of successful race discrimination claims against the federal government. The absence, it argues, is not a function of a lack of federal discrimination. Rather, it is a function of shared norms between the federal judiciary and the political branches of the federal government. The federal courts and the other branches share a view of what constitutes unconstitutional discrimination, such that conduct the federal courts are willing to call "discriminatory" is largely activity that the other branches do not engage in, at least not as a matter of official policy. When federal officers depart from official policy and engage in unauthorized discrimination, subconstitutional rules created by the other branches are sufficient to police their behavior. Accordingly, there is little evidence that reverse incorporation has done much independent work in checking federal racial discrimination.

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### INTRODUCTION

This Article is about a case, a doctrine, and a surprising fact about our constitutional system. The case is *Bolling v. Sharpe*,¹ and the doctrine is reverse incorporation. In *Bolling*, decided the same day as *Brown v. Board of Education*,² the Supreme Court ruled that the District of Columbia may not segregate its public schools even though the Equal Protection Clause is addressed only to states.³ It would be "unthinkable," the Court declared, to hold that the Constitution imposes a lesser duty of nondiscrimination on the federal government than it does on the states.⁴ That declaration has become the keystone for the reverse incorporation doctrine; just as the Fourteenth Amendment's Due Process Clause has been held to incorporate provisions of the first eight amendments,⁵ the Fifth Amendment's Due Process Clause was construed to incorporate at least some—and later all—of the equal protection guarantee of the Fourteenth.⁶

*Bolling* and reverse incorporation have generally been regarded as hard or even impossible to justify in terms of the text or the history of the

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3. U.S. Const. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").
6. See infra Part I.
Fourteenth Amendment. Nonetheless, the conventional wisdom in constitutional scholarship has not concluded that *Bolling* is wrongly decided or that reverse incorporation is an illegitimate doctrine. Instead, the dominant approach has been to regard *Bolling* and reverse incorporation as justified by the force of sheer normative necessity. That claim could mean any or all of three different things. One is that desegregating the District's schools was itself so important as to justify departing from normal modes of legality. A second is that allowing the continuing segregation of the District of Columbia's schools would have undermined the legitimacy of *Brown* and perhaps made that decision unenforceable, because the Court would have appeared to be hypocritically imposing a mandate on the states that it did not impose on the federal government. A third, which is not limited to the specific context of school
desegregation, is that preventing the federal government from engaging in racial discrimination is simply important enough to justify a strong judicial misreading.\textsuperscript{12} The first two of these ideas concern \textit{Bolling} more specifically, and the third is bound up with reverse incorporation more broadly. This Article focuses on the third idea.

Few doubt that federal racial discrimination is normatively intolerable, but it does not follow that reverse incorporation has been necessary to prevent it. The surprising fact that this Article analyzes is that the reverse incorporation doctrine is almost never applied to protect members of minority groups against racial discrimination. Since \textit{Bolling}, the Supreme Court has never declared a federal statute or regulation unconstitutional on the grounds that it discriminates against members of a racial minority group. Nor has the Court ever invalidated any other kind of federal action on those grounds. The Court has never found that a federal prosecutor impermissibly struck a juror from a venire on account of race, that a federal law enforcement officer engaged in unconstitutional racial discrimination against criminal suspects, or that a federal employer fired an employee for unconstitutional racial reasons. This does not mean that reverse incorporation has had no progeny at all. In an important development decades after 1954, the courts have invoked \textit{Bolling} to limit the use of affirmative action.\textsuperscript{13} Courts have also struck down federal measures as unconstitutionally discriminatory in nonracial contexts like sex\textsuperscript{14} and alienage.\textsuperscript{15} But in the Supreme Court's decisions with respect that at least they had to respect the Court's adherence to a consistent principle. On the contrary, some segregationists marshaled the doctrinal unorthodoxy of \textit{Bolling} as evidence of the Court's runaway lawlessness. See 1957 Ga. Laws 553, 560 (calling for the impeachment of several United States Supreme Court Justices, and adducing \textit{Bolling}'s innovative reading of the Due Process Clause as an example of the Justices' illegal propensity to privilege their own desired outcomes over established constitutional principles). These complaints do not mean that \textit{Bolling} aggravated Southern resistance—it seems more likely that \textit{Brown}'s opponents simply seized on any convenient ammunition with which to attack the Court. But this use of \textit{Bolling}, together with the fact that virtually no desegregation was accomplished in the Deep South until the mid-1960s, see Klarman, supra, at 363, suggests that it is fanciful to think that \textit{Bolling} had any significant power to persuade segregationists to accept the ruling in \textit{Brown}.

12. See Eskridge, supra note 8, at 2365–66 (grouping \textit{Bolling} with \textit{Brown} and \textit{Loving v. Virginia} as cases whose broad normative force is more powerful than the demands of proper method in constitutional interpretation). Robert Bork, an otherwise steadfast originalist, maintained that he would not dream of overruling \textit{Bolling} even though he could not justify it on originalist grounds. See Hearings on the Nomination of Robert H. Bork to Be Assoc. Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong. 83–84, 287–88, 351 (1987).

13. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–17 (1995) (relaying on reverse incorporation to subject federal racial classifications to the same strict scrutiny that applies to parallel state laws); see also id. ("\textit{Bolling}'s facts concerned school desegregation, but its reasoning was not so limited.").

14. See, e.g., \textit{Frontiero v. Richardson}, 411 U.S. 677, 688–91 (1973) (invalidating military regulation presuming that male service members, but not female service members, needed to provide financial support for their spouses).

15. See, e.g., \textit{Hampton v. Mow Sun Wong}, 426 U.S. 88, 116–17 (1976) (holding that aliens may not be categorically barred from civil service employment); \textit{Schneider v. Rusk},
to the heartland of equal protection—the defense of racial minority groups against governmental discrimination—reverse incorporation has been a rule for Bolling alone.

The situation is similar in the lower courts, despite their immensely larger caseload. In the fifty years since 1954, there have been only a dozen reported cases in which African American litigants claiming racial discrimination by any branch or officer of the federal government have obtained relief from any court on constitutional grounds, and on only two or three of those occasions has reverse incorporation been necessary for redressing the discrimination at issue. Many judgments are unreported and many cases settle before judgment, so these cases are probably not the only instances in which reverse incorporation has had legal force. Nonetheless, the extremely small volume of judgments against the government suggests the limited extent of reverse incorporation's broader effects.

This Article analyzes the absence of judicial decisions finding unconstitutional federal discrimination against racial minority groups after Bolling. The best explanation for that absence, it argues, is a matter of shared federal norms. At any given time, the courts are not likely to regard the activities of the other branches as unconstitutionally discriminatory, because the judiciary's view of impermissible racial discrimination more or less tracks the other branches' views of normatively unacceptable conduct.

For much of American history, the federal government practiced overt and official racial discrimination, as in the segregation of the military and the civil service. Those practices would violate equal protection if undertaken today. Prior to the middle of the twentieth century, however, courts interpreted equal protection to permit segregation, and therefore would have upheld these practices even if equal protection had applied to the federal government. Then, in the years around World War II, federal practices began to change. A new set of racial norms arose, and federal segregation began to give way—slowly, painfully, imperfectly—to official nondiscrimination. Shortly thereafter, the Supreme Court decided Brown and Bolling, rejecting the separate-but-equal view of equal protection.

This timing was not merely coincidental. The federal courts are shaped by the same national political constituency that constrains the action of the other federal branches, such that the courts and the other branches will often share a basic normative stance on important national issues. The heightened judicial commitment to racial nondiscrimina-

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16. See infra Part II.
17. See infra Part III.A–B.
18. See infra notes 139-143, 151–153 and accompanying text.
19. See infra Part V (describing work of scholars taking various views on the influence of national norms on the courts).
tion in *Brown* and *Bolling* was an outgrowth of a general rise in national antidiscrimination norms in the 1940s and 1950s. Those norms had largely done their work in the national polity—though not in all of the states—before *Bolling* was decided. In the effort to eliminate overt racism in official federal policy, little work remained for reverse incorporation to do. And since *Bolling*, given the political norms that prevent official policy from engaging in overt racism, and given the judicial construction of equal protection to prohibit only discrimination that is overt, official policy never runs afoul of the constitutional rule.

Nor has reverse incorporation been a consequential force in redressing federal discrimination that persisted in spite of official policy. To the extent that legal rules have successfully checked such unauthorized discrimination, the relevant rules have been nonconstitutional: The same mainstream federal norm that repudiated official discrimination also created a web of statutory and administrative rules to enforce antidiscrimination norms within the government. That web is dense, leaving few gaps for equal protection to fill and indeed often preempting the possibility of constitutional remedies for litigants who complain of discrimination. In principle, if that web did not exist, reverse incorporation might do consequential work. But without the norm that generated the statutory and administrative web, the courts would not have created reverse incorporation. In short, the same forces that created reverse incorporation have also ensured that reverse incorporation does little of practical consequence—at least where discrimination against racial minority groups is concerned.

In other areas, however, reverse incorporation has been more consequential, and the analysis outlined above helps explain why. The mainstream of the national polity clearly opposes overt racial discrimination against racial minority groups, and that norm animates Congress and the executive as well as the courts. On affirmative action, however, the national polity is divided, and so are the courts. There is no normative consensus for the different branches to share, with the consequence that the courts occasionally second-guess the policies that Congress and the

20. See Dudziak, supra note 10, at 79–114 (discussing Truman Administration action such as integration of Armed Forces taken in context of American racism being used for Soviet propaganda purpose); Klarman, From Jim Crow to Civil Rights, supra note 11, at 171–289 (describing shifting attitudes toward race after World War II, as well as corresponding shift in Supreme Court decisions); Richard A. Primus, The American Language of Rights 177–233 (1999) [hereinafter Primus, Language of Rights] (discussing American concepts of rights and justice as developing in response to Nazi and Soviet totalitarianism).


22. See infra Part V.B.


24. See infra notes 252–253 and accompanying text.
executive endorse. A similar dynamic helps explain why courts have found unconstitutional federal discrimination on nonracial grounds. There is no clear national norm regarding the appropriate distinctions that can be made between, for example, citizens and aliens, or legitimate and illegitimate children. Moreover, the system of statutory and administrative antidiscrimination rules is not as comprehensive where nonracial discrimination is concerned, so federal conduct that would be addressed through nonconstitutional means if it were based on race is more often in need of a constitutional remedy when it is based on other grounds.

This Article is thus concerned with a descriptive account of reverse incorporation. It is, to be sure, a descriptive account that raises questions about a leading normative defense for that doctrine. But it is not my ambition to argue that reverse incorporation is invalid or that Bolling was wrongly decided. On the contrary, my own view is that both Bolling and reverse incorporation are normatively defensible, albeit not for reasons of practical necessity. Instead, they are appropriate expressions of a fundamental shift in constitutional thought in the years around World War II, a shift that featured a heightened commitment to universal individualism and racial antidiscrimination. I suspect that the traditional argument that Bolling is justified by force of practical necessity springs in part from constitutional lawyers' reluctance to acknowledge the broad role of that shift as an independent source of legitimacy in constitutional law.

25. See, e.g., 42 U.S.C. § 2000d (2000) (prohibiting the use of federal funds for programs that discriminate on the basis of race, but not addressing discrimination on the basis of sex); § 2000e-16(a) (prohibiting discrimination in federal employment on the basis of race and sex, but not addressing discrimination on the basis of alienage or family status).

26. The important limiting case is that of sex discrimination, which is addressed in many (but not all) of the statutes and regulations forbidding discrimination and yet has been the source of a few judicial decisions against the federal government. Those cases, however, were almost entirely decided during the 1970s, a decade during which the national norm on sex discrimination was hotly contested. Since the consolidation of a norm against overt sex discrimination, very few sex discrimination cases have been decided against the federal government. See infra Part V.C.

27. Even if Bolling and reverse incorporation turn out not to have been necessary for the ends they were imagined to be essential for, proponents of the various necessity arguments could fall back upon the claim that judges in the generation of Bolling did not have the benefit of our hindsight and might have believed in good faith that reverse incorporation was more necessary than it now appears to have been. Whether such a claim sufficiently justifies Bolling or reverse incorporation depends on whether one measures the legitimacy of judicial decisionmaking against what the deciding judges believed, in good faith and given their position in history, or against what the world is actually like.

28. Similarly, the best attempts to derive reverse incorporation from earlier constitutional authorities try to locate the source of the doctrine in Reconstruction, a time whose generation of authoritative constitutional norms is uncontroversial. See Amar, supra note 7, at 772-73 (suggesting that for the framers of the Fourteenth Amendment, equal protection was a "clarifying gloss on the due process idea"); Lessig, supra note 7, at 410 (arguing that the Fourteenth Amendment removed racial inequality from the list of legitimate governmental ends). But just as others have wanted to read constitutional history in ways that repress the fundamental changes of Reconstruction, see Norman W.
in the end, the legitimacy of that shift and the legitimacy of reverse incorporation must stand and fall on the same normative judgment.

Part I of this Article charts the rise of a constitutional equality rule binding the federal government. Part II presents the results of a review of more than 1,300 cases raising equal protection claims under Bolling, in order to document the absence of reported cases finding unconstitutional racial discrimination by the federal government. Part III considers and mostly rejects three possible explanations for that absence of cases: that the small number of cases is a function of the federal government's limited jurisdiction, that the federal political process avoids discriminatory policies due to the pro-minority dynamics of a Madisonian "extended republic," and that the federal government abandoned its discriminatory practice because the Supreme Court articulated the reverse incorporation rule. Part IV shifts the focus from the conduct of the political branches to the conduct of the judiciary by examining the role of judicial deference. Part V then looks at the courts and the other branches in tandem and develops the explanation that I most endorse, which is based on shared federal norms. The norm against overt racial discrimination, I argue, was already broadly held in the political branches by the time the Court required it in Bolling. Congress and the executive had by that time done most of the work that reverse incorporation demanded, leaving little for the constitutional rule to do. Rather than being a significant cause of changed governmental behavior, reverse incorporation—at least in the context of discrimination against racial minority groups—has been mostly an artifact of change already accomplished.

I. THE RISE OF REVERSE INCORPORATION

A. Before Bolling

Prior to 1954, constitutional doctrine held that the Equal Protection Clause was applicable only against the states and not against the federal government. Litigants claiming discrimination by the federal government had periodically argued that the Fifth Amendment's Due Process Clause contained an equal protection component of its own, but these arguments were repeatedly rejected.\(^{30}\)

Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 2005-24 (2003) (arguing that the Court's recent revival of federalism is a result of "memory work" that forgets the significance of the Reconstruction Amendments), these defenses of reverse incorporation obscure the fundamental constitutional shifts that occurred in the middle of the twentieth century.


30. See, e.g., Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (declaring that the "Fifth Amendment contains no equal protection clause" in context of upholding military curfew for persons of Japanese descent); Detroit Bank v. United States, 317 U.S. 329, 337 (1943) (upholding statute giving tax advantage to certain property owners, because "[u]nlike the Fourteenth Amendment the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress"); United States v.
Even if constitutional equal protection did not bind the federal government, however, the federal government did face certain requirements of evenhandedness. Every legal system that respects the principle that like cases should be treated alike necessarily answers to some idea of equality, however thin, and the Court accordingly acknowledged that some minimal spirit of "equality of application of the law" was inherent in the system and specifically in the Due Process Clause.

That minimal spirit, however, did almost none of the work that the Equal Protection Clause would later do. After all, whatever minimal equality was inherent in the system had also been applicable against the states before the adoption of the Fourteenth Amendment, and for the same reason. Accordingly, if the Equal Protection Clause merely required that likes be treated alike, it would have been entirely unnecessary. Instead, the Court explained, adoption of that Clause bound the states to a form of equality far beyond the irreducible minimum inherent in the notion of due process. The federal government remained bound only by that minimal spirit of equal application.

During the early twentieth century, complaints about unequal treatment by the federal government appeared mostly in challenges to the new direct federal income tax, as litigants argued that the taxes fell on them in discriminatory ways. These contentions were routinely rejected on the ground that the Fifth Amendment does not contain an equal pro-

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Caroline Prods. Co., 304 U.S. 144, 151 (1938) (upholding constitutionality of a federal statute that distinguished between filled milk and other dairy substitutes, because the "Fifth Amendment has no equal protection clause"); La Belle Iron Works v. United States, 256 U.S. 377, 392 (1921) (rejecting claim that a federal tax was invalidly discriminatory on the grounds that "[t]he Fifth Amendment has no equal protection clause"). But see Mondou v. N.Y., New Haven, & Hartford R.R. Co., 223 U.S. 1, 52 (1912) (assuming arguendo that the Fifth Amendment's Due Process Clause embodied a principle similar to that of the Equal Protection Clause).

31. Similarly, this minimal idea of equality routinely becomes a part of the understanding of legal principles that seem in substance to be about values other than equality. Consider, for example, the way that free speech doctrine incorporates an equality component: Once there exists a legal claim against government restrictions on speech, speech regulations come to be tested in part by whether they abridge some speakers' rights more than the rights of other speakers who are similarly situated. See, e.g., Police Dep't v. Mosley, 408 U.S. 92, 96, 102 (1972) (striking down ordinance that permitted labor-related picketing but not other picketing); see also Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975) (arguing that equality "lies at the heart" of the protection of freedom of speech). But see Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982) (arguing that the principle that like cases should be treated alike is not a coherent or legally helpful principle).

33. Id.
34. See Stanton v. Baltic Mining Co., 240 U.S. 103, 110 (1916) (rejecting argument that income tax statute unconstitutionally denied mining companies and their stockholders equal protection of the laws under the Fifth Amendment); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24-26 (1916) (rejecting claim that the federal income tax operated discriminatorily in violation of the Fifth Amendment).
tection clause. In the 1940s, however, when the military began limiting the freedom of persons of Japanese descent living on the West Coast, claims of federal discrimination began to appear in a more sensitive context. At first, the Court held to its old position: Hirabayashi v. United States upheld a race-based curfew and reiterated without dissent that "[t]he Fifth Amendment contains no equal protection clause." But the norm against racial discrimination was growing stronger during the war years, in part because the conflict with an avowedly racist foreign enemy made many Americans increasingly uncomfortable with racist practices at home.

In 1944, Justice Frank Murphy's dissent in Korematsu v. United States denounced the military order at issue in that case as a violation of the Fifth Amendment, which he read to include a guarantee of equal protection. The majority, which upheld the military order, did not adopt this doctrinal innovation. Nonetheless, it nodded to the growing power of the norm against racial discrimination by declaring that measures limiting the rights of a particular racial group were "immediately suspect."

