BACK TO THE FUTURE: ORIGINAL INTENT AS A MEANS FOR