The Korematsu Court did not explain what constitutional paradigm gave rise to that suspicion. Instead, it ducked that technical issue by declining to identify equal protection, due process, or any other specific constitutional guarantee as the basis for the petitioner's claim. Subsequent decisions also ducked the constitutional question, disposing of cases without confirming or denying that the Fifth Amendment had an equal protection component. In Hurd v. Hodge, decided in 1948, the Court articulated the federal nondiscrimination principle as one of "pub-

36. 320 U.S. 81, 100 (1943).
37. See Primus, Language of Rights, supra note 20, at 186-91 (noting optimism of many members of racial minority groups "that the American caste system would have to give ground to the logical implications of one of America's leading explicit reasons for fighting the war").
38. 323 U.S. 214, 234-35 (1944) (Murphy, J., dissenting) ("Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment."). Justice Murphy also pressed this position in Steele v. Louisville & Nashville R.R. Co., 325 U.S. 192, 208-09 (1944) (Murphy, J., concurring), decided the same day as Korematsu. In his concurrence, Murphy argued that a labor union exercising powers conferred by federal labor law could not discriminate by race, because the Fifth Amendment forbade Congress to discriminate by race, and a union acting under the provisions of federal labor law should be treated as an agent of Congress. Id.
40. One good example is United States v. Petrillo, 332 U.S. 1 (1947). The respondent in Petrillo was charged with violating the Communications Act of 1934, but he challenged the Act by claiming that it discriminated against radio broadcasting employees in violation of equal protection as guaranteed by the Fifth Amendment. Id. at 3-5. Rather than denying that the Fifth Amendment had an equal protection component, the Court rejected respondent's equal protection claim on its merits. Id. at 8-9.
lic policy” rather than as something grounded in the Constitution.\textsuperscript{41}

\textit{Hurd} concerned a challenge to the enforcement of racially restrictive covenants in the District of Columbia.\textsuperscript{42} Unlike \textit{Shelley v. Kraemer},\textsuperscript{43} \textit{Hurd}’s companion case, \textit{Hurd} could not be decided under the Equal Protection Clause, because the government action in \textit{Hurd} was that of the federal government rather than that of a state. The petitioners in \textit{Hurd} raised a Fifth Amendment equal protection argument, and the Court ducked again, deciding the case on statutory grounds instead.\textsuperscript{44} But the Court also offered an alternative rationale, one based on “the public policy of the United States.”\textsuperscript{45} That public policy, the Court explained, did not permit a federal court to use its equitable powers for a purpose that would violate basic constitutional rights if undertaken by a state court.\textsuperscript{46}

Thus, at the end of the 1940s, the federal government’s obligation to avoid racial discrimination was articulated at the level of statutes and public policy rather than as a matter of constitutional equal protection. As such, this obligation could prevent a court from discriminating when sitting in equity, as in \textit{Hurd}. It might also influence the interpretation of statutes and regulations whose meanings were ambiguous with respect to racial discrimination.\textsuperscript{47} But no holding yet established a constitutional rule that would override a legislative or administrative choice to discriminate.

B. Bolling and Beyond

The segregation of the District of Columbia’s public schools was rooted in old statutory authority.\textsuperscript{48} Overcoming that authority and ordering desegregation would require a holding on constitutional grounds, and that is what \textit{Bolling} delivered. Without a great deal of doctrinal exposition—the text of the whole opinion occupies less than three pages in the United States Reports—the Supreme Court concluded that “racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”\textsuperscript{49} Specifically, school segregation violated due process because it

\begin{itemize}
  \item 41. 334 U.S. 24, 35 (1948).
  \item 42. Id. at 26–28.
  \item 43. 334 U.S. 1 (1948).
  \item 44. See \textit{Hurd}, 334 U.S. at 30, 33–34 (reading Civil Rights Act of 1866 to forbid a federal court to enforce a racially restrictive covenant, thus making it “unnecessary to resolve” the constitutional question).
  \item 45. Id. at 35.
  \item 46. Id. at 35–36.
  \item 48. See Carr v. Corning, 182 F.2d 14, 18–19 (D.C. Cir. 1950) (reviewing the statutory history of segregation in the District’s schools, and rejecting a challenge to that segregation).
\end{itemize}
was "not reasonably related to any proper governmental objective" and was therefore "an arbitrary deprivation of . . . liberty."50

Construed strictly, that doctrinal rationale did not entail a new rule whereby the constitutional apparatus of equal protection would apply against the federal government. Formally, the choice to rest on due process rather than equal protection avoided any overt rejection of the Court's previous holdings. Indeed, Bolling recited once again that the Fifth Amendment does not expressly contain an equal protection clause.51 Substantively, the Court need not have relied on equal protection at all, because due process already embodied the idea that government may not deprive people of liberty without a legitimate public purpose. Due process was understood to include a minimum standard of rationality and evenhandedness, thus prohibiting truly arbitrary or irrational government action.52 If school segregation was arbitrary and not reasonably related to any proper governmental objective, it would fail what we now know as rational basis scrutiny under the Due Process Clause. Equal protection need play no part.

For those who are disposed to defend the constitutionality of affirmative action, the foregoing analysis points to a temptingly elegant doctrinal position. If school segregation and other forms of status-reinforcing racial discrimination violated the due process guarantee because they served no valid governmental purpose, then Bolling could have ordered desegregation under pure due process principles, and constitutional law could have maintained the position that due process but not equal protection binds the federal government. This resolution would have allowed the federal government leeway to make racial distinctions forbidden to the states, so long as those distinctions could survive rational basis scrutiny.53 Many or most forms of race-based affirmative action fail strict scrutiny, but they would surely survive a rational basis test. Standard rationales for affirmative action such as remedying the effects of past discrimination54 or promoting diversity55 are legitimate governmental interests, and affirmative action clearly has some tendency to advance them, even if reasonable legislators could disagree about the wisdom of choos-

50. Id.
51. Id. at 499. But see Akhil Reed Amar, Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation, in Benchmarks: Great Constitutional Controversies in the Supreme Court 71, 79 (Terry Eastland ed., 1995) (reading Bolling to consider it "largely irrelevant" that the text of the Fourteenth Amendment addresses the Equal Protection Clause to the states rather than the federal government).
53. It would also avoid the textual and historical problems with reading the Fifth Amendment's Due Process Clause to incorporate the Fourteenth Amendment's Equal Protection Clause. See supra text accompanying note 7.
54. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496–99 (1989) (discussing scope of past discrimination that can be redressed by an affirmative action program).
55. See, e.g., Grutter v. Bollinger, 123 S. Ct. 2325, 2337 (2003) (holding that promoting diversity within a student body can be a compelling interest).
ing that means to promote those ends. Once exempted from the require-
ment of fitting means closely to ends, the federal government would be
largely free to practice affirmative action.

The elegance of that reading, however, is purchased only by focusing
on one cogent doctrinal statement in Bolling and ignoring a fair amount
of contrary context. Consider, for example, the Court's statement in
Korematsu that all governmental measures curtailing the rights of particu-
lar racial groups are subject to "the most rigid scrutiny."\(^{56}\) Whether Kore-
matsu was a due process case or an equal protection case, or both or
neither, that statement makes it hard to argue that constitutional law as
of 1954 subjected federal discrimination only to the minimal, rational-
basis style requirements of due process. Similarly, the Court's 1938 deci-
sion in United States v. Carolene Products Co. suggested that discrimination
against minority groups would face heightened scrutiny under the Fifth
Amendment's Due Process Clause, not under the Fourteenth Amend-
ment.\(^{57}\) The claim in Carolene Products was, after all, brought against the
federal government, and the Court dismissed any equal protection argu-
ments on the simple basis that the Fifth Amendment contains no equal
protection clause.\(^{58}\) Thus, the pre-Bolling case law had already articulated
the position that in racial discrimination cases due process required more
than governmental rationality.\(^{59}\)

Rather than choosing clearly between the minimal due process ap-
proach and the more expansive heightened scrutiny approach, the Boll-
ing Court gave voice to both. On one hand it described segregation as
arbitrary, but on the other hand it declared that the Constitution im-
posed no less a duty of antidiscrimination on the federal government

57. 304 U.S. 144, 152 n.4 (1938) (suggesting the need for more searching judicial
inquiry where the political process could not be trusted to protect "discrete and insular"
minorities).
58. Id. at 151.
59. A dogged lawyer might point out that these statements in Korematsu and Carolene
Products are technically both dicta, such that the question of what due process required of
the federal government in racial discrimination cases remained technically open. As a
doctrinal matter, that is a legitimate argument. But the issue of how due process would
apply in discrimination cases was ultimately a question of larger norms rather than precise
legalisms, and the Court's statements in Korematsu and Carolene Products indicate judicial
scruples about permitting the federal government to engage in racial discrimination on a
showing of rational basis. Similarly, neither Carolene Products nor Korematsu dealt with
racial classifications intended to benefit disadvantaged groups, but that is of little
moment—neither did Bolling. The decision to apply the same scrutiny to all racial
classifications, articulated in Croson, is analytically independent of the decision to apply the
same equality norms against the states and the federal government. Once the principle
was established that racial classifications required strict scrutiny, a court holding the views
that animated Croson would surely reach the conclusion of Adarand on the basis of Carolene
Products and Korematsu even if the prevailing doctrinal view remained that Fifth
Amendment due process did not fully incorporate Fourteenth Amendment equal
protection.
than on the states. The second approach was to prevail. Lower courts began citing Boling as authority for the more general proposition that the federal government was constitutionally barred from practicing racial discrimination, and the Court’s own decisions after Boling treated the Fifth Amendment as if it fully incorporated equal protection.

To be sure, the Court did not immediately abandon the minimal due process voice. Opinions in several subsequent cases repeated the claim that although the Fifth Amendment prohibits discrimination that is so unjustifiable as to violate due process, it contains no equal protection clause. In none of those cases, however, did the Court uphold a challenged practice on the ground that the discrimination it embodied, though at odds with equal protection, was sufficiently justifiable to satisfy due process. The cases—none of which involved racial discrimination—either struck down discriminatory practices as violating due process or upheld challenged practices on rationales that showed the practices to comport not only with due process but also with equal protection.

The absence of any cases in which the distinction between the antidiscrimination mandates of the Fifth and Fourteenth Amendments had consequences may have made it harder to insist upon a real distinction. (Or it may signal that there remained no real distinction upon which to

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60. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

61. See, e.g., Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 226-27 (D. Haw. 1956) (holding that an equal protection claim in a federal territory was cognizable because equal protection and due process sufficiently overlapped under the authority of Boling), rev’d, 256 F.2d 728 (9th Cir. 1958); United States ex rel. Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674, 678 (S.D.N.Y. 1954) (holding that it would violate due process to require that persons of Chinese descent, but not other persons, undergo blood tests to establish familial relationships in immigration proceedings).


63. See, e.g., Frontiero, 411 U.S. at 690–91 (Brennan, J., plurality opinion) (holding that provision requiring female but not male members of armed forces to establish spousal dependency in order to claim benefits violated due process under heightened scrutiny analysis); Shapiro, 394 U.S. at 641–42 (welfare eligibility requirement that applicant have resided in jurisdiction for at least one year violated Due Process Clause of Fifth Amendment); Schneider, 377 U.S. at 168 (due process did not allow Congress to discriminate against naturalized citizens by stripping them of nationality while residing abroad); see also Hampton v. Mow Sun Wong, 426 U.S. 88, 116–17 (1976) (striking down federal Civil Service Commission rule that required that members of the civil service be citizens).

64. See, e.g., Marshall v. United States, 414 U.S. 417, 421–22, 430 (1974) (upholding sentencing rule that disfavored convicts with two prior felonies, because classification was not suspect and thus required only a rational basis); United States v. Kras, 409 U.S. 434, 446 (1973) (upholding federal statutory scheme that required even indigents to pay filing fees for bankruptcy proceedings, stating it satisfied rational basis test applicable in equal protection cases not involving fundamental rights or discrimination on the basis of suspect classifications).
insist, or both may be true in combination.) Over time, the Court became less careful about insisting on the difference, speaking sometimes of "equal protection" as a rule binding the federal government without bothering to recite that the Fifth Amendment contains no equal protection clause.\textsuperscript{65} By the mid-1970s, the Court asserted flatly and repeatedly that the rules governing Fifth and Fourteenth Amendment equal protection claims were, and had always been, the same.\textsuperscript{66} The historian of ideas should squirm at this assertion; it certainly does not map constitutional thought before 1935, and even \textit{Bolling} did not establish this complete version of reverse incorporation.\textsuperscript{67} As a practical matter, though, the fact that reverse incorporation was articulated haltingly in the first twenty years after \textit{Bolling} seems to have made little difference. From \textit{Bolling} forward—and indeed, perhaps already a few years before \textit{Bolling}, in cases like \textit{Carolene Products} and \textit{Korematsu}—constitutional doctrine has behaved as if the Fifth Amendment's Due Process Clause incorporated the full apparatus of Fourteenth Amendment equal protection against the federal government.\textsuperscript{68}

\textsuperscript{65} See, e.g., \textit{Marshall}, 414 U.S. at 422 (speaking of "the concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment"); \textit{Kras}, 409 U.S. at 446 ("We are also of the opinion that the [federal] filing fee requirement does not deny Kras the equal protection of the laws.").

\textsuperscript{66} See \textit{Buckley v. Valeo}, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); \textit{Weinberger v. Wiesenfeld}, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

\textsuperscript{67} In addition to the Court's repeated (if largely empty) assertions after \textit{Bolling} that the Fifth Amendment does not contain an equal protection clause, one should remember that the possibility that equal protection would apply differently to the federal and state governments—though applicable in some form to each—remained alive until \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200 (1995). \textit{Adarand} rejected \textit{Metro Broadcasting, Inc. v. FCC}, 497 U.S. 547 (1990), which had held that federal affirmative action was subject to less strict equal protection scrutiny than affirmative action practiced by state governments. \textit{Adarand}, 515 U.S. at 225–27; see also id. at 215–18 (describing equal protection under the Fifth and Fourteenth Amendments as having been coextensive ever since \textit{Bolling}). In addition to holding that the same level of scrutiny applies to federal and state affirmative action, \textit{Adarand} more broadly rejected the idea of different equal protection approaches for the federal and state governments. \textit{Adarand} recognized that the Court had previously suggested that federal responsibility for national security and immigration might permit the federal government to discriminate between citizens and aliens in ways that the states may not. The usual citation for this proposition is \textit{Hampton v. Mow Sun Wong}, 426 U.S. 88 (1976), in which the Court struck down a federal Civil Service Commission rule requiring that members of the civil service be citizens. At the same time, it qualified its holding by stating that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." Id. at 100. According to \textit{Adarand}, however, \textit{Mow Sun Wong}'s suggestion of a distinction does not materially affect the general rule under which equal protection applies identically to the federal and state governments. \textit{Adarand}, 515 U.S. at 217–18.

\textsuperscript{68} The only contrary holding—\textit{Metro Broadcasting}—was expressly overruled. See supra note 67.
II. THE ABSENCE OF CASES

Despite the extension of equal protection to cover the federal government, there are virtually no reported cases in which a court holds a federal law or other federal action unconstitutional on the grounds that it discriminates against a racial minority group. There have been cases finding that federal law discriminated unconstitutionally on nonracial grounds, and there have been cases striking down federal affirmative action programs, but there have been almost no decisions holding that the federal government violated equal protection by practicing racial discrimination against nonwhites. Many cases are not litigated all the way to judgment, and many judgments are not reported, so the absence of reported judgments does not mean that litigants never obtain relief on the basis of constitutional race discrimination claims against the federal government. Nonetheless, the absence of reported judgments is striking.

A. Federal Discrimination Against Racial Minority Groups

The purest kind of successor case to Bolling would be one in which the Supreme Court sustained an equal protection challenge to a federal statute or regulation on the grounds that that statute or regulation discriminated against African Americans. Other than Bolling itself, no case answers to that description. Nor has the Court ever found a violation of the equal protection rights of African Americans in federal action below the level of a formal regulation, such as an agency order or even the actions of an individual federal officer. Broadening the category to in-

69. Throughout this Article, I use the term “federal law” to mean statutes passed by Congress and codified regulations promulgated by federal agencies. I use phrases like “other federal action” or “other federal conduct” to encompass the residual category of all other activities taken with the force of federal authority, including the individual actions of federal officers.

70. The findings described in this Part are based on research that I conducted or directed between May and November of 2003. To find cases in which litigants successfully stated reverse incorporation claims, I searched Westlaw’s ALLFEDS and ALLSTATES databases for all instances of the phrase “Bolling v. Sharpe.” Those searches defined a universe of more than 1,300 decisions. Then, three people separately examined each one of those cases to determine whether the court found unconstitutional behavior on the part of the federal government. Every case in which a court did find unconstitutional discrimination was further coded as to (1) the basis of the plaintiff’s discrimination claim or claims (e.g., race, sex, age) and (2) the group suffering discrimination (e.g., blacks, women, the elderly). Because a less than careful court might proceed with an equal protection analysis against the federal government without citing the authority that permits it to do so, this method may have missed a few cases, but it is unlikely to have missed many. (Since I began writing this Article, I have asked dozens of law professors for examples of cases holding that the federal government violated the equal protection rights of racial minority groups. No one has identified any that qualify but were not discovered through my search.) Most importantly, the basic observation and argument of this Article would not be much affected even if this method had missed a few cases, so long as the total number remained comparably small.

71. Perhaps the closest thing to such a case is Hills v. Gautreaux, which concerned the appropriate remedy for discrimination against African Americans in public housing around Chicago, Illinois. 425 U.S. 284, 286 (1976). The relevant discrimination had been
clude racial discrimination against Latinos, Asians, Native Americans, or any other racial minority group does not change the tally: There are no Supreme Court cases holding federal action to be unconstitutional racial discrimination against a member or members of any such group.

Nor is there any significant volume of equal protection enforcement in lower court cases. Reported cases involving claims of unconstitutional discrimination are common, but the litigants raising those claims are overwhelmingly unsuccessful. Not counting cases in which lower courts upheld equal protection challenges but were reversed by higher courts, I have been able to identify only twelve reported cases since 1954 in which any state or lower federal court has awarded relief to a black litigant or litigants on the grounds that the federal government engaged in unconstitutional racial discrimination. Only one of these cases—Sim-
kins v. Moses H. Cone Memorial Hospital—actually invalidated a congres-
sional statute or a codified federal regulation.

Moreover, reverse incorporation was a necessary condition for relief
in only three of the twelve cases. In eight of the twelve, federal liability
was parasitic on someone else’s illegal discriminatory behavior, usually
that of state officials.75 In those cases, federal agencies were found to
have supported, usually financially, state or local government actions that
were unconstitutional under the Fourteenth Amendment. Because the
underlying state or local conduct was unconstitutional irrespective of fed-
eral participation, it could have been invalidated without a judgment
against a federal party. The practical result—no public funding for segre-
gated hospitals, schools, or housing—would have been the same with or
without reverse incorporation.76 One of the remaining four cases re-
versed a federal criminal conviction after finding that the prosecutor ex-
ercised a race-based peremptory strike in violation of Batson v. Kentucky,77
but the Batson violation was not necessary for the reversal, because the
court separately held that there was insufficient evidence to support the
conviction.78 Thus, only in three cases was reverse incorporation neces-

the Macon County, Alabama committee of the Agricultural Stabilization and Conservation
Service based on vote dilution); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967)
(ordering District of Columbia officials to stop dragging their feet in the desegregation
that Bolling had required years before). In addition, one should count Hicks v. Weaver,
302 F. Supp. 619 (E.D. La. 1969), which held that HUD was a passive participant in a
discriminatory housing scheme orchestrated by the local government. The court in Hicks
did not actually enter judgment on Fifth Amendment grounds, contenting itself with
finding federal liability under HUD’s own interpretation of Title VI of the Civil Rights Act
of 1964, which prohibits racial discrimination in any program receiving federal funds. 42
U.S.C. § 2000d (2000). But the plaintiffs in the case did include a constitutional claim,
and the opinion in its entirety can be read to find a constitutional violation as well as a
statutory one. Choosing to construe ambiguous data against my thesis, I therefore include
Hicks among cases finding constitutional violations even though the district court did not
find one in so many words.

75. Federal liability was parasitic on state and local discrimination in Gautreaux, 448
F.2d at 739; Simkins, 323 F.2d at 962-63; Chicago, 395 F. Supp. at 332-33; Hart, 383 F. Supp.
at 706-07; Kelley, 372 F. Supp. at 543; Brennan, 360 F. Supp. at 1008-09; and Hicks, 302 F.
Supp. at 622. In NLRB v. Mansion House, the underlying discrimination was that of a labor
union. 473 F.2d at 472-73. Because the union was not a state actor, it avoided liability
under the Fourteenth Amendment, but its discrimination was forbidden by Title VII of the
Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2(c) (providing that labor organizations
may not discriminate on the basis of race, color, religion, sex, or national origin).

76. By way of illustration, consider Simkins in greater detail. The legally contentious
issue in that case was whether the hospital construction was state action, not whether the
segregation of hospitals violated equal protection. Once the court concluded that there
was sufficient public involvement to render the funding state action, the flow of funds was
forbidden under both the Fifth and Fourteenth Amendments, the former under Bolling
and the latter under the Equal Protection Clause itself, because the program at issue called
for the federal funds to be routed through the states. Simkins, 323 F.2d at 969-70. As long
as the Fourteenth Amendment prohibition applied, the funding at issue would not have been
permissible.

77. 476 U.S. 79 (1986).

78. See United States v. Bishop, 959 F.2d 820, 828-31 (9th Cir. 1992).
sary to redress the underlying discrimination. Two were local matters in Washington, D.C.—one revisited *Bolling* itself by ordering concrete steps toward school desegregation,⁷⁹ and the other forbade the use of marriage license applications that asked applicants to specify their "color."⁸⁰ The one remaining case invalidated the results of an election for a local committee of the Agricultural Stabilization and Conservation Service in Macon County, Alabama.⁸¹ This is not a large yield for fifty years worth of litigation.⁸²

The record of successful claims in reported cases probably understates the practical impact of a doctrine. Even when courts do not grant legal relief, the threat of such relief can cause parties to settle their disputes⁸³ or alter their underlying behavior before disputes arise in the first place.⁸⁴ The full impact of reverse incorporation as a check on federal discrimination against nonwhites is therefore likely to be greater than reflected in the cases cited above.⁸⁵ But unless the absence of cases en-

81. Henderson v. Agric. Stabilization & Conservation Serv., 317 F. Supp. 430, 434, 438 (M.D. Ala. 1970). The ASCS was created by Congress to administer certain federal agricultural programs. Although it is therefore a federal body, much of its work is done by locally elected county committees. In *Henderson*, local whites conspired to nominate a large number of black candidates for Macon County’s committee offices, thus splitting the black vote several different ways and securing the election of white candidates. Id. at 433-34.
82. In addition to these cases granting relief to African Americans, there are three cases granting relief to Native Americans on race discrimination claims and one granting relief to a Latino, but none involving any other racial minority group. All three of the cases involving Native Americans raised the same issue: Under the Major Crimes Act, ch. 645, 62 Stat. 758 (1948) (codified as amended at 18 U.S.C. § 1153 (2000)), Indians who committed certain crimes on reservation land were subject to the local state penalties for those crimes while non-Indians committing the same crimes were subject to the general federal schedule of punishments. See United States v. Big Crow, 523 F.2d 955, 960 (8th Cir. 1975) (finding the disparity unconstitutionally discriminatory); United States v. Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974) (same); United States v. Boone, 347 F. Supp. 1031, 1035 (D.N.M. 1972) (same). The one case in which a Latino litigant successfully demonstrated an equal protection violation is somewhat ironic, because the unconstitutional discriminators in that case were mostly African American. See Acosta v. Univ. of D.C., 528 F. Supp. 1215, 1222-23 (D.D.C. 1981) (finding that a university committee primarily comprised of African Americans discriminatorily denied promotion to a Latino assistant professor). It should also be noted that equal protection did no independent work in *Acosta*: The court’s analysis was conducted under Title VII’s statutory standard for discrimination. See id. at 1221-22.
84. See infra notes 133–134 and accompanying text (discussing the power of legal deterrents and incentives to influence behavior).
85. Here are two examples, both from the realm of prison litigation. In May of 1965, the warden of a federal prison in the state of Washington issued a policy directive stating that inmate housing and work assignments would be made without respect to race. The warden was at the time the defendant in a racial discrimination suit brought by an inmate who alleged that race was being considered in such assignments. The district court granted summary judgment for the warden, and the Ninth Circuit affirmed the dismissal.
joining such discrimination reflects the government's having reacted to \emph{Bolling} by reforming itself comprehensively before further judgments were necessary—a possibility considered in Part III.C—the preceding review of cases calls into question the idea that reverse incorporation has been necessary for addressing federal discrimination against members of disadvantaged racial groups.

B. Comparisons

In addition to being small in absolute terms, the number of cases in which reverse incorporation has been necessary for curing federal racial discrimination is small in comparison to the number of cases finding other kinds of constitutional violations by the federal government. These include affirmative action cases, cases involving nonracial discrimination, and cases outside of the equal protection arena entirely. Unsurprisingly, the number of cases finding unconstitutional racial discrimination by the federal government is also small in comparison to the number of cases finding unconstitutional racial discrimination by many states.

1. Affirmative Action. — There are more reported cases in which reverse incorporation has been used to strike down affirmative action for African Americans than reported cases in which reverse incorporation has been necessary to cure discrimination against African Americans.\footnote{86} This comparison holds over the entire fifty-year period since \emph{Bolling}, but it is especially stark in the years since \emph{Adarand Constructors, Inc. v. Pena}.\footnote{87}

In \emph{City of Richmond v. J.A. Croson Co.}, the Supreme Court held that all state government actions using express racial classifications are subject to strict
scrutiny, even if they are intended to improve the position of historically disadvantaged groups. 88 Adarand extended that rule to federal affirmative action, 89 and it did so largely on the authority of Bolling. 90 Since Adarand, courts have struck down federal affirmative action in several cases, 91 but there has not been a single reported case finding unconstitutional federal racial discrimination against members of a minority group. 92 Accordingly, one noteworthy feature of reverse incorporation is that a doctrine originally bound up with the effort to dismantle Jim Crow now operates to the net disadvantage of African Americans.

It is worth pausing for a moment to consider whether this fact offers a cautionary tale about the unintended consequences of judicial decision-making. From a certain normative perspective, Adarand might be come-uppance for Warren Court activism. After all, one might imagine that Adarand would have come out differently if the Court had not ordered desegregation in Bolling, or if the holding of Bolling had been properly cabined within a due process framework rather than acting as a fount for the full incorporation of equal protection against the federal government. As discussed in Part I, however, this line of reasoning is open to question. 93 Even without Bolling, Carolene Products and Korematsu would support the idea that racially discriminatory legislation raises serious due process problems, and the question of whether affirmative action requires the same level of judicial scrutiny as discrimination against disadvantaged groups is doctrinally independent of the question of whether equal protection applies against the federal government. Thus, even if equal protection were not deemed to apply the same way against the states and the federal government, the Court that decided Croson could have decided Adarand as a straight due process matter. 94

At a larger level, the real question is not about Bolling but about the doctrinal choice to apply strict scrutiny to racially classificatory federal action, regardless of whether the framework for that application is called "due process" or "equal protection." To be more specific, the question is whether the fact that reverse incorporation may have curtailed affirmative action more than discrimination against disadvantaged groups erodes the traditional claim that reverse incorporation is a manifestly necessary constitutional principle. The answer may depend on one's normative perspective. For someone who sees affirmative action as illegitimate racial
discrimination on par with school segregation, the answer is probably no. On this view, Adarand is a vindication of the principles that made Bolling necessary in the first place. In contrast, someone who favors affirmative action might regard reverse incorporation's practical consequences as making the doctrine not just unnecessary but positively undesirable. More moderately, people who are neither strongly in favor of nor strongly opposed to affirmative action, but who see it as raising different issues from discrimination against disadvantaged groups, might see this part of the empirical record as not greatly affecting the question of whether reverse incorporation is a necessary doctrine. Dismantling Jim Crow might require constitutional innovations, this perspective might hold, but affirmative action is a sufficiently close and complex issue that it should not be the root of arguments about extraordinary necessity, one way or the other.

2. Nonracial Discrimination. — In addition to the affirmative action cases, there are cases striking down federal action as unconstitutionally discriminatory based on sex,\(^95\) citizenship,\(^96\) indigency,\(^97\) and legiti-

\(^{95}\) See, e.g., Califano v. Westcott, 443 U.S. 76 (1979) (provision of benefits to families with children with unemployed fathers but not to those with unemployed mothers); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Social Security benefits payable to widows but not widowers on the basis of their deceased spouses’ earnings); Frontiero v. Richardson, 411 U.S. 677 (1973) (requirement that female but not male members of armed forces establish spousal dependency in order to claim benefits); United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990) (federal prosecutor's peremptory challenge to venireperson based on her gender); In re Crist, 632 F.2d 1226 (5th Cir. 1980) (bankruptcy code provision making debts for alimony and support nondischargeable only when owed by husbands to wives); Carrasco v. Sec'y of Health, Educ., & Welfare, 628 F.2d 624 (1st Cir. 1980) (allocation of Social Security disability benefits favoring husbands over wives in community property jurisdictions, where income from trade or business treated as husband's); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (Marine Corps regulation mandating discharge of female Marines for pregnancy); Moritz v. Comm'r, 469 F.2d 466 (10th Cir. 1972) (disallowance of tax deduction to men never married).

\(^{96}\) See, e.g., Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rico statutory restriction of civil engineering licenses to U.S. citizens); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (regulation excluding noncitizens, including lawfully admitted resident aliens, from employment in the federal competitive civil service); Schneider v. Rusk, 377 U.S. 163 (1964) (act stripping nationality from naturalized citizens for residing continuously in territory of their birth or former nationality); see also Yeung v. INS, 76 F.3d 337 (11th Cir. 1995) (discretionary relief from deportation for criminal conviction available only to those aliens who have left the country and returned); Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (same).

\(^{97}\) See, e.g., Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976) (statute requiring $250 bond to obtain hearing, when property at stake was less than $2,500); Paroutian v. United States, 471 F.2d 289 (2d Cir. 1972) (failure to count time spent in criminal sentence because defendant unable to pay bail during appeal); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969) (agency's failure to provide counsel to indigent parolees in hearings to revoke early release from federal penitentiaries); Doyle v. United States, 366 F.2d 394 (9th Cir. 1966) (failure to appoint adequate counsel in appeal of federal criminal conviction).
macy,\textsuperscript{98} as well as on other grounds.\textsuperscript{99} The number of such nonracial cases far exceeds the number of cases finding unconstitutional federal racial discrimination against African Americans or members of other minority groups.\textsuperscript{100} The litigated impact of \textit{Bolling} thus appears to be greater in nonracial areas than in the racial context that seemed to give reverse incorporation its initial urgency.\textsuperscript{101}

3. \textit{Other Constitutional Violations.} — One might add a further comparative note by looking outside the discrimination context altogether. The number of reported cases finding unconstitutional federal discrimination against racial minorities is far smaller than the number of reported cases finding federal violations of other kinds of constitutional rights, such as free speech rights under the First Amendment or search-and-seizure rights under the Fourth. The Supreme Court alone has struck down federal statutory and regulatory provisions on free speech grounds at least nine times since 1995.\textsuperscript{102} Similarly, there were more appellate cases finding federal Fourth Amendment violations in the years 2002–2003 than

98. See, e.g., Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security benefits for illegitimate children of "disabled wage-earner parent" contingent on parent’s having contributed to child’s support or having lived with child prior to disability); Tanner v. Weinberger, 525 F.2d 51 (6th Cir. 1975) (requirement that illegitimate child of deceased wage-earner establish paternity and other association with wage-earner in order to receive survivor’s benefits); Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (agency determination that part of decedent’s estate would go to legitimate child of decedent’s niece but that nothing would go to her illegitimate child); Beatty v. Weinberger, 478 F.2d 300 (5th Cir. 1973) (requirement that illegitimate children be dependent upon disabled parent at time disability begins in order to receive Social Security benefits).


100. The same method used to find race discrimination cases, described supra note 70, discovered approximately eighty such reported decisions in the federal courts, not counting decisions reversed by higher courts.

101. I use the phrase "litigated impact" rather than simply the word "impact" because I have not yet demonstrated that \textit{Bolling} has not had significant internalization effects on the federal government’s policies with respect to race. If the existence of the rule prevented the government from engaging in racial discrimination that it would otherwise practice, then reverse incorporation would have a large impact in racial areas. Part III.C analyzes the possibility that \textit{Bolling} has had such effects, whether through simple deterrence or as part of a process of changing the norms that guide federal action.

appellate cases finding unconstitutional federal discrimination against members of racial minority groups in the entire fifty-year period since Bolling.\(^{103}\)

Clearly, these comparisons cannot boast scientific controls. First and Fourth Amendment litigation differ from equal protection litigation in many ways that could make them more likely to generate new case law finding constitutional violations, such that the present comparison can only be impressionistic. To the extent that the comparison is informative, however, it indicates that the number of cases finding unconstitutional federal discrimination against racial minorities is not just small but unusually small.

4. Racial Discrimination by States. — Finally, it is useful to compare the experience of states and that of the federal government. A small number of decisions finding that states violated the equal protection rights of racial minority groups would suggest that there is nothing distinctive about the absence of cases against the federal government. Instead, the phenomenon to be explained would be the general absence of cases finding race-based equal protection violations. As it happens, however—and unsurprisingly so—there have been many more reported cases since 1954 in which state (or local) governments are held to discriminate unconstitutionally against members of racial minority groups than there have been parallel cases for the federal government.

One could reasonably wonder whether the quantitative difference between cases finding state and federal violations might be a function of the fact that the federal and state governments engage in different (though overlapping) activities. Perhaps that difference, together with the difference in the scale of governance undertaken by each kind of government, affords state governments more opportunities to discriminate. If so, the larger number of cases finding state discrimination need not indicate a greater judicial tendency to hold state conduct unconstitutionally discriminatory.\(^{104}\) In Part III, I will argue that the activities allo-


103. See, e.g., United States v. Bridges, 344 F.3d 1010, 1018 (9th Cir. 2003) (holding search warrant issued to IRS unconstitutional as overly broad and failing to specify criminal activity being investigated); Wiley v. Dep’t of Justice, 328 F.3d 1346, 1356 (Fed. Cir. 2003) (anonymous tip insufficient under Fourth Amendment to support federal agency’s search of employee’s car); United States v. Portillo-Aguirre, 311 F.3d 647, 650 (5th Cir. 2002) (Border Patrol’s extended detention of defendant at immigration checkpoint became an unreasonable seizure in violation of the Fourth Amendment); United States v. Keszthelyi, 308 F.3d 557, 568 (6th Cir. 2002) (DEA search violated Fourth Amendment); United States v. Jones, 286 F.3d 1146, 1148 (9th Cir. 2002) (FBI search violated Fourth Amendment).

104. Some readers may wonder why I have not solved this problem by looking at the number of equal protection cases lost as a fraction of the total number of equal protection claims that are brought against each kind of government. If one used the number of adverse judgments as the numerator and the total litigated claims as the denominator, one could compare the federal government’s likelihood of avoiding an adverse judgment under Bolling and a state’s likelihood of avoiding an adverse judgment under the Fourteenth Amendment. Such an approach, however, would be both unworkable and
cated to the federal government are not inherently less likely to be sites of racial discrimination than the activities allocated to the states. But the problem of scale remains. Even if the federal and state governments engage in precisely the same kinds of activities, one should expect more cases finding unconstitutional state discrimination if the states’ activities are more extensive. It is tempting to try to address this problem by quantifying the difference in size between the federal and state governments and then discounting the number of state violations by the appropriate percentage to control for the size difference, thereby arriving at a meaningful comparison between cases finding federal and state violations of equal protection. Unfortunately, it is not possible to undertake such a general control in a way that would be methodologically sound. In part because state and federal governments engage in different mixes of activities, there is no single factor or even set of factors that can be used to compute a meaningful comparison of their relative overall sizes. Inaccurate. First, no data are readily available on the total number of equal protection claims filed against either the federal government or any given state government. The survey of cases presented in this Article reflects reported cases only. A comprehensive study of reported cases is likely to identify the whole set, or almost the whole set, of cases actually entering judgments of unconstitutionality—such cases are litigated all the way to judgment, and they are also relatively unusual, thus making them worthy of publication. Cases that are filed and quickly dismissed are much more likely to go unreported. Accordingly, although a survey of reported cases can produce a respectable assessment of the raw number of constitutional judgments against the government, it provides no reliable guide to the total number of claims. Using the number of reported claims as the denominator would be little more than arbitrary.

Second, even if it were feasible to establish a denominator that would allow us to calculate different governments’ relative likelihoods to win or lose equal protection cases, the resulting rates of success in litigated cases would say little about the degree to which judicially enforced equal protection checked or otherwise shaped the behavior of the relevant governments. Imagine, for example, that during a given time period Defendant X was sued on claims of unconstitutional racial discrimination ten times, losing six judgments, while Defendant Y was sued a hundred times, losing thirty judgments. Defendant X loses such cases at twice the rate of Defendant Y, but one cannot infer that judicially enforced equal protection is more consequential for Defendant X than for Defendant Y. Defendant Y has equal protection enforced against it more frequently, and the fact that it also wins equal protection cases more often than Defendant X may simply mean that plaintiffs are more inclined to bring suit against Defendant Y than against Defendant X. Indeed, the larger number of judicially announced equal protection violations by Defendant Y might encourage the filing of more equal protection lawsuits against it, meritorious and nonmeritorious, than against Defendant X. For this reason as well as the near impossibility of counting the total number of unreported lawsuits, it does not make sense to use the percentage of successful equal protection claims as the basis for statistical comparisons between different governments.

One could not, for example, get a meaningful sense of the relative “sizes” of the federal government and a given state government by comparing the number of schools they operated, because schooling is overwhelmingly the province of states. One might compare budgets or the number of governmental employees, but neither of these measures is likely to yield a ratio that is properly correlated to the ratio of opportunities for violating equal protection: If the federal government spends ten million dollars to buy a fighter plane and employs ten people to operate and maintain it, while a state government spends forty thousand dollars to employ one police officer, there is little reason to think
deed, and for the same reason, there is no precise sense in which it is meaningful to speak of the state governments being collectively "larger" than the federal government in the first place. Accordingly, the lessons of quantitative comparisons between cases finding state and federal discrimination can be no more than suggestive.

For what they are worth, however, these comparisons suggest that the constitutional prohibition on racial discrimination has had a greater impact on state governments—or at least on some state governments—than on the federal government. To be sure, this is not true for all states, and it is predictably more true for certain Southern states than for most states elsewhere in the country. For instance, in the first decade after Brown and Bolling, judicial decisions finding violations of the equal protection rights of African Americans by state government officials in Pennsylvania and Illinois were scarce, but decisions finding such violations by state government officials in Georgia and Louisiana were plentiful, signifi-

that the federal outlay reflects greater opportunity to violate equal protection than the state outlay does. To be sure, something like direct comparisons are plausible in a few areas. For example, both federal and state governments empanel criminal juries, albeit under nonidentical circumstances, and one could count the number of juries that each government or kind of government empanels per year, in order to compare the rates at which courts find prosecutors to have exercised unconstitutional race-based peremptory challenges. The results of that particular comparison show that courts are much more likely to find unconstitutional behavior on the part of state prosecutors than they are on the part of federal prosecutors. See infra text accompanying notes 111-113. But the possibility of this kind of direct comparison between federal and state activities is more the exception than the rule.

106. This conclusion is based on two separate searches through the Westlaw databases housing all reported cases with legal force in Pennsylvania and Illinois (i.e., PA-CS-ALL and IL-CS-ALL). The searches were conducted for the years 1955 to 1964 and looked for the term "equal protection" occurring in conjunction with any of the words "black," "Negro," "African," "white," or "Caucasian." No cases finding equal protection violations on the basis of racial discrimination were found, although several cases were found in which the state governments were found to have violated equal protection on nonracial grounds. See, e.g., La Salle Nat'l Bank of Chi. v. County of Cook, 145 N.E.2d 65, 68-70 (Ill. 1957) (holding that a zoning scheme violated equal protection in its treatment of different kinds of real property); Butcher v. Bloom, 203 A.2d 556, 564 (Pa. 1964) (holding that a state voting apportionment system violated equal protection because of the unequal number of voters in different districts).

The absence of reported cases finding unconstitutional racial discrimination does not mean that these states did not discriminate on the basis of race. On the contrary, the case law does reveal activity that we now recognize as racially discriminatory. See, e.g., People v. Dukes, 169 N.E.2d 84, 88 (Ill. 1960) (holding, prior to Batson v. Kentucky, 476 U.S. 79 (1986), that a prosecutor's use of peremptory strikes to exclude all five potential black jurors from a trial jury did not violate equal protection); In re Estate of Stephen Girard, 127 A.2d 287, 295 (Pa. 1956) (holding that public authorities could constitutionally administer a charitable trust designated only for whites without violating equal protection, because the discrimination was that of a private actor rather than that of the state), rev'd sub nom. Pennsylvania v. Bd. of Dirs. of City Trusts, 355 U.S. 230 (1957). On remand from the U.S. Supreme Court, the state Orphans' Court chose to privatize the orphanage rather than integrate it, and the Pennsylvania Supreme Court upheld the decision. See In re Girard Coll. Trusteeship, 138 A.2d 844, 851-54 (Pa. 1958) (holding that the privatization did not compromise appellants' civil rights).
cantly exceeding the number of cases finding federal violations not just during that decade but at any time then or since.107

Although they have not been completely eliminated, these regional differences have diminished with time. By the 1990s, there was only one context in which any significant number of unconstitutional race discrimination cases arose in any of these four states—Batson violations,108 for which I estimate there have been between 250 and 300 reported cases.109

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109. According to one study of reported decisions, there were 165 occasions between 1986 and 1993 on which criminal defendants successfully challenged peremptory jury strikes on equal protection grounds. See Kenneth J. Melilli, Batson in Practice: What We
These violations have occurred disproportionately in Southern states, but the disparity is smaller than the disparity in equal protection violations a generation earlier and may have lessened further since *Batson* was decided in 1986.  

More stark is the difference between the number of cases finding state *Batson* violations and the number finding federal *Batson* violations. Since *Batson*, there has been only one reported instance of a federal pros-

Have Learned About *Batson* and Peremptory Challenges, 71 Notre Dame L. Rev. 447, 459 (1996). The study does not specify how many of these 165 cases involved race-based peremptories rather than other kinds, such as sex-based peremptories, but it does indicate that out of the entire universe of unconstitutional peremptory challenges—in civil as well as criminal cases, and as exercised by the lawyers for either side—179 out of 195, or 92%, involved race-based strikes of black or Hispanic jurors. See id. at 463. Taking that proportion as instructive, I assume that roughly 92% of the 165 successful *Batson* claims by criminal defendants are claims of discrimination against blacks or Hispanics. That yields an approximate figure of 152 for the years 1986 to 1993. For the years between 2000 and 2002, my own searches of cases citing *Batson* have identified forty more, some of them state court decisions on direct review and others federal court decisions reviewing state proceedings on petitions for habeas corpus. Interpolating from the averages of roughly twenty cases per year in the early period and ten cases per year in the later period, I estimate that there are on average roughly fifteen cases per year for the years between 1994 and 1999, or ninety more cases in all. That yields an estimated total of roughly 280 reported *Batson* violations by state prosecutors between 1986 and 2002.


110. According to Melilli's study, about two-thirds of the *Batson* violations reported between 1986 and 1993 occurred in former slave states. See Melilli, supra note 109, at 468 tbl. F-4. In my own survey of cases decided between 2000 and 2002, the figure was 18 out of 40, or just under 50%. See cases cited supra note 109.
executor exercising a race-based peremptory challenge.\textsuperscript{111} Even considering that state prosecutors empanel approximately twenty times as many juries as federal prosecutors,\textsuperscript{112} the rate of Batson violations by federal prosecutors is far less than the rate of violation by state prosecutors.\textsuperscript{113}

In the fifty years since Bolling, then, the number of cases finding unconstitutional federal racial discrimination against nonwhites has been considerably smaller than the number of cases finding such discrimination by states. Unsurprisingly, the number of state cases varies from state to state and from the beginning to the end of the relevant time period.

\textsuperscript{111}See United States v. Bishop, 959 F.2d 820, 821–22 (9th Cir. 1992) (reversing a criminal conviction after concluding that a federal prosecutor had exercised a race-based peremptory challenge during jury selection).

\textsuperscript{112}In the year from October 1999 to September 2000, the federal district courts conducted approximately three thousand jury trials in criminal cases. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Compendium of Federal Justice Statistics, 2000, at 56 (2000). I have been unable to locate a source giving a similar comprehensive statistic for all of the state courts, but the Conference of State Court Administrators, the State Justice Institute, the Bureau of Justice Statistics, and the National Center for State Courts’ Court Statistics Project have jointly compiled statistics for twenty-six participating states. See Examining the Work of State Courts, 1999–2000 (Brian J. Ostrom et al. eds., 2001); see also Jeffrey Abramson, We the Jury 251 (1994) (noting that approximately one-third of the states do not publish the number of trials they conduct). According to the study conducted by Ostrom et al., these twenty-six states collectively conducted approximately 44,000 criminal jury trials during 1999. Examining the Work of State Courts, 1999–2000, supra, at 68 (data calculated from chart showing manner of disposition for criminal cases filed in twenty-six states, Puerto Rico, and the District of Columbia). The twenty-six participating states—which are spread geographically throughout the country—have about two-thirds of the national population, so I estimate that the total number of criminal jury trials in state courts during 1999 was about 66,000. That number is 22 times the number of federal criminal jury trials for roughly the same period.

\textsuperscript{113}In the federal district courts, the default rule is that voir dire is conducted mostly from the bench. Judicial Conference of the U.S., Admin. Office of the U.S. Courts, Handbook for Trial Jurors Serving in the United States District Court, available at http://www.wiwd.uscourts.gov/assets/pdf/aopj.pdf (last modified Dec. 13, 2003) (on file with the Columbia Law Review). This practice goes a long way toward explaining why there are almost no Batson violations in federal trials. But it cannot be a complete explanation. The practice of judges conducting voir dire is not mandatory, see Fed. R. Crim. P. 24(a) (stating that judges have discretion to allow counsel to conduct voir dire in criminal cases), and even when judges conduct the voir dire, it is the prosecuting attorneys who exercise peremptory strikes. See, e.g., United States v. Lucas, 357 F.3d 599, 609 (6th Cir. 2004) (addressing claim of racial discrimination in prosecutor’s peremptory challenge in cocaine case); United States v. Wilson, 355 F.3d 358, 363 (5th Cir. 2003) (same); United States v. Brown, 352 F.3d 654, 661, 670–71 (2d Cir. 2003) (addressing claim that prosecutor violated Batson in striking black juror in mail fraud case). It should also be noted that a judge’s conducting voir dire rather than leaving it to the lawyers is no guarantee that the voir dire will not be discriminatory. Judges are imperfect, and allegations that federal judges discriminate in jury selection are not unknown. Cf. Hobby v. United States, 468 U.S. 339, 341–42 (1984) (addressing claim that district court judge discriminated against blacks and women in selecting grand jury foreman). But for such discrimination to give rise to a successful reverse incorporation claim, an appellate federal court would have to find and declare that one of their district court colleagues had violated the constitutional rule. Whether for reasons of comity, difficulty of proof, or underlying innocence, that has never happened.
Some states have had very few such cases, such that their records of losing racial equal protection challenges do not appear meaningfully different from that of the federal government. In other states, especially in the South and especially early in the period, cases finding unconstitutional discrimination by state officials have been much more common, far exceeding the number of cases finding federal discrimination. The number of state race-based equal protection violations has diminished over time, such that regional differences are no longer as pronounced. But the number of such violations by state parties, especially in some states, is large enough to suggest that the absence of federal cases calls for a distinctive explanation.

III. Unsatisfactory Explanations

This Part considers and largely rejects three possible explanations for the absence of reported decisions finding unconstitutional racial discrimination by the federal government. The first of these is that the federal government’s limited jurisdiction prevents it from engaging in much racial discrimination, because the areas of life in which racial discrimination arises as a problem—schooling, for example—are mostly the province of state rather than federal governance. The second is that the political dynamics of the “extended republic” help keep the federal government friendly to the interests of minority groups, racial or otherwise. The third is that even if the federal government would have engaged in unconstitutional racial discrimination had it been permitted to do so, judicial articulation of the reverse incorporation doctrine has caused the government to alter its behavior, internalizing the rule into its decisionmaking process. On this third explanation, reverse incorporation might well have been necessary for eliminating federal discrimination, and the absence of successor cases to Bolling would testify to the successful achievement of the doctrine’s aim.

All of these hypotheses are weak. The first two fail because there is in fact a significant historical record of racial discrimination by the federal government. It therefore cannot be the case that the federal government lacks opportunities to discriminate. Nor can it be the case that the political structure of the federal government prevents all such discrimination—though it still may be true that those political dynamics keep the federal government more friendly to the interests of racial minority groups than many state governments, or even than the median state government. The third hypothesis may also have a small amount of explanatory power, but it cannot account for much of the phenomenon being analyzed, because there is little or no historical evidence that federal officials changed their behavior to account for the changed constitutional rule. Indeed, reverse incorporation demanded little change from official federal policy as it existed in 1954. That fact, which is the basis for a better explanation of the absence of cases, will be explored in Part V.
A. The Opportunity to Discriminate

The federal government is, at least officially, a government of limited jurisdiction, and most of the canonical cases striking down government-sponsored racial discrimination deal with subjects that are outside those limits. They concern matters that are characteristically the province of state regulation, including schools, property, the family, and so on. If that pattern reflected where government-sponsored discrimina-

117. It is here worth noting another basic area of law that is mostly handled by states and that is often the site of racial discrimination, but that is not on the present list: law enforcement. Criminal law was a major locus of racial discrimination early in the history of constitutional equal protection, see Leon F. Litwack, Been in the Storm So Long: The Aftermath of Slavery 366-71, 375 (1979) (discussing the prescription of differential criminal penalties for offenders of different races), and questionable uses of race remain common in contemporary enforcement as well, see, e.g., Samuel R. Gross & Katherine Y. Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway, 101 Mich. L. Rev. 651, 653-60 (2002) (describing the use of racial profiling in law enforcement). Nonetheless, with the exception of rulings addressing the process of jury selection, see, e.g., Batson v. Kentucky, 476 U.S. 79, 84-89 (1986); Swain v. Alabama, 380 U.S. 202, 203-04 (1965); Strauder v. West Virginia, 100 U.S. 303, 310 (1879), judicial intervention into the enforcement process has been framed in terms of race-neutral rules under the Fourth, Fifth, and Sixth Amendments rather than in terms of equal protection. See, e.g., Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2002 (1998). Thus, despite the pervasive use of race in law enforcement, see id. at 2005-06, there are almost no reported cases in which any law enforcement authorities—state or federal—are held to violate equal protection. See Gross & Barnes, supra, at 725-26 & n.214 (stating that New Jersey is the only jurisdiction in which evidence can be excluded due to a racially motivated search); Karlan, supra, at 2004 (arguing that the standard remedies available to criminal defendants—suppression of evidence, dismissal of indictment, reversal of conviction, and civil damages—are either unavailable or ineffective for litigants claiming racial discrimination in law enforcement).

This pattern is the product of several factors, some doctrinal and some practical. Contemporary doctrine is shaped by McCleskey v. Kemp, 481 U.S. 279 (1987), which establishes prohibitive statistical standards for the demonstration of racially selective enforcement or prosecution, and City of Los Angeles v. Lyons, 461 U.S. 95 (1983), under which it is almost impossible for a person injured by the police to sue for injunctive relief, because standing is limited to people who can show that they, individually, are likely to be injured in the same way in the future. Practically, criminal defendants tend to be unsympathetic litigants and often lack high-quality legal counsel and other resources necessary to mount serious litigation. See Gross & Barnes, supra, at 726-27. When people alleging discrimination in law enforcement do sue for civil damages, they are often outsiders in the venues where they must sue and are therefore further disadvantaged in jury proceedings. See Karlan, supra, at 2012 (noting that this is especially true of litigants who have been racially profiled). The exceptional cases where litigants have stronger civil claims usually settle, leaving no judicial findings of unconstitutional discrimination. See Gross & Barnes, supra, at 727. The combined force of these influences yields the result that courts very rarely find equal protection violations in law enforcement at any level, state or federal. Accordingly, the fact that most criminal law enforcement in the United States is
tion generally occurs, then cases finding equal protection violations might overwhelmingly involve state law simply because it is state law that applies in the relevant areas.

The trouble with this hypothesis is that many areas of federal jurisdiction do present opportunities for racial discrimination. For example, the federal government is a large employer, and the civil service could be and in many aspects has been racially segregated.118 So was the military.119 Federal contracts and subsidies could be and have been allocated on racially discriminatory bases.120 Federal law enforcement has long been sufficiently extensive and sufficiently street-level to afford many op-

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118. See, e.g., John Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom 324 (7th ed. 1994) (noting that President Wilson, by executive order, racially segregated federal eating and restroom facilities); Michael J. Klarman, Race and the Court in the Progressive Era, 51 Vand. L. Rev. 884, 915 (1998) (describing Wilson administration’s segregation of facilities in Treasury, Post Office, and Navy departments); see also Desmond King, Separate and Unequal: Black Americans and the U.S. Federal Government 72-76 (1995) (discussing 1943 study showing that black government employees were largely excluded from professional positions and relegated to clerical or custodial positions).

119. See, e.g., Robert Fredrick Burk, The Eisenhower Administration and Black Civil Rights 23-44 (1984); Donald R. McCoy & Richard T. Ruetten, Quest and Response: Minority Rights and the Truman Administration 221-50 (1973). Outside the context of affirmative action, see Berkley v. United States, 287 F.3d 1076, 1091 (Fed. Cir. 2002) (requiring that strict scrutiny be applied to military recruiting practice favoring women and minorities), there have been no successful equal protection challenges to racial discrimination in the military. There have, however, been successful equal protection challenges based on sex, see Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (invalidating military regulation presuming that male, but not female, service members needed to support their spouses financially), though of course other instances of military sex discrimination have been upheld against equal protection challenge, see Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (upholding practice of requiring only males to register for draft).

opportunities for racial discrimination. Since September 2001, there has been a great deal of concern that federal officials would unconstitutionally use race and ethnicity in the course of their activities in the war on terrorism. Territorial administration, immigration, and Indian law all bring federal authority to bear on significantly nonwhite populations, and all afford opportunities for deliberate racial discrimination. Accordingly, the absence of cases finding federal racial discrimination cannot be a function of the federal government's lack of opportunities to discriminate.

B. The Extended Republic

The historical record of overt racial discrimination by the federal government also precludes a related hypothesis, one that would focus on the choice not to discriminate rather than a lack of opportunities to discriminate. According to one reading of Madisonian political theory, one of the virtues of the federal system is that an "extended republic" consisting of representatives from all of the states is less likely to use governmental power against minority groups than individual state governments are. Experience has not always vindicated this view as applied to racial

("These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century.").

121. See Gross & Barnes, supra note 117, at 670-72 (describing federal drug enforcement efforts, including stops of highway motorists).

122. See, e.g., Jeremy Waldron, Security and Liberty: The Image of Balance, 11 J. Pol. Phil. 191, 194, 200 (2003) (expressing concern that members of ethnic minority groups with which people associate the September 11 terrorists face greater threat to civil liberties than other Americans).


124. The phrase "extended republic" comes from Madison's writings in The Federalist No. 51 and is used to differentiate the United States from the smaller republics of the individual states. Madison argued that the greater size of the United States would change the dynamics of the political process such that minority interest groups would be less vulnerable than in smaller polities. "In the extended republic of the United States," he wrote, "and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . ." The Federalist No. 51, supra note 29, at 335 (James Madison). Accordingly, there should be "less danger to a minor from the will of a major party." Id. For discussions of various questions related to this bit of Madisonianism that are beyond the scope of this Article, see, e.g., Sherman J. Clark, A Populist Critique of Direct Democracy, 112 Harv. L. Rev. 434, 478 (1999) (discussing difference between majority power and popular voice and arguing that representation can appropriately check the former without limiting the latter); Larry D. Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 616 (1999) (arguing that Madison's theory had little influence in his own time); Alexandra Natapoff, Note, Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict, 47 Stan. L. Rev. 1059, 1079, 1087 (1995) (relying on Madison's theory to argue that the structure of the federal government will yield benign race-conscious legislation). In this issue of this law review, James Liebman and Brandon Garrett explore the role of Madison's proposed national
minorities: Particular states have often been more responsive to the interests of minority groups than the federal government has. Nonetheless, it may well be true that the federal political process tends, in the aggregate, to be more responsive to the interests of racial minority groups than are the political processes of most states. It is therefore tempting to explain the absence of cases finding unconstitutional federal racial discrimination by reference to the extended republic's tendency to reject discriminatory measures in the political process, before the need for a judicially enforceable rule arises.

This approach might well explain some portion of the differing frequencies with which the federal and state governments are held to violate equal protection. It cannot, however, account for the fact that the number of cases finding federal violations is almost nil. For the extended republic theory to fully explain the absence of cases finding violations, the dynamics of the extended republic would have to prevent discrimination from occurring at all. That cannot be the case, because the federal government has historically engaged in a fair amount of racial discrimination. As noted in the preceding subsection, examples include the segregation of the military and the civil service, the discriminatory allocation of federal financial benefits, and the pervasive racism of immigration law, to say nothing of federal policy toward Native Americans or the Japanese internment during World War II.

125. See supra notes 118-119 and accompanying text.

126. See supra note 120 and accompanying text.

127. See supra note 126 and accompanying text.

128. Under the Naturalization Act of 1795, only "white persons" could immigrate to the United States and become citizens. The Naturalization Act, ch. 20, §1, 1 Stat. 414, 414 (1795) (repealed 1802). Africans became eligible to be naturalized in 1870, but foreign-born Asians could not become naturalized American citizens until 1952. Before that date, the courts frequently had to adjudicate the question of whether a particular immigrant was white. See, e.g., United States v. Bhagat Singh Thind, 261 U.S. 204, 213-15 (1923) (rejecting the naturalization petition of an immigrant from India); Takao Ozawa v. United States, 260 U.S. 178, 198-99 (1922) (rejecting the naturalization petition of a Japanese immigrant); see also Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law 7-14 (1995) (discussing discriminatory immigration laws such as the Page Law of 1875 and the Chinese Exclusion Act of 1882); Rogers M. Smith, Civic Ideals 13-39 (1997) (analyzing American citizenship requirements as pervasively discriminatory).

129. Cleveland, supra note 123, at 25-81 (noting examples of exploitative and racist federal action, including limitations on Indian land rights in favor of white settlement, restrictions on liquor sales, forced expulsion, and limitations on equal citizenship).
Courts have not used constitutional rules to check the federal government's discriminatory practices in these areas, but that fact cannot reflect an absence of discriminatory conduct, because the existence of discriminatory conduct is clearly established. The extended republic may reduce federal discrimination to a level below that of the average state, but it has not eliminated such discrimination. Accordingly, the extended republic hypothesis might explain why there are fewer reported federal violations than state violations, but it cannot explain the nearly complete absence of reported federal violations.

The federal government's historical discrimination in these various realms should call into question the intuition that areas of state regulation, such as schools, are at the core of governmental racial discrimination. Why, after all, should the segregation of schools be more central to the problem of racial equality than the segregation of armies, practiced by the federal government, or the segregation of employment, practiced by both state and federal governments? One reason might be the pervasiveness of schooling. School is a formative experience for almost every American. But for the two generations whose schooling occurred after segregation officially ended—and especially for the lawyers among them—the centrality of schools to the history of discrimination is also shaped by another factor: Schools were a prominent area of judicial intervention. Because legal training focuses on the work of courts, lawyers thinking of areas where racial discrimination is a problem will naturally think most about areas where courts have intervened. Courts have also intervened against official racial discrimination in other areas of state regulation, such as property and family law. When we think of the substantive areas of unconstitutional discrimination, these examples come readily to mind, and they create an image of racial discrimination as a state-law problem. That image is misleading, because the absence of court cases dismantling racial discrimination in the military, the civil service, or immigration laws does not reflect an absence of underlying federal discrimination.

C. Internalizing the Rule: Doctrine as Cause

Many of the leading examples of overt federal discrimination discussed in the previous subsection, such as the segregation of the military and the civil service, occurred before Bolling was decided—that is, before the courts established the rule that equal protection applies to the federal government. One might therefore wonder whether the judicial an-

130. Korematsu v. United States, 323 U.S. 214, 233-42 (1944) (Murphy, J., dissenting) (describing racist underpinnings of military order to intern more than 112,000 Japanese Americans).


nouncement of reverse incorporation caused the government to behave differently than it had before that rule was established. Perhaps Bolling’s deterrent effect, and its more diffuse influence on the norms that shape notions of right conduct, have prevented the government from engaging in discrimination that it would have practiced had Bolling not been decided. On this understanding, the absence of post-Bolling cases holding the federal government to have discriminated unconstitutionally against members of racial minority groups would testify to Bolling’s comprehensive success in reforming federal conduct.

This is a hypothesis worth testing. One of the chief functions of law is to influence behavior, and much of our understanding of law assumes that most people will seek to conform their conduct to what the law requires, whether from a sense of simple obligation or because the system of legal incentives and deterrents makes it instrumentally rational for them to do so. Although special complications arise when the party supposed to conform its conduct to a legal rule is a government or a government official rather than a private person, it is reasonable to expect the federal government to try to comply with clear constitutional commands, at least most of the time.

How well an internalization hypothesis can account for the absence of post-Bolling cases finding unconstitutional federal racial discrimination is a question that should be answered empirically. Even if federal conduct after 1954 largely conformed to the demands of equal protection, it would still be necessary to show that reverse incorporation was the cause of that conforming behavior, rather than simply coincidentally convergent with it. That showing of causation, it turns out, is hard to make on the relevant historical record. A major reason for the difficulty is that the federal government had, for the most part, already abandoned policies of overt racial discrimination before Bolling was decided. Accordingly, there was little official policy for reverse incorporation to change. A great deal of racial discrimination persisted unofficially, and perhaps Bolling played a role in reducing that unauthorized discrimination. But as explained below, factors including subconstitutional rules against

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133. See, e.g., H.L.A. Hart, The Concept of Law 82–90 (2d ed. 1994) (discussing the idea of legal obligation as understood from the internal point of view of the person bound).

134. See, e.g., Guido Calabresi, The Costs of Accidents 26–29 (1970) (arguing that incentives offered by tort law change behavior so as to alter the number and kind of accidents that will occur); Robert Cooter, Unity in Tort, Contract, and Property: The Model of Precaution, 73 Cal. L. Rev. 1, 5–8 (1985) (describing how “injurer responds [to simple negligence rule] by minimally fulfilling the legal standard of care, so that even a small reduction in his care will cause him to be liable”).


137. I thank Evan Caminker for suggesting the term “unauthorized discrimination.”
discrimination have left such unauthorized discrimination relatively insensitive to the constitutional rule.

1. Official Discrimination. — If the absence of cases holding the federal government to have violated the equal protection rights of racial minority groups were due to the impact of Bolling and reverse incorporation on government decision making, then the government would have abandoned its discriminatory policies within a reasonable time after the rule was announced. As it happens, however, the timing was otherwise. By the time the Supreme Court decided Bolling in 1954, little in official federal policy violated the demands of equal protection as applied to matters of race.

Although issues regarding the rule of intentionality in equal protection have been much contested, the courts since Bolling have limited the application of equal protection doctrine to discrimination that can be characterized as overt or intentional. By 1954, the federal government had largely abandoned those forms of discrimination, at least as matters of official policy. Presidents Roosevelt and Truman had already issued executive orders banning discrimination in federal employment. Truman had also ordered the desegregation of the armed forces. Congress amended the immigration laws to eliminate race as a basis for denying naturalized citizenship. The Eisenhower administration had ordered the desegregation of federally operated schools on military bases. In the District of Columbia, restaurants and hotels were required

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138. See Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that only overt or intentional discrimination triggers heightened scrutiny). For differing views on the intent requirement, see Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 146 (1976) (concluding that if the goal is improving welfare of disadvantaged groups, intent rule may not be appropriate); Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105, 1150 (1989) (arguing that intent doctrine offers court flexibility to consider individual and societal interests); David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 956 (1989) (arguing that intent standard will result in incoherence and an amorphous inquiry).

139. See Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 26, 1948) ("All personnel actions taken by Federal appointing officers shall be based solely on merit and fitness; and such officers are authorized and directed to take appropriate steps to insure that in all such actions there shall be no discrimination because of race, color, religion, or national origin."); Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941) ("All contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin.").

140. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) ("[T]here shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."); see also McCoy & Ruetten, supra note 119, at 129-30 (explaining that Executive Order 9981 was politically significant because the issue of antidiscrimination in the military was part of both major party platforms during the 1948 presidential election).

141. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422) (specifying that the right to "become a naturalized citizen of the United States shall not be denied or abridged because of race").

142. See Burk, supra note 119, at 29 (explaining that although the administration issued an executive order banning segregation, "[t]he declaration actually only affected
by law to serve patrons without regard to race.\textsuperscript{143} The continuing de jure segregation of the District's schools was thus an outlier within federal policy when \textit{Bolling} was decided. After \textit{Bolling}, few instances of official discrimination remained to which the reverse incorporation rule could be applied.

In part for that reason, the federal bureaucracy does not seem to have reacted to the decision in any significant way. On the day after \textit{Bolling} was decided, President Eisenhower met personally with District of Columbia officials and directed them to comply quickly with the order to desegregate the District's public schools.\textsuperscript{144} But there does not seem to be any record of federal officials discussing whether \textit{Bolling} required other changes in existing federal policy, much less initiating a process of reform designed to comply with a new constitutional rule.\textsuperscript{145}

Because \textit{Bolling} can be read to have stopped short of imposing the full apparatus of equal protection doctrine on the federal government, it is also worth considering whether the doctrinal change that might have provoked changes in federal policy was not the rule articulated in \textit{Bolling} but the later development of full-fledged reverse incorporation. As explained in Part I, \textit{Bolling} read narrowly holds only that discrimination lacking any legitimate governmental purpose violated the Due Process Clause of the Fifth Amendment. It would be another twenty years before

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\textsuperscript{143} The laws forbidding discrimination by restaurant and hotel operators in the District of Columbia had been adopted in 1872 and 1873, before the end of Reconstruction. The laws subsequently fell into disuse, and in practice many restaurant and hotel operators refused to serve black customers. Shortly after the Second World War, however, the District government began to enforce the law again, and in 1953 the Supreme Court upheld the validity of the 1873 antidiscrimination law against a claim that it had been implicitly repealed or become unenforceable through long disuse. See \textit{District of Columbia v. John R. Thompson Co.}, 346 U.S. 100, 113-14 (1953). The Eisenhower Administration was publicly committed to eliminating remaining segregation in the District of Columbia even before \textit{Bolling} was decided. See Notes on the President's Meeting with Congressional Leaders (Mon., Jan. 26, 1953), in \textit{12 Civil Rights, The White House, and the Justice Department, 1945-1968}, at 108, 114 (Michal R. Belknap ed., 1991) [hereinafter Notes on the President's Meeting] ("The President stated his intention of using the full power of the President to do away with segregation in the District of Columbia . . . ."); Burk, supra note 119, at 16, 18, 49 (describing Eisenhower's position as articulated during his 1952 campaign and in his 1958 State of the Union address).

\textsuperscript{144} Burk, supra note 119, at 55 (describing meeting between President Eisenhower and local officials).

\textsuperscript{145} Each year, the Attorney General files an annual report on the activities of the Justice Department. These reports, which are each several hundred pages in length, are comprehensive descriptions of the activities of all branches of the Department of Justice, including the Office of Legal Counsel. Accordingly, they regularly contain reports on consequential changes in the law during the relevant years. The reports for 1954, 1955, and 1956 are devoid of any discussion of \textit{Bolling} or its consequences for federal policy. See \textit{Att'y Gen. Ann. Rep.} 1956; \textit{Att'y Gen. Ann. Rep.} 1955; \textit{Att'y Gen. Ann. Rep.} 1954. The \textit{New York Times}, \textit{Wall Street Journal}, and \textit{Washington Post} did not report on any governmental reactions to, or planned changes in light of, \textit{Bolling}. 
the Court would make the simple declaration that equal protection applies against the federal government in the same way that it applies against the states,\textsuperscript{146} and the question of whether that equal application really extended to every aspect of equal protection law—and in particular to affirmative action—remained contested for another twenty years after that.\textsuperscript{147} One might therefore wonder whether the federal bureaucracy's failure to treat \textit{Bolling} as a stimulus for thoroughgoing reform was simply a function of \textit{Bolling}'s not having demanded very much. Perhaps reverse incorporation caused significant changes in the government's racial policies, but not until later cases expanded \textit{Bolling} into a complete application of equal protection to the federal government.

This more nuanced understanding of the development of reverse incorporation, however, does not lend much support to the hypothesis that reverse incorporation could have caused changes in government behavior. \textit{Bolling} described segregation as lacking any legitimate purpose\textsuperscript{148} and racial classifications as constitutionally suspect.\textsuperscript{149} Thus, even if some gap remained between the antidiscrimination norm binding the federal government and that binding the states—and it is not clear from subsequent case law that there was in practice such a gap\textsuperscript{150}—\textit{Bolling} did establish a standard stringent enough to threaten or invalidate any overt racial discrimination. Accordingly, \textit{Bolling} was sufficient cause for the federal bureaucracy to reevaluate and change any affected policies, even if it was not quite tantamount to a full incorporation of equal protection. The absence of a federal reaction was thus not a function of \textit{Bolling}'s moderate demands. It was more likely a function of reverse incorporation's having arrived too late to play a significant causal role in ending official racial discrimination by the federal government.

2. \textit{Unauthorized Discrimination}. — One may well still ask, however, why the reverse incorporation rule was not regularly applied in cases involving federal discrimination outside of, or in contravention of, official federal policy. After all, there can be a large gap between official policies of nondiscrimination and nondiscrimination in practice. This is partly a matter of the practical impossibility of instantaneous reform. No matter how sincere the intentions of the top decisionmakers, a segregated army or civil service does not become substantially integrated on the same day that desegregation is ordered.\textsuperscript{151} Given the sheer size of the federal government's decisionmaking apparatus, a certain amount of discrimination was bound to persist, and progress toward genuine nondiscrimination

\begin{itemize}
\item \textsuperscript{146} See supra note 66 and accompanying text.
\item \textsuperscript{147} See supra note 67.
\item \textsuperscript{148} \textit{Bolling v. Sharpe}, 347 U.S. 497, 500 (1954).
\item \textsuperscript{149} Id. at 499.
\item \textsuperscript{150} See supra notes 65–66 and accompanying text.
\item \textsuperscript{151} Despite the fact that the military had been officially desegregated before he took office, President Eisenhower found that segregation in the Armed Forces persisted and that achieving desegregation would require additional effort. See Notes on the President's Meeting, supra note 143, at 114.
\end{itemize}
was slow in many areas.\textsuperscript{152} Moreover, the obstacles to thorough nondiscrimination were not only practical. The federal government is not just large but also internally ideologically diverse, and many officials with decisionmaking authority preferred, where possible, to hold on to racially discriminatory practices.\textsuperscript{153}

It follows that the absence of cases holding unauthorized federal discrimination invalid under \textit{Bolling} cannot be due to reverse incorporation's complete success in changing decisionmakers' ex ante behavior. That explanation could hold only if discriminatory behavior had in fact been eliminated, which was not the case. Nor should it be surprising that the rule was not a perfect deterrent. After all, constitutional text and judicial doctrine unambiguously applied equal protection against state and local governments, and the cases holding those governments liable for unconstitutional racial discrimination show that they and their officials were not entirely deterred.

It does not follow, of course, that reverse incorporation had no effect on the conduct of would-be discriminators. Even if some amount of discrimination persisted, some federal decisionmakers who would otherwise have been inclined to discriminate might have altered their behavior due to the constitutional rule. But the plausible suspicion that the constitutional rule would have changed behavior in this way needs careful unpacking. For one thing, reverse incorporation offered no monetary remedy to deter the unauthorized discriminator; damages were not available in Fifth Amendment lawsuits until 1979.\textsuperscript{154} Nor has the subsequent addition of a damage remedy made the classic model of actors induced to change their behavior by legal rules threatening monetary liability\textsuperscript{155} applicable to this situation, because government officials tend not to internalize the costs of adverse judgments in the same way that private actors

\textsuperscript{152} See Burk, supra note 119, at 23–44, 68–88 (describing the patchy progress of desegregation in the military and the civil service during the 1940s and 1950s); King, supra note 118 (describing the persistence of segregation within federal agencies before the mid-1960s).

\textsuperscript{153} See King, supra note 118, at 77–108 (describing efforts of some officials to maintain segregation and discrimination in hiring and promotions).


They are likely to be indemnified, and their motivating incentives are generally political rather than financial.\(^{158}\)

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156. See Levinson, supra note 135, at 345-47.

157. See Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*, 88 Geo. L.J. 65, 65–68 (1999) (arguing that government indemnification for its officers limits the effect of tort actions against government officials in their individual capacities). The higher-level government officials who are responsible for the budgets from which the damages must be paid generally respond to political rather than financial incentives, such that it is very hard to know how imposing financial costs will affect their behavior. A public official may well commit to a course of action that will cost the government more than it is worth in financial terms if nonfinancial political benefits will result, or if the distribution of the overall costs and benefits will favor the officeholder's supporters. See Levinson, supra note 135, at 345, 357.

158. See Levinson, supra note 135, at 345, 357. To be sure, government behavior sometimes does respond to the costs of legal liability. See, e.g., Michael A. Heller & James E. Krier, Deterrence and Distribution in the Law of Takings, 112 Harv. L. Rev. 997, 999 (1999) (describing how the requirement to pay just compensation for a taking of private property will affect governmental decisions about what property to take). Moreover, the legal system frequently makes use of the assumption that individual officials can be deterred from undesirable action through the threat of monetary penalties. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1788–89 (1991) (stating view that the system of remedies for constitutional torts imposes damages to deter unconstitutional government conduct). It is probably the case, however, that federal officials inclined to commit constitutional torts face low expected costs. First, relatively few people who are victims of such constitutional violations actually bring suit. See Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 284 (1988) (arguing that deterrent effect of constitutional litigation may be low because many potential plaintiffs, for example, those who are incarcerated, face barriers to suit including ignorance of their rights, poverty, and fear of reprisal, in addition to lack of incentive because of the difficulty of proving an often intangible harm to an unsympathetic trier of fact). Second, those plaintiffs who do sue face long odds against winning. According to one study, of 12,000 *Bivens* actions filed, only thirty yielded judgments for the plaintiffs, and very few were settled. See Perry M. Rosen, The *Bivens* Constitutional Tort: An Unfulfilled Promise, 67 N.C. L. Rev. 337, 343–44 (1989); see also id. at 347–48 (attributing small success rate to, among other things, a jury’s reluctance to award damages when officials are not indemnified). And as noted above, even when the plaintiff does succeed in extracting a monetary award, the named defendant is usually indemnified. See supra note 157 and accompanying text.

To be sure, the threat of litigation attaches certain expected financial costs to unconstitutional conduct even if government officials can be confident that they will not have to pay damage awards. Notably, litigation is expensive even for the prevailing party. Officeholders may not bear the costs of litigation in the way that private parties would, but they may still prefer to preserve their budgets for other purposes. See, e.g., William A. Niskanen, A Reflection on *Bureaucracy and Representative Government*, in The Budget-Maximizing Bureaucrat: Appraisals and Evidence 13, 19 (André Blais & Stéphane Dion eds., 1991) (outlining areas of spending such as staff and capital). Still, some officials may be perfectly happy to spend the public fisc on litigation. It is, after all, not the officials' own money, and indeed the money often comes from separate litigation funds or from liability insurance rather than from a fund that would otherwise support the responsible official's nonlitigation activities. If it is to an official's political, personal, or bureaucratic advantage to act unconstitutionally, the expense of litigation is therefore less likely to deter her than to deter a private actor whose incentives are monetary and who bears his own litigation costs. Moreover—and this is a consideration applicable at the level of official policy as well as individual deviation—compliance with a constitutional norm is sometimes
Monetary incentives and deterrents are not the only mechanisms through which law affects behavior. Law also exerts influence through its effects on social norms, the market, or other circumstances that people consider when deciding how to behave.¹⁵⁹ Most ambitiously, judicial articulation of a system of constitutional values in which racial discrimination is reprehensible might shape the normative atmosphere in which government officials act, making them less likely to want to discriminate in the first place.¹⁶⁰ More moderately, the judicial articulation of such values could have an indirect effect on would-be discriminators by affecting the norms of their coworkers and superiors, who would then be more likely to notice and punish discriminatory conduct. In that way, the law’s effect on some people’s norms could act as a deterrent for other people whose own attitudes remain unchanged.

I do not doubt that many federal officials during the 1950s and 1960s were influenced by the symbolic power of judicially enforced equal protection or, more fundamentally, by the general rise of antidiscrimination itself costly. Desegregating a school system is expensive, but that is true no matter which branch of government orders the school desegregated. Indeed, in cases where compliance is more expensive than noncompliance, the government has a financial interest in delaying compliance as long as possible, and thus in waiting until a litigated defense of a policy fails, rather than correcting it in advance of judicial intervention. Cf. Edelman v. Jordan, 415 U.S. 651, 691–92 (1974) (Marshall, J., dissenting) (arguing that where remedy for violation is only prospective, states lack incentive to comply ex ante).

¹⁵⁹. See Lessig, supra note 136, at 666. Somewhat playfully, Lessig refers to this more capacious understanding of how people internalize legal rules as the “New Chicago School” and the more limited theory of direct incentives and deterrents as the “Old Chicago School.” See id. at 665–66. He might just as easily have referred to the more limited approach as the school of Holmes and the Bad Man. Holmes wrote: If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897).

¹⁶⁰. This phenomenon can be further subdivided into two categories. In one, the courts announce that the Constitution requires X, and although government officials privately believe Y, they also believe that they should place the Constitution above their own views and therefore act in accordance with X, not because they fear legal sanction but because they believe that it is their duty to act constitutionally and they accept the judiciary’s authority to interpret the Constitution. See Sanford Levinson, Constitutional Faith 56 (1988) (describing the articulated intentions of various officials to follow the Constitution rather than their own consciences). In the other, the courts announce that the Constitution requires X, and although government officials had previously believed Y, they come to believe X instead, because the courts’ pronouncements have moral or persuasive power. See Christopher L. Eisgruber, Is the Supreme Court an Educative Institution?, 67 N.Y.U. L. Rev. 961, 962–65 (1992) (analyzing the role of Supreme Court decisions in changing public attitudes about constitutional issues); cf. Mark Tushnet, Renormalizing Bush v. Gore: An Anticipatory Intellectual History, 90 Geo. L.J. 113, 125 (2001) (arguing that the cognitive dissonance required to maintain persistent disbelief in the validity of a Supreme Court decision can prompt progressives to revise their views and come to see that decision as valid). For a more skeptical view, see Klarman, From Jim Crow to Civil Rights, supra note 11, at 464 (arguing that Supreme Court decisions on major contested normative issues rarely persuade people to change their views).
norms that the renewed judicial commitment expressed. It does not follow, however, that reverse incorporation was an important part of that influence. The famous judicial decisions that may have shaped people’s normative views about discrimination were, like *Brown v. Board of Education*, decisions involving state and local government.\(^1\) If *Bolling* had never arisen—if, for example, the desegregation of the District of Columbia’s schools had been a matter of executive order prior to 1954, as the desegregation of the military was—it is highly unlikely that the rising norm against racial discrimination would have been weakened due to the absence of a judicially articulated rule applying equal protection to the federal government. In other words, where the shaping of public norms is concerned, nobody thinks that *Bolling* had much additional value over and above *Brown*. Indeed, the same sense of constitutional values that led the *Bolling* Court to describe exempting the federal government from equal protection rules as “unthinkable” would probably also have influenced the independent decisionmaking of most (though not all) federal legislators and administrators, whether or not reverse incorporation had officially been invented.\(^2\)


\(^2\)There is, of course, a further question, which is whether the status of that antidiscrimination norm among federal decisionmakers would have been different, not in the absence of reverse incorporation, but if the Supreme Court in *Bolling* and other cases had affirmatively refused to hold the federal government to the same standard to which the states were held. If so, then perhaps *Bolling* was a meaningful variable among the influences shaping the normative atmosphere in which federal officials decided whether to comply with official nondiscrimination policies. There is a valid point here, but it should not be overstated; a contrary decision in *Bolling* might have had less effect on the normative atmosphere than is generally supposed. My suspicion on this point derives from a more general skepticism about the received wisdom that *Bolling* was needed to avoid a symbolic undercutting of *Brown*, and thus needed to allow *Brown*’s normative message to be accepted not just within the federal bureaucracy but also in the country at large. According to that conventional view, the Court had to decide *Bolling* as it did, or else “the apparent hypocrisy [of permitting federal segregation] would have made *Brown* all the more unenforceable.” McConnell, supra note 9, at 1162 n.14; cf. Amar, supra note 7, at 766–67 (describing *Brown* and *Bolling* as partners in a three-legged race, such that one cannot stand if the other falls). But the argument that *Bolling* was indispensible in order to get the country, and especially the South, to accept *Brown* implies that the bogeyman to be avoided—Southern refusal to accept *Brown*—was averted in any significant way by *Bolling*. Perhaps the resistance to *Brown* would have been yet more massive had the Court not ordered desegregation in *Bolling*. The rocks that white Southern racists threw at black schoolchildren could have been bigger. Even with *Bolling*, however, implementing *Brown* required military force and took a decade to do more than begin. In that light, the possibility that *Brown*’s opponents would add one more charge of hypocrisy to the invective they already deployed seems like a marginal factor in the greater struggle over whether the country would accept the norm *Brown* represents. I am therefore left wondering whether legal academics have inflated the degree to which *Bolling* was of potential consequence in
Assessing the impact of reverse incorporation on the ex ante behavior of government officials inclined to discriminate is thus anything but straightforward. The doctrine's direct disincentives for discrimination were not particularly potent, especially in the years of greatest change. The more diffuse normative effects probably added little to a much more powerful set of normative changes, legal and otherwise, occurring at the same time.\(^\text{163}\) Again, none of this means that the rule caused no behavioral changes at all. But there are limits to the view of reverse incorporation as an agent of change, and the documented record of continued unauthorized federal discrimination after 1954 shows that the primary conduct at issue was not entirely eliminated.\(^\text{164}\) It is therefore necessary to look elsewhere to explain why the constitutional rule was so rarely enforced by the courts.

### IV. Judicial Deference

The observation that there are virtually no cases holding the federal government to have engaged in unconstitutional racial discrimination is only secondarily an observation about federal legislative, executive, or administrative conduct. It is primarily an observation about the behavior of courts. No matter what the other federal branches do, there will be no

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the broader struggle over segregation. Moreover, to the degree that it was consequential, its consequences could have operated in both directions, because *Bolling* furnished Southern segregationists with a new opportunity to charge the Court with hypocrisy. In 1957, the Georgia legislature passed a resolution calling on that state’s congressional delegation to impeach several Supreme Court Justices, and it listed the Court’s doctrinal innovation in *Bolling* as a leading example of the misconduct warranting impeachment. See 1957 Ga. Laws 553, 560.

The concern that a contrary decision in *Bolling* would have adversely affected the normative atmosphere in which *Brown* had to be implemented is not really about the norms held by the Georgia legislature, which would have opposed desegregation regardless of the outcome in *Bolling*. It is about the views held by more moderate actors, actors not firmly committed to either side of the struggle over segregation and who might have been open to influence. This group might well have regarded a decision permitting segregation in the District of Columbia as hypocritical. But that is not the only way to see such an outcome. To the extent that one of the issues regarding *Brown's* legitimacy was whether the Supreme Court had imposed its own preferences rather than doing what the Constitution required, a contrary decision in *Bolling* might have served as evidence that the Court regarded itself as constrained by constitutional text. Among the relevant moderate actors, *Brown* might therefore have enjoyed some marginal legitimacy gain as well as some legitimacy loss had *Bolling* come out the other way.

I do not think we should be confident in our abilities to assess the practical impacts of these various counterfactuals. Whatever the net impact of a contrary decision in *Bolling* might have been, however, I suspect it would have been less than that of the forces advancing the norm of *Brown*. The influences that prompted the executive branch to desegregate the military and the civil service during the 1940s and that prompted Congress to pass comprehensive civil rights legislation in the 1950s and 1960s would still have been in force.

163. See generally Taylor Branch, *Parting the Waters: America in the King Years 1954–63* (1988) (giving comprehensive account of civil rights movement, including its increasing strength and renown in the 1950s).

164. See supra notes 152–153 and accompanying text.
judicial declarations of unconstitutionality unless the courts intervene. Such intervention requires two judicial decisions: one to review cases on their merits, and another to disapprove of the conduct being reviewed. In Part V, I will show that the absence of cases finding unconstitutional federal racial discrimination is largely a function of the federal courts’ substantive approval of the conduct of the other federal branches. Before doing so, however, I will address the role of the judicial choice not to review cases on their merits at all, or, if they do engage in some review, the choice to review federal conduct deferentially. If the courts defer to other federal decisionmakers, they will tend not to find federal conduct unconstitutional.

One moderate form of judicial deference is the presumption that government officials act in good faith. In equal protection cases, that presumption is invoked to increase the showing that a litigant must make in order to establish unconstitutional discrimination.\(^{165}\) By shaping the requirements of proof in this way, the deference this presumption embodies reduces the likelihood that courts will find constitutional violations.\(^{166}\) The presumption of good faith, however, is often afforded to state actors as well as federal ones.\(^{167}\) It therefore might be more germane to a generally low number of cases finding unconstitutional discrimination than to a distinctively low number of cases finding such discrimination by federal officials.

In some quintessentially federal fields of action, however, judicial deference takes a more extreme form. Consider the legal regulation of the military, immigration law, and Indian law. These are all exclusively federal areas, and they are all areas with clear records of racial discrimination by the federal government.\(^{168}\) The federal courts have long afforded the political branches broad or nearly unreviewable discretion to conduct policy in these fields.\(^{169}\) When courts defer to this extent, federal dis-

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165. See, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976) (declining to hold governmental action with a disparate impact unconstitutionally discriminatory); see also Ortiz, supra note 138, at 1107, 1134–35 (showing how courts vary the levels of proof needed to sustain equal protection claims across different substantive contexts).

166. See Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 286 (1997) (arguing that courts adjust proof requirements so as to make deliberate governmental discrimination a hard conclusion to reach).

167. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (stating, in the course of rejecting an equal protection challenge to the state administration of capital punishment, that the courts “decline to assume that what is unexplained is invidious”).

168. See supra notes 128–129 and text accompanying note 119.

169. For examples regarding military affairs, see, e.g., United States v. Stanley, 483 U.S. 669, 683–84 (1987) (declining to recognize subordinate’s right to civil remedy for constitutional violation by superior officer, because unique disciplinary nature of military requires minimum of outside interference); Chappell v. Wallace, 462 U.S. 296, 305 (1983) (same); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (“The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”). Regarding immigration, see Wong Wing v. United States, 163 U.S. 228, 237 (1896) (“No limits can be put by the courts
crimination will not provoke judicial decisions holding discrimination unconstitutional. By forgoing judicial review in fields of law where federal power is brought to bear on significantly nonwhite populations, the courts help insulate the government from whatever restrictive power reverse incorporation might have.

Judicial deference may offer courts an attractive way to avoid calling the government into disrepute when the government does in fact discriminate. In the decades since *Bolling*, any finding of deliberate racial discrimination by the government would entail a harsh moral indictment of the official or officials responsible, and perhaps of the broader system of which they were a part. Some courts might therefore prefer to avoid making such findings.170 Deference can offer a way out, excusing courts from having to render factual judgments about what a government official did or legal-normative judgments about whether a government policy is ultimately acceptable.171

170. See, e.g., Pamela S. Karlan, Two Section Twos and Two Section Fives: Voting Rights and Remedies After *F/ores*, 39 Win. & Mary L. Rev. 725, 785 (1998) (arguing that courts try to avoid the conclusion that legislators act on illicit motives when drawing electoral districts); Donald H. Regan, Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, *Da Capo*, 99 Mich. L. Rev. 1853, 1891 (positing that courts may be reluctant to make accusations of malevolent racial motive, even if true); cf. Selmi, supra note 166, at 284 (arguing that courts only find government discrimination when there is no plausible alternative to doing so). This factor differentiates cases involving racial discrimination from cases involving violations of First and Fourth Amendment rights. Violations of those rights can often be seen as well-intentioned efforts to protect the security of the public or the health and morals of its children, rather than as unambiguously immoral actions that all right-thinking Americans must condemn. It also differentiates discrimination against members of racial minority groups from affirmative action, inasmuch as even many steadfast opponents of affirmative action concede that the aims behind affirmative action are often worthy or at least reasonable, even if the means used to attain those ends are not. See, e.g., *Grutter v. Bollinger*, 123 S. Ct. 2925, 2950 (Thomas, J., concurring in part and dissenting in part) (“Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School . . . .”).

171. The foregoing variations on the theme of judicial deference illustrate the range of possible relationships between a court’s choice to defer and its normative view that the government’s underlying substantive conduct is desirable, or at least not undesirable. It is easy to understand the choice to defer when the court approves of the policy at issue, and much deference probably does follow that model. In a recent article, Sarah Cleveland has powerfully argued that the long-standing policies of deference with respect to immigration law, Indian law, and the law of non-state territories grows out of the nineteenth-century judiciary’s broad sympathy with the imperial aspirations of the political branches. See
It would be extremely difficult to know, however, whether this feature of deference played a significant role in reducing the number of cases finding discrimination by federal officials. Indeed, the power of the same antidiscrimination norm that might encourage judges to avoid declaring federal conduct unconstitutionally discriminatory could just as well make judges especially keen to enforce equal protection when they see it violated.\(^\text{172}\) In part because it is hard to establish which of these dynamics is a more powerful influence in judicial decisionmaking, it is difficult to gauge the degree to which judicial deference explains the absence of cases finding racial discrimination by the federal government. Similarly, it is hard to know the degree to which the presumption of good faith reduces the number of cases finding unconstitutional racial discrimination by the federal government. The more extreme deference afforded in areas like the regulation of the military, immigration law, and Indian law may do a good deal of work in the areas where it is applicable, but those areas do not nearly encompass the wide range of activities undertaken by the federal government. Accordingly, although judicial deference probably does account for some increment of the absence of cases finding reverse incorporation violations, a great deal of the pattern still remains to be explained.

V. SHARED FEDERAL NORMS

Suppose, counterfactually, that the Fourteenth Amendment had been written with a slightly different text, such that the Equal Protection Clause had always been addressed to the federal government as well as the states. It does not follow that courts prior to 1954 would have held that federal policies such as maintaining a segregated military or a segre-
gated civil service were invalid, even if they did not regard the military as a subject of special deference. After all, the prevailing equal protection regime prior to 1954 deemed segregation constitutional. A challenge to the segregated military or civil service in 1910 or 1930 would surely have failed. African Americans were permitted to join the army, and the segregation of military units by race would have been upheld as a reasonable instance of providing separate but equal opportunities to people of different races. (There were no successful constitutional challenges to segregated state national guards prior to 1954, despite the fact that the Equal Protection Clause governed action by states.) Accordingly, although the absence of cases finding federal conduct to be unconstitutionally discriminatory is partly a matter of timing, reverse incorporation might not have played a significant causal role in dismantling federal segregation even if it had come ten or twenty years earlier.

The operative question is not whether the federal government ever engaged in practices that would be considered unconstitutional discrimination today, or that would have been considered unconstitutional discrimination in 1954, but whether the federal government engaged in practices that would have been unconstitutional discrimination at the time they were practiced, had the practitioner been a state government rather than the federal one. That question goes to the relationship, at any given time, between federal practice and the views of the contemporary federal courts. After all, courts find constitutional violations when the government's conduct runs afoul of judicially defined norms. Even if the absence of successful equal protection claims proved an absence of unconstitutional conduct—which it does not—that absence would only mean that federal practice was aligned with contemporary constitutional doctrine, that is, that federal practice was broadly consistent with what the courts were willing to permit at the time when it occurred. As long as the federal courts' normative view of discrimination is similar to the view held by the rest of the government, the courts will rarely perceive the rest of the government as acting inappropriately. Instead, they will see federal action as consistent with constitutional values.

173. Constitutional violations sometimes occur without reference to judicially defined norms, because courts need not always be the ultimate arbiters of constitutional meaning. See Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 237 (2002) (arguing that the political question doctrine "forces the Court to confront the institutional strengths of the political branches—and the Court's weaknesses—in resolving some constitutional questions"); Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 5, 5–6 (2001) (arguing that Marbury “ventur[ed] only that it was proper for the Court to interpret the Constitution without in any way suggesting that its interpretations were superior to those of the other branches”); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943 (2003) (arguing that we should move away from current "enforcement model" to one that demonstrates more deference to Congress). The present question, however, is about the absence of court cases finding constitutional violations, so the focus is necessarily on constitutional violations as defined by the courts.
The phenomenon to be explained is thus not the nondiscriminatory behavior of the federal government but the rough correspondence between the federal judiciary’s orientation toward issues of racial equality and the rest of the federal government’s orientation toward those same issues.

According to the strand of scholarship that sees the federal courts as enforcing national norms, stating the problem in this way comes close to stating the solution. The federal courts are an arm of the federal government. Judicial nominees are drawn from a stratum of the population with views that are mainstream among the elite, and the confirmation process ensures that federal judges’ views on important issues will be acceptable to a majority, or indeed a supermajority, of the officeholders in the political branches. Unlike state officials, whose constituencies may be to the right or the left of the national polity, the acceptable normative boundaries for federal judges are shaped by the composition of the other federal branches. It follows that Congress and the executive are likely

174. An important early statement of this idea is found in Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as National Policy-Maker, 6 J. Pub. L. 279, 285 (1957) (arguing that the Supreme Court’s views usually accord with the dominant views among the nation’s lawmaking majorities and never stay opposed to those views for very long). More recently, important developments of thinking along these lines include Klarman, From Jim Crow to Civil Rights, supra note 11, at 449–50 (observing that Supreme Court decisions have reflected dominant public opinion on matters of race); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 580–81, 653–80 (1993) (emphasizing existence of “dialogue” between courts and political branches rather than imposition of judicial will on elected officials); Mark A. Graber, The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary, 7 Stud. Am. Pol. Dev. 35, 36 (1993) (expressing concern that judicial review not be viewed “as a practice that either sustains or rejects the measures favored by lawmaking majorities”); Michael J. Klarman, Bush v. Gore Through the Lens of Constitutional History, 89 Cal. L. Rev. 1721, 1749–50 (2001) (noting that many well-known Supreme Court reversals of state laws accorded with national sentiment, and collecting cases); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 6–18 (1996) (“Frequently the Court takes a strong national consensus and imposes it on relatively isolated outliers. Infrequently the Court resolves a genuinely divisive issue that rends the nation in half.”); Barry Friedman, The Politics of Judicial Review 2, 53–67 (2003) (unpublished manuscript, on file with the Columbia Law Review) (describing how interbranch forces require the Court to consider the responses of the other branches of government). Scholars writing in this vein have taken different positions on the question of whether equal protection jurisprudence follows this model. Compare Friedman, Dialogue and Judicial Review, supra, at 604 n.135 (identifying equal protection as the area in which the courts are perhaps most likely to act against the wishes of the majority), with Klarman, From Jim Crow to Civil Rights, supra note 11, at 446–54 (presenting equal protection jurisprudence as largely consonant with the majority’s preferences).

175. The removal of Senator Trent Lott of Mississippi from the position of Majority Leader in 2002 nicely illustrates these dynamics. Lott lost his position because he made sympathetic remarks about fellow senator Strom Thurmond’s support for segregation several decades earlier. Carl Hulse, Lott Fails To Quell Furor and Quits Top Senate Post; Frist Emerges as Successor, N.Y. Times, Dec. 21, 2002, at A1. Lott held his Senate office only because of the support of voters of Mississippi, and if his remarks are sufficiently in keeping with the norms of that constituency, he will be able to retain that office. But for the office of Majority Leader, Lott needed the support not only of Mississippi voters but also of Republican senators from around the country. In the national polity, support for
to hold antidiscrimination norms much like those held by the courts. Under those conditions, the federal government is unlikely to enact official policies that the courts would regard as unconstitutionally discriminatory.

For the same reason, a constitutional antidiscrimination rule will do little independent work in policing deviant federal actors who depart from official policy and discriminate on the basis of race. The shared federal norms that shape the content of equal protection have also created statutory and administrative rules against discrimination. A government employee who can prove that he was fired on the basis of race has little need for *Bolling*, because he can obtain relief through the enforcement of nonconstitutional rules. To be sure, a great deal of discrimination goes undetected and unproven. But that problem is not solved by adding a constitutional prohibition to statutory or administrative prohibitions.

Reverse incorporation is consequential where the Constitution prohibits what other rules do not reach. In large part, this explains why there are almost no cases finding unconstitutional discrimination against racial minorities but there are cases finding violations of the equal protection rights of aliens, indigents, and persons born out of wedlock. Statutory and administrative antidiscrimination rules are particular: They prohibit discrimination on specifically enumerated bases. The political segregation is clearly out of bounds, and the Senate Republicans jettisoned Lott as their leader. See id. (reporting that Lott was criticized across the political spectrum and that Republicans feared keeping him as majority leader would damage their party). A federal judge, like a Senate leadership officer, needs to be acceptable at the level of the national polity, and for the same reason: Taking office requires the assent of a majority of the Senate.

These dynamics have been part of the federal system since long before Lott's recent travails, and indeed an almost exact though inverse precedent occurred shortly after *Bolling* was decided. In 1956, nineteen of the twenty-two senators representing former Confederate states signed a "Declaration of Constitutional Principles" denouncing *Brown v. Board of Education* and its companion cases. The only three Southern senators not to sign were the two from Tennessee, Albert Gore, Sr., and Estes Kefauver, and one senator from Texas: Lyndon Johnson. See 102 Cong. Rec. 4460-64 (1956). Johnson was at the time Majority Leader of the Senate, just as Lott was two generations later. By refusing to sign this "Southern Manifesto," Johnson maintained his ability to serve in an office that relies on a national constituency rather than only a statewide one. Indeed, two of the three non-signers became the Democratic nominees for vice-president in the two succeeding presidential elections: Kefauver in 1956 and Johnson in 1960. One cannot prove that these senators would not have been nominated had they signed the Southern Manifesto, but it seems exceedingly unlikely.

176. See infra notes 205-206 and accompanying text (discussing Title VII and Civil Service Reform Act of 1978).

177. See supra notes 96-98 and accompanying text.

178. The Civil Service Reform Act approaches being an exception, because it prohibits discrimination "on the basis of conduct which does not adversely affect . . . performance . . . ." 5 U.S.C. § 2302(b)(10) (2000). This prohibition appears to reach discrimination on nonenumerated grounds, but it is not fully a catch-all provision, because it reaches only nonenumerated conduct. Discrimination on the basis of status is still prohibited only on specifically enumerated grounds.
cal process and the powerful mainstream norm against official racial discrimination\textsuperscript{179} ensure that race is always one of those bases. But where more peripheral kinds of discrimination are concerned, only a general antidiscrimination rule can provide relief. That is not the work for which reverse incorporation was invented, but the work it actually does is largely limited to those contexts—and to the context of affirmative action.

A. Official Discrimination

Prior to 1954, a government could stay on the right side of equal protection even if it practiced segregation. If the federal government had continued official segregation in the military and the civil service after 1954, that policy might have been held unconstitutional under the reverse incorporation doctrine. The issue never arose, because the political branches altered their official conduct shortly before the reverse incorporation doctrine was born.\textsuperscript{180} That timing was not entirely a coincidence. \textit{Brown} and \textit{Bolling} were products of a strengthened federal commitment to antidiscrimination values in the first years after World War II, and that commitment infused executive and legislative policy as well as judicial doctrine.\textsuperscript{181} The branches of the federal government all moved in the same direction at roughly the same time.

One should not overstate the harmony of this process. In the seventeen years between Truman’s executive order desegregating the civil service and the passage of the Voting Rights Act of 1965,\textsuperscript{182} each branch underwent a similar evolution in its stance on general questions like the acceptability of segregation and the importance of a federal commitment to ending Jim Crow. Nonetheless, the branches did not all travel the same path at exactly the same time, and each was often internally divided as well.\textsuperscript{183} The internal diversity of each branch was great enough to include some elements whose views, if adopted by the branch as a whole, could easily have caused conflict among the branches. Congress, for example, had a significant segregationist bloc during the 1950s and 1960s.

\textsuperscript{179} Senator Lott’s recent fall from the position of Majority Leader is again a good illustration. See supra note 175.
\textsuperscript{180} See supra notes 139–143 and accompanying text.
\textsuperscript{181} See, e.g., Dudziak, supra note 10, at 79–114 (discussing Truman administration action such as integration of Armed Forces taken in context of American racism being used for Soviet propaganda purposes); Klarman, From Jim Crow to Civil Rights, supra note 11, at 171–289 (describing shifting attitudes toward race after World War II, as well as corresponding shift in Supreme Court decisions); Primus, Language of Rights, supra note 20, at 177–233 (discussing American concepts of rights and justice as developing in response to Nazi and Soviet totalitarianism).
\textsuperscript{183} See Michael J. Klarman, Court, Congress, and Civil Rights, in Congress and the Constitution (Neal Devins & Keith E. Whittington eds., forthcoming 2004) (manuscript at 5–9, on file with the Columbia Law Review) (showing how the legislature and the judiciary have moved along parallel tracks on equal protection issues, albeit not in lockstep, as well as showing the role of internal conflict in Congress).
Had that bloc commanded a majority, Congress might have enacted legislation that the courts would have regarded as unconstitutional. The segregationist bloc was, however, never more than a powerful minority during these years. It was strong enough to frustrate many attempts at serious civil rights legislation, but it was not strong enough to put Congress actively at odds with judicially defined equal protection.184

Similarly, different judges within the federal court system have often held different views of what equal protection requires of the federal government. Judges and courts with more aggressive understandings of equal protection tend to be more likely to hold federal practices unconstitutional. But the centralized and hierarchical organization of the courts ensures that lower courts will not cause serious interbranch conflict if they depart from the judicial mainstream. Instead, lower courts that espouse more aggressive antidiscrimination norms and sustain equal protection claims against the federal government are frequently reversed by higher courts.185 As a general matter, the higher courts are more likely to track the norms of the national polity. Their judges are subject to greater political vetting before confirmation, and a committee of three or more judges is less likely to reach an outlier decision than a single district judge acting alone.186

185. See, e.g., City of New York v. United States Dep't of Commerce, 34 F.3d 1114, 1128, 1130-31 (2d Cir. 1994) (ordering use of statistical sampling to reduce census undercounting of minorities), rev'd sub nom. Wisconsin v. City of New York, 517 U.S. 1, 24 (1996); Davis v. Washington, 512 F.2d 956, 965 (D.C. Cir. 1975) (holding that facially race neutral District of Columbia police entrance exam constituted racial discrimination because of disparate impact), rev'd, 426 U.S. 229, 238-40 (1976); Diaz v. Weinberger, 361 F. Supp. 1, 16 (S.D. Fla. 1973) (holding that Medicare eligibility rules for aliens stricter than those for citizens violated Due Process Clause), rev'd on direct appeal sub nom. Matthews v. Diaz, 426 U.S. 67, 81-84 (1976). In cases where lower courts find equal protection violations and higher courts reverse and rule for the government, the lower courts mostly appear to be outliers in a politically liberal direction. The same dynamic can occur, however, when the lower courts are outliers in a politically conservative direction. A leading example is the pattern of decisions in employment discrimination cases in the first years after passage of Title VII. In those years, district judges in Southern states frequently attempted to evade the force of antidiscrimination laws through narrow legal constructions and questionable findings of fact favoring defendants. Appellate courts—mostly the Fourth and Fifth Circuits, but also sometimes the Supreme Court—responded with a set of innovations that made it easier to reverse the district courts so as to allow the laws to operate as Congress had hoped. See Alfred W. Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Indus. Rel. L.J. 313, 342-50 (1984). In so doing, the higher courts acted as enforcers of national norms against lower courts more closely tied to outlier local norms.
Consider, as an example, the judiciary’s internal conflict over the issue of disparate impact during the 1970s. In *Griggs v. Duke Power Co.*, decided in 1971, the Supreme Court read Title VII of the Civil Rights Act of 1964 to prohibit facially neutral employment practices that had disparately adverse effects on members of disadvantaged racial groups.\(^{187}\) Subsequently, a number of lower courts pushed one step further, holding that the disparate impact standard was applicable not just under Title VII but as a matter of constitutional equal protection.\(^{188}\) Had the Supreme Court adopted the disparate impact standard as a constitutional rule,

145, 159–60 (1908), that state officers were not immune from federal court injunctions in constitutional cases. See Perez v. Ledesma, 401 U.S. 82, 108–09 (1971) (Brennan, J., concurring in part, dissenting in part) (reviewing history of the Three-Judge Court Act). This Act, which has since been repealed, see Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976), was based on the theory that three judges acting together would be less likely to reach an aggressive result than one judge acting alone.

\(^{187}\) 401 U.S. 424, 429–30 (1971). That *Griggs* was a statutory decision might seem to imply that the disparate impact standard reflected the legislature’s view of the appropriate antidiscrimination norm, but that implication would be misleading. On the contrary, Congress at that time lagged behind both the executive and the judiciary in the move toward this more aggressive equality norm. On the most honest reading of the statutory text (as it existed in 1971), Title VII did not create a cause of action for disparate impact irrespective of discriminatory intent, but the Equal Employment Opportunity Commission and the courts read a disparate impact standard into the statute nonetheless. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 494, 506 (2003) [hereinafter Primus, Disparate Impact]. Congress did not exercise its statutory power to countermand the interpretation of the other branches. Once again, Congress was internally divided, and although forces that might have preferred a disparate impact standard in 1964 were not sufficiently powerful to put one in the statute, the forces that would have wanted to eliminate such a standard were not sufficiently powerful after *Griggs* to reverse that decision. It was only twenty years after *Griggs*, in the Civil Rights Act of 1991, that Congress codified a disparate impact standard in Title VII. See 42 U.S.C. § 2000e-2(k) (2000) (permitting plaintiffs to state statutory employment discrimination claims on the basis of disparate impact); Primus, Disparate Impact, supra, at 507–08. Even after 1991, however, disparate impact is actionable under only a subset of federal antidiscrimination legislation. Examples go both ways: The Americans with Disabilities Act reaches disparate impact, see 42 U.S.C. § 12112(b)(3)(A) (2000), but the Age Discrimination in Employment Act may not, see Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (declining to decide whether disparate impact theory is available under ADEA); id. at 618 (Kennedy, J., concurring) (noting that there are substantial reasons disparate impact analysis should not apply under the ADEA). Title VI, which prohibits racial discrimination in any program receiving federal funding, has no express disparate impact standard in its original text, and unlike with Title VII, none has been read in by judicial construction. On the contrary, the Supreme Court has construed Title VI to prohibit only intentional discrimination, regardless of impact, see Alexander v. Sandoval, 532 U.S. 275, 280 (2001), and Congress has not second-guessed this reading. As the above discussion shows, the set of federal antidiscrimination statutes is too varied to make it possible to say that Congress either does or does not hold an antidiscrimination norm that reaches disparate impact.

many extant federal practices might have given rise to successful reverse incorporation claims. An example is the disparate way in which federal sentencing treats offenses involving powder cocaine and offenses involving crack cocaine.\textsuperscript{189} That conflict between the branches never actually arose, because the Supreme Court ultimately rejected disparate impact as the constitutional standard for discrimination. Under \textit{Washington v. Davis}, decided in 1976, courts will only grant relief on equal protection claims if the discrimination complained of is formal or intentional.\textsuperscript{190} With \textit{Davis}, the question of what equal protection prohibited was resolved in a way that did not threaten the federal government's policies with unconstitutionality, because the Court's vision of equal protection was not more demanding than that held by the political branches.\textsuperscript{191}

To be sure, this resolution was not inevitable. \textit{Davis} was a normative choice, and a Supreme Court staffed by different judges might have chosen differently.\textsuperscript{192} If a Democrat had won the presidency in 1968 and appointed liberal justices to fill the seats to which Richard Nixon appointed Justices Burger, Powell, and Rehnquist, \textit{Davis} might not have been decided as it was. But the fact that things could have happened differently should not obscure the tendency suggested by what actually did happen: If the alignment between the branches is not inherent, it is also not purely coincidental. If more Supreme Court Justices had favored the disparate impact standard, it probably would have been because of

\textsuperscript{189} The sentences for cocaine base (crack cocaine) are much heavier, and persons convicted of possessing cocaine base are disproportionately black. See United States v. Clary, 846 F. Supp. 768, 774, 797 (E.D. Mo. 1994), rev'd, 34 F.3d 709, 713-14 (8th Cir. 1994). A judiciary with a more aggressive equal protection norm might hold this disparity unconstitutional, but the actual federal judiciary does not. See, e.g., United States v. Carter, 91 F.3d 1196, 1198-99 (8th Cir. 1996) (rejecting equal protection challenge based on sentencing rules giving 100 times as harsh a sentence for cocaine-base offense as for powder-cocaine offense).

\textsuperscript{190} 426 U.S. 229, 239-48 (1976).

\textsuperscript{191} Again, this is not to say that the political branches never choose disparate impact as the antidiscrimination standard. Sometimes they do. See supra note 187. It is only to say that they have not adopted a general rule that would invalidate federal practices with disparate impacts. A constitutional disparate impact standard, adopted by the judiciary, would create just such a general rule.

\textsuperscript{192} Prominent scholars have argued that \textit{Davis} rests on relatively non-normative considerations like the relative competence of courts and legislatures. On this view, a constitutional impact standard would simply be unworkable, such that the result in \textit{Davis} is compelled by common sense and the limits of the judicial capacity. See, e.g., Paul Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 26 (1976); see also Personel Adm'r v. Feeney, 442 U.S. 256, 272 (1979) (stating that the judiciary has limited ability to manage a standard that requires a fair amount of empirical investigation). But this argument is probably overstated. Other constitutional systems—Canada's, for example—have adopted impact standards in constitutional law without dissolving into chaos. See British Columbia (Pub. Serv. Employee Relations Comm'n) v. BCGSEU, [1999] 3 S.C.R. 3, 4 (Can.) (rejecting distinction between "direct" and "adverse effect" discrimination); Law v. Minister of Human Res. Dev. (Minister of Employment & Immigration), [1999] 1 S.C.R. 497, 499 (Can.) (defining equality standard as focused on whether law has discriminatory purpose or effect).
general political trends that also would have made the legislative and executive branches more determined to avoid governmental practices with disproportionately adverse effects on disadvantaged racial groups.

This understanding of the relationship among the federal branches accounts for two other aspects of federal court decisionmaking on equal protection claims. First, the few lower court cases in which reverse incorporation has been necessary for ending discriminatory conduct have involved discrimination not by Congress or major executive agencies, but by local decisionmakers acting with federal authority.193 Two of the three cases involved administrative problems in the District of Columbia.194 The discrimination in the third case was that of the local citizenry of Macon County, Alabama, acting without any check that a broader constituency might have offered.195 These cases illustrate a classic problem of principal and agent: Core federal authorities like Congress, the President, and the heads of the executive departments inevitably fail to exercise perfect control over every person on a sprawling organizational chart. But the courts have never squared off against those core federal authorities and held them to account on issues of racial discrimination. Indeed, the most prominent judicial opportunities to invalidate overt racial discrimination by core federal authorities were spectacularly forgone when the Supreme Court decided Hirabayashi196 and Korematsu.197 Those cases suggest that discrimination appealing enough to become official federal policy may commend itself to the courts as well.198

A second aspect of federal court decisionmaking under reverse incorporation is even more telling. As noted in Part II, there is only one case in which a court has actually invalidated a statute passed by Congress or a regulation approved by a federal administrative agency on the grounds that it unconstitutionally discriminated against members of racial minority groups.199 That case is Simkins, in which the Fourth Circuit

193. See supra text accompanying notes 79–81.
197. Korematsu v. United States, 323 U.S. 214 (1944); see also supra note 38 and text accompanying notes 36–39.
198. Even the Court's decision in Ex parte Mitsuye Endo, 323 U.S. 283 (1944), which granted habeas corpus relief to a Japanese American internee who argued that she had been detained in violation of due process, did not describe the internment policy as unconstitutionally discriminatory. Only Justice Murphy took that position. See id. at 307–08 (Murphy, J., concurring). In contrast, the Court continued to assume that the relocation of persons of Japanese descent had been justified, and held only that detaining a citizen after she had been individually shown to be loyal was beyond the scope of the relocation authority. See id. at 302–04.
199. See supra text accompanying note 74.
invalidated a federal law permitting the use of federal funds by segregated hospitals operated by states or private parties.\textsuperscript{200} One might think that in this instance at least, the different branches of the federal government were officially at odds with each other. In fact, however, the most noteworthy thing about \textit{Simkins} is its demonstration of unity among the federal branches.

In the \textit{Simkins} litigation, the United States intervened on the side of the plaintiffs, asking the court to declare the law unconstitutional.\textsuperscript{201} In other words, the federal executive and the federal judiciary both took the position that using federal money for discriminatory hospitals was unacceptable. Nor was Congress on the other side, even though the case formally presented a constitutional challenge to a congressional statute. \textit{Simkins} was, after all, decided in 1963. At the time of the decision, a minority bloc within Congress was trying to prevent the majority from enacting broad new civil rights legislation.\textsuperscript{202} Within a year, in Title VI of the Civil Rights Act of 1964, Congress would succeed in enacting a statutory ban on federal funding for racially segregated institutions.\textsuperscript{203} The Fourth Circuit's equal protection decision in \textit{Simkins} thus operated in tandem with the political branches rather than as a check upon them. Moreover, no court invalidated the funding program struck down in \textit{Simkins} before the other branches of the federal government were ready to discontinue the practice of funding discriminatory programs.

B. Unauthorized Discrimination

The broad normative alignment between the federal courts and the other branches plays a large role in explaining why there are almost no cases striking down federal statutes or administrative regulations as unconstitutionally discriminatory. Official measures that would offend the courts are also unlikely to be approved by the other branches, and discriminatory measures attractive enough to the political branches to be enacted might well be upheld by the courts. Still to be explained, however, is the substantial absence of successful constitutional claims alleging that federal officers discriminate in spite of official policy. After all, federal officers sometimes discriminate even when official policy forbids it.\textsuperscript{204}

Unauthorized racial discrimination by the federal government is unconstitutional under \textit{Bolling}. Almost all such discrimination, however, would also be prohibited without \textit{Bolling}. There is and has long been a

\textsuperscript{200} Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 966-67 (4th Cir. 1963).
\textsuperscript{201} See id. at 962.
\textsuperscript{202} See Chen, supra note 125, at 97-101.
\textsuperscript{203} See Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2000)) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").
\textsuperscript{204} As previously, I will call this "unauthorized discrimination." See supra note 137 and accompanying text.
constellation of statutory and administrative rules prohibiting racial discrimination by federal officials. Unauthorized discrimination may go unremedied in spite of these rules—some significant proportion of discrimination probably goes undetected or unproven in every context where it occurs. But where racial discrimination can be demonstrated, nonconstitutional antidiscrimination rules are usually sufficient to supply a remedy. A federal employee fired on the basis of race can seek redress under Title VII\textsuperscript{205} and the Civil Service Reform Act.\textsuperscript{206} A plaintiff alleging that federal funds support the racially discriminatory activities of state governments or private entities can bring suit under Title VI.\textsuperscript{207} Military officials are charged by regulation not to discriminate on the basis of race.\textsuperscript{208} Federal lending agencies are statutorily required to adopt rules against racial discrimination in the processing of loans.\textsuperscript{209} Criminal defendants in the federal system have a statutory right not to have their race considered as a criterion in sentencing.\textsuperscript{210} These nonconstitutional remedies make direct constitutional actions under the reverse incorporation doctrine much less necessary than they might otherwise be.

By making the constitutional remedy less necessary, this set of alternatives also makes the constitutional remedy substantially less available. As a doctrinal matter, \textit{Bivens} actions against federal officers are generally not permitted when the government has provided an alternative legal remedy.\textsuperscript{211} A federal employee who is fired for racially discriminatory reasons, for example, may not bring a \textit{Bivens} action alleging a violation of Fifth Amendment equal protection, because she has statutory and administrative remedies under Title VII and the Civil Service Reform Act.\textsuperscript{212} Indeed, the \textit{Bivens} remedy is preempted even if the alternative remedy

\begin{footnotes}
\item[205] 42 U.S.C. § 2000e-16(b).
\item[207] See 42 U.S.C. § 2000d (prohibiting the use of federal funds for racially discriminatory facilities or programs).
does not provide all the relief that a *Bivens* action might; preemption flows simply from the fact that another responsible branch of the government has made a calibrated judgment about how such problems are to be resolved.  

*Bivens* actions are accordingly available only for violations not provided for by other remedial schemes. Because there is a thick web of statutory and administrative remedies for racial discrimination by federal officers, there is little room for direct constitutional actions under reverse incorporation and *Bivens*. By driving the enactment of preclusive nonconstitutional remedies, the pervasive norm against deliberate racial discrimination has thus prevented reverse incorporation from doing practical work.

*Bivens* actions are, of course, not the only kind of constitutional suit. A plaintiff could forgo a claim for damages and sue simply for declaratory or injunctive relief, as the plaintiffs in *Bolling* itself did. But where the discrimination prompting a victim to seek redress is unauthorized discrimination in violation of established policy, and if that established policy provides a method of redress short of a constitutional lawsuit, then that alternative method of redress will probably be easier to pursue. The administrative process is generally cheaper than litigation, and the complainant will not have to worry about overcoming the qualified immunity doctrines that protect government officials sued for violations of constitutional rights. Without the incentive of damage remedies making litigation more attractive, there may be little reason for the victim of unauthorized racial discrimination to pursue a constitutional lawsuit. Without such lawsuits, reverse incorporation is not invoked.

C. Nonracial Discrimination

The idea that the different federal branches share basic norms might imply that there should be few court cases striking down federal law in any context, not just in the context of racial discrimination. In fact, that implication is broadly consistent with some basic observations about the volume of cases holding federal law unconstitutional. For most of the twentieth century, the average rate of Supreme Court decisions invalidating congressional statutes was only about one per year. That figure understates the total volume of judicial invalidations of federal action, because it does not include lower court decisions or decisions countermanding the actions of federal actors other than Congress. But in keep-

administrative apparatus preclude *Bivens* actions by federal employees alleging age discrimination).

213. Schweikert v. Chilicky, 487 U.S. 412, 423 (1988) (refusing to create *Bivens* remedies where Congress has provided "what it considers adequate remedial mechanisms for constitutional violations").


ing with the analysis thus far, it does suggest that core interbranch conflict has been rare. The pattern could reflect either substantive agreement between the branches or a frequent judicial choice to defer to congressional judgment, and probably it reflects a mix of both. Whatever its precise causes, however, this record shows that the infrequency of court cases declaring federal law unconstitutional is a phenomenon that transcends the issue of discrimination.

That said, when the Supreme Court does find Congress to have acted unconstitutionally, it is not particularly unlikely for the subject matter to be equal protection.²¹⁶ In the time between Bolling and Davis, the Court struck down acts of Congress on thirty-five occasions,²¹⁷ and six of these were equal protection cases. They involved discrimination based on natural-born citizenship,²¹⁸ place of residence,²¹⁹ birth out of wedlock,²²⁰ other family status,²²¹ and sex.²²² Not one concerned race. Cases finding racial discrimination are similarly rare at the level of unauthorized federal discrimination, even by comparison to cases finding discrimination on nonracial grounds.²²³

The difference is largely explicable in terms of the analysis already given. First, there is no clear national norm on the question of the permissible distinctions between citizens and aliens, or people living in different locations, with the same power to command universal assent in the federal mainstream as the rule against deliberate racial discrimination. The issues have not consumed the same kind of national attention, and reasonable people hold various views, if they have any developed views at all.²²⁴ Second, and largely for the same reason, the apparatus of noncon-

²¹⁶. In Part II, I showed that cases finding unconstitutional federal discrimination against members of racial minority groups are in fact significantly more rare than cases finding federal violations of the First and Fourth Amendments. That showing is consistent with the present account. The statement that equal protection violations comprise a respectable share of all cases finding unconstitutional federal behavior is a statement about all equal protection violations, not just those where the discrimination is against members of racial minority groups.

²¹⁷. See Shugerman, supra note 215, at 1016–17 (listing cases).
²²³. See supra Part II.B.2.
²²⁴. In part because the questions of discrimination on these grounds have not commanded the same kind of attention as discrimination on the basis of race or sex, there is little data regarding public attitudes on these issues. Data that do exist on the question of the acceptability of citizenship discrimination, however, suggest that there are areas of substantial disagreement rather than the kind of clear consensus norms that condemn overt discrimination against racial minority groups. See, e.g., Peter H. Schuck, Citizens, Strangers, and In-Betweens 192–93 (1998) (arguing that distinctive status of citizens has been substantially eroded but noting efforts in the mid-1990s to curtail public benefits available to noncitizens); John David Skrentny, Introduction to Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America 22 (John David Skrentny ed.,

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stitutional antidiscrimination rules is not as extensive in nonracial areas as it is for race. All federal statutory and administrative antidiscrimination rules prohibit racial discrimination against minority groups, and most, though not all, also prohibit discrimination on the basis of sex. But there are many other bases of potential discrimination that most nonconstitutional rules do not address. Examples include alienage, indigency, and birth out of wedlock. In short, the nonconstitutional rules generally prohibit particular, named forms of discrimination, and the constitutional rule created through reverse incorporation is general. There are therefore residual categories of discrimination where the constitutional rule does independent work.

This way of understanding the greater frequency of cases finding nonracial forms of federal discrimination reflects the fact that American antidiscrimination norms have a core concern with race and then more peripheral concerns with categories like alienage and indigency. The general antidiscrimination norm is strongest at the core, and the doctrine of reverse incorporation begins with the need to apply equal protection in a core case. Once established, however, the principle does more work at the periphery than at the core, because at the core there is general agreement that discriminatory conduct is unacceptable. Moreover, the contents of core and periphery are not static. A form of discrimination may migrate from one category to the other over time. When a kind of discrimination moves from the periphery to the core, the rate of constitutional cases finding federal discrimination on that basis should decline: Having moved to the core, such discrimination would be prohibited by official policy, leaving less work for a constitutional rule to do.

The pattern thus abstractly stated describes the path of federal sex discrimination in the generation after Bolling. Ten years after that decision, in the landmark Civil Rights Act of 1964, sex discrimination was not of much concern. Title II of that Act, which prohibits racial discrimination in public accommodations, does not prohibit sex discrimination. Neither does Title VI, which prohibits racial discrimination by programs receiving federal funds. Title VII does prohibit sex discrimination in


226. § 2000a (prohibiting discrimination in places of public accommodation "on the ground of race, color, religion, or national origin").

227. § 2000d (prohibiting programs receiving federal financial assistance from discriminating "on the ground of race, color, or national origin").
employment, but only through a famously ironic contingency whereby a Southern opponent of the bill offered an amendment adding sex as a prohibited ground of discrimination in hopes of scuttling the bill as a whole. Thus, in the mid-1960s, sex discrimination was not yet at the core. By the end of the 1970s, however, there had been a significant migration, as reflected in the passage of legislation like Title IX and the Pregnancy Discrimination Act. The passage of those laws was part of a shift in prevailing conceptions of discrimination whereby sex discrimination moved toward the core.

Not coincidentally, the judicial decisions holding the federal government liable for practicing sex discrimination in violation of the reverse incorporation doctrine occurred precisely during those years. In 1961, the Supreme Court upheld a state law requiring men but not women to serve on juries, thus signaling that equal protection had little bite in the sex context as of that date. Change followed soon thereafter. The first lower court case holding a federal law unconstitutional on grounds of sex discrimination, Moritz v. Commissioner of Internal Revenue, was decided in 1972. The Supreme Court's three decisions holding federal law to constitute unconstitutional sex discrimination—Frontiero v. Richardson, Weinberger v. Wiesenfeld, and Califano v. Westcott—were decided between 1973 and 1979. Several lower court cases also found federal sex discrimination during those years. After 1980, however, there appear

228. § 2000e-2 (prohibiting discrimination in employment on the basis of "race, color, religion, sex or national origin").
234. 469 F.2d 466, 470 (10th Cir. 1972) (striking down provision of Internal Revenue Code that denied a tax deduction to men who had never married).
238. See, e.g., Crist v. Crist (In re Crist), 632 F.2d 1226, 1234 (5th Cir. 1980) (striking down provision of Bankruptcy Act providing for nondischargeability of alimony debts owed to wives but not alimony debts owed to husbands); Carrasco v. Sec'y of Health, Educ. & Welfare, 628 F.2d 624, 630 (1st Cir. 1980) (striking down provision of Social Security Act favoring husbands over wives in community property jurisdictions, where income from trade or business treated as husband's); Crawford v. Cushman, 531 F.2d 1114, 1125 (2d Cir. 1976) (prohibiting Marine Corps from discharging a woman due to her pregnancy or refusing her reenlistment due to her having a dependent child); Owens v. Brown, 455 F. Supp. 291, 294 (D.D.C. 1978) (invalidating blanket ban on women serving on naval vessels other than hospital and transport ships); Stevens v. Califano, 448 F. Supp. 1313, 1323 (N.D. Ohio 1978) (striking down provision of Social Security Act that permitted families to qualify for benefits based on unemployment of father but not on unemployment of mother); Coffin v. Sec'y of Health, Educ. & Welfare, 400 F. Supp. 953, 958 (D.D.C. 1975)
to have been only four reported cases finding unconstitutional federal sex discrimination. Two of those cases addressed peremptory challenges to prospective jurors, one struck down a National Park Service rule under which only men could play men in Civil War reenactments, and one invalidated the continuing effect of a facially discriminatory statute that Congress had long since repealed.

That there are so few such cases since 1980 is especially remarkable given that the intermediate scrutiny applicable in constitutional challenges to sex-based distinctions is the most indeterminate of equal protection standards. As compared with rational basis scrutiny and strict scrutiny, each of which generally leads to a predictable outcome when invoked, intermediate scrutiny seems to preserve a greater role for the kind of judicial balancing that could cause cases to come out either way. One might therefore expect to see a patchwork of results, with some practices being held valid and others struck down. That there has been no such patchwork is largely due to the political process having eliminated most overt sex classifications from the law.

It seems, therefore, that during the years when the prevailing norm in the federal government on the issue of sex discrimination shifted, it shifted in the courts as well as in Congress, with both branches ending in roughly the same place. Indeed, movement in Congress may have helped shape the changing judicial view of the issue. The move from legislative acquiescence in sex discrimination during the 1960s to legislative ac-

241. Aguayo v. Christopher, 865 F. Supp. 479, 490 (N.D. Ill. 1994) (striking down a law in effect at the time of the plaintiff's birth in 1922, but repealed in 1934, under which children born outside the United States were eligible for U.S. citizenship if their fathers were U.S. citizens but not if their mothers were U.S. citizens).
243. See Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 Cal. L. Rev. 1373, 1502-03 (2000). That purge, however, has not been total, and the Supreme Court has upheld remaining instances of sex discrimination under intermediate scrutiny. See, e.g., Nguyen v. INS, 533 U.S. 53, 70-71 (2001) (upholding 8 U.S.C. § 1409 (2000), which distinguishes between citizenship requirements for out-of-wedlock children born abroad to American mothers and citizenship requirements for out-of-wedlock children born abroad to American fathers). This case arose in the context of immigration law and thus exemplifies both the relative normative concord between the federal branches and the federal courts' choice to defer to the other branches. See supra Parts IV-V.
244. See Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973) (Brennan, J., plurality opinion) (noting, in course of argument for raising level of scrutiny for sex discrimination, that Congress's view of sex discrimination as an evil to be remedied was of significance to the Court); Post & Siegel, Equal Protection, supra note 232, at 515-21 (describing process by which changes in Congress's position may have helped to change the Court's view).
tion against sex discrimination in the 1970s was mirrored by the introduction of heightened scrutiny for sex discrimination in the courts. In that period of transition, there was a flurry of successful sex discrimination claims under reverse incorporation, as the courts sometimes moved faster than other arms of the federal government. By the end of the 1970s, however, the situation had stabilized. Statutory and administrative action prohibited much sex discrimination, and the discrimination that remained has been largely tolerated by the courts. Reverse incorporation has fallen out of use.

D. Affirmative Action

Finally, consider the difficult problem of race-based affirmative action. The Supreme Court has never actually struck down a federal affirmative action program, but Adarand is about as close to a successor case as Bolling has ever had, and lower federal courts have indeed invalidated federal affirmative action programs. Thus, the general alignment of norms among the federal branches has not ensured constitutional safety on every issue relating to race: Affirmative action programs are often exceptions to the overall pattern whereby the federal government is not held to practice unconstitutional racial discrimination. Two factors consistent with the present account explain why.

First, equal protection doctrine has drawn a line between government action that uses express racial classifications and government action that does not. Facially classificatory government action is automatically subject to strict scrutiny and almost always invalid. Actions that are not facially classificatory fall under the rule of Washington v. Davis, whereby strict scrutiny will not be applied unless the plaintiff can demonstrate a governmental intent to discriminate. The standards for proving such intentions can be prohibitive. It follows that facially classificatory government actions present the easiest targets for equal protection


246. See, e.g., MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 15-16 (D.C. Cir. 2001) (vacating FCC affirmative action rule upon finding said rule not narrowly tailored to support compelling government interest); Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998) (finding FCC's diversity promotion unconstitutional).

247. See Adarand, 515 U.S. at 235.


250. See Selmi, supra note 166, at 334-35 (observing that to prove intentional discrimination is so difficult that "short of outright exclusion, the Court is unlikely to find a violation").
challenges. In almost all contexts, government actors have accordingly abandoned the use of express racial classifications. The major exception is affirmative action. Affirmative action, understood to mean a program that uses racial preferences to improve the position of disadvantaged racial groups, will necessarily contain express racial classifications and therefore be subject to strict scrutiny. In consequence, federal affirmative action programs occupy a constitutionally perilous position that almost no other federal programs occupy.251

Second, and perhaps more fundamentally, there is no consensus about the normative status of affirmative action. This lack of consensus differs in some ways from that involved in issues of discrimination on grounds like alienage or indigency. Notably, it is not a product of the polity’s not having thought much about the issue. It is instead a matter of ongoing disagreement. The national polity is divided on the issue,252 and the Supreme Court is split down the middle almost as precisely as possible. Recent decisions leave a very small margin separating the permissible from the impermissible,253 and a single change of judicial personnel could scramble what little stability the doctrine presently enjoys. When a norm is closely contested in the national political sphere and also in the courts, the correspondence between the normative stances of the judiciary and the other federal branches produces not concord but uncertainty. The branches are still roughly in normative tandem, but it is a tandem poised on a knife’s edge. Even if only a short distance separates the partners, they could be on opposite sides of the line.

251. This doctrinal architecture has pushed some commentators and government officials toward formally race-neutral alternatives to traditional affirmative action. See, e.g., Kim Forde-Mazrui, The Constitutional Implications of Race-Neutral Affirmative Action, 88 Geo. L.J. 2351, 2364–81 (2000). These alternatives are formally race-neutral, but they proceed from race-conscious motivations much like those underlying traditional affirmative action. See id. at 2382–83; see also Gratz v. Bollinger, 123 S. Ct. 2411, 2442 (2003) (Souter, J., dissenting) (noting that to admit that a diversity program benefits different races differentially dooms such a program to strict scrutiny, while hiding programmatic objectives might save the program from such review). One question that emerges from the Supreme Court’s most recent decisions on affirmative action is whether the heightened awareness that such programs are racially motivated will make them less constitutionally palatable than they previously seemed. See Primus, Disparate Impact, supra note 187, at 543–44 & n.209.

252. In January 2004, a group called the Michigan Civil Rights Initiative launched a campaign to place a question on the 2004 statewide election ballot that would, if approved, ban the state of Michigan from practicing affirmative action. See Pete Waldmeir, Battle Lines Drawn for Affirmative Action Drive, Detroit News, Jan. 11, 2004, at 1B. The same week, while campaigning in Iowa for the Democratic presidential nomination, Congressman Richard Gephardt pledged to double the magnitude of the federal government’s affirmative action programs for minority contracting. See The Democratic Presidential Candidates in Their Own Words, N.Y. Times, Jan. 12, 2004, at A17.

253. Compare Gratz, 123 S. Ct. at 2417 (invalidating by 6-3 vote an affirmative action program for admission to University of Michigan’s undergraduate college), with Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003) (upholding by 5-4 vote a slightly different affirmative action program for admission to University of Michigan’s law school).
The disagreement over affirmative action could be static and entrenched. If so, some uncertainty as to its constitutional status will persist indefinitely. Small shifts in power in the various federal branches could prompt the enactment or repeal of affirmative action programs, which then might or might not be upheld by the courts. It is also possible, however, that the country is now experiencing a time of transition toward a new consolidated national norm on affirmative action, analogous to the transition in the mainstream norms on sex discrimination that occurred in the 1970s. Like sex discrimination at that time, affirmative action is now a sharply contested area of constitutional law as well as a significant issue in the political process. It is possible, therefore, that uncertainty and interbranch conflict will characterize affirmative action only for an intermediate period, after which a clearer mainstream national norm will emerge. After that point, courts would rarely second-guess the constitutionality of federal law.

If affirmative action does follow a path similar to that of sex discrimination, there is more than one place where the path could end. It could end with the establishment of something like a color-blind norm, under which affirmative action is prohibited or severely restricted. Or it could result in a greater relaxation of the color-blind idea, which would give the government more latitude to act without judicial interference. To be stable, this second alternative would require a significant change in the meaning of strict judicial scrutiny, or alternatively, the overruling of Adarand, but either of those obstacles could be overcome given the right shift in underlying norms. The more restrictive alternative might achieve stability more easily, because it would offer a clear rule to follow. If the more restrictive alternative were to prevail, the trajectory of affirmative action would turn out to be similar to that of sex discrimination, inasmuch as it would involve the consolidation of a norm prohibiting a kind of governmental practice that had previously been permitted. The more permissive outcome, in contrast, would be a case of the national polity's contesting a practice that was once broadly allowed, and then ultimately abandoning the contest, returning things to the status quo ante. Either outcome is possible, just as it is possible that the question will remain a matter of disagreement in both Congress and the courts. It is simply too soon to know.

What is clear now, however, is that the issue giving rise to the closest thing to a successor case to Bolling in the fifty years since 1954 is one on which the national polity is deeply divided. That is not an accident. It is the obverse face of the same interbranch dynamics that have made reverse incorporation a rule with almost no applications in the context of discrimination against racial minorities—a context for which it has long been thought indispensable.

Reverse incorporation was not invented, and is not usually defended, as a means of providing protection against discrimination for aliens, indigents, or others not presently covered by nonconstitutional antidiscrimination rules. It was certainly not developed with the intent of preventing federal efforts to improve the position of disadvantaged minority groups. The major concern was, of course, the problem of discrimination against African Americans. But reverse incorporation has not in practice done much observable work where that kind of discrimination is concerned. Instead, the same forces that led the Court to deem racial segregation unthinkable also helped make *Bolling* the last case of its kind.

The account I have given of reverse incorporation's practical impact is positive rather than normative. Its primary value is in improving our understanding of how the constitutional system actually functions. It does not resolve the normative question of whether the choice to apply equal protection against the federal government is a correct judicial innovation. It does, however, alter the terms in which that normative question should be asked.

Obviously, any view that reverse incorporation is justified by the practical demands of normative necessity is harder to maintain once the claim of necessity is called into question.\(^{255}\) That said, the implications of this Article's analysis can cut both ways on the normative issue. The root problem of reverse incorporation's legitimacy is that it is understood as an act of naked activism.\(^{256}\) The signature complaint against judicial activism, however, is that judges should not substitute their own views for those of the proper decisionmakers.\(^{257}\) If reverse incorporation is unnecessary because the norm it established was already the mainstream position in the federal polity, some of the sting goes out of that complaint. To be sure, such an account does not eliminate the problem. Legitimacy may require that the appropriate decisionmakers decide rather than letting other decisionmakers impose an outcome, even if the outcome imposed is the one the appropriate decisionmakers would have chosen. Nonetheless, the urgency of the charge of unwarranted activism is dulled when the judicially imposed decision is consistent with what the national polity has already established.

Similarly, there is no straightforward moral here about affirmative action and the unintended consequences of judicial overreaching. Such

\(^{255}\) I say "harder" rather than "impossible" in part because proponents of the necessity argument could fall back on the claim that judges in the generation of *Bolling* did not have the benefit of our hindsight and might have believed in good faith that reverse incorporation was more necessary than it now appears to have been. For consideration of that claim, see supra note 27.

\(^{256}\) See Ely, supra note 7, at 32–33 (calling theoretical underpinnings of reverse incorporation "gibberish," and accusing Justice Warren of straining logic in applying equal protection to the federal government).

\(^{257}\) See, e.g., Learned Hand, The Bill of Rights 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").
a story would be misleadingly easy to tell: Reverse incorporation, a feat of Warren Court activism, turns out to impede rather than advance the liberal position on the only major racial equality issue where it has really mattered. If the Court had only been more willing to leave change to the political branches, we would not have *Adarand* today. But that perspective is too simplistic, and not only because there is a normative perspective from which *Adarand* is an appropriate fulfillment of the values underlying *Brown* and *Bolling* rather than a bitter irony betraying them.

The idea that federal racial classifications should be constitutionally suspect was not a momentary impulse indulged to solve a local problem in *Bolling*. Nor was it even an innovation of the Warren Court. On the contrary, it was already present a decade or two before in cases like *Korematsu* and *Carolene Products*. It bore the label of due process rather than equal protection, but that distinction need not make much difference if the substance of the rule was the same. Once that principle was established, a court holding the view that racial classifications are equally suspect no matter which racial group or groups is benefited—that is, a court that would decide *Croson*—could easily have reached the decision in *Adarand*. It does not follow, of course, that *Adarand* is correct. For one thing, *Croson* could be wrong. Alternatively, the supporter of affirmative action who is willing to disavow *Bolling* could be just as willing to disavow the relevant passages in *Carolene Products* and *Korematsu*. But the argument looks different once we see that it requires us to revisit not just a single case decided under conditions of extreme political pressure, but rather several cases decided over the course of sixteen years. Reverse incorporation, I suggest, is less an act of judicial will generating practical consequences for government conduct than an artifact of a broader change in constitutional thought.

*Bolling*'s statement that imposing different constitutional equality standards on the state and federal governments would be "unthinkable" was probably intended in a normative sense, but "unthinkability" could also describe a cognitive condition. By 1954, elite American opinion had come to see freedom from racial discrimination less as a limitation on the power of a particular government and more as a universal right. As an analytic matter, individual rights and limitations on government powers may be simply obverse descriptions of the same relationships. But the rise of the paradigm of universal rights made it increasingly unwieldy, as an intuitive matter, to maintain a doctrinal structure on which it mattered which government engaged in such discrimination. In a descriptive as well as a normative sense, such distinctions were no longer as "thinkable" as they had once been. In a way, therefore, *Bolling* is the very opposite of alone. It is the only case of its kind, but it is inseparable from the larger transformation that produced it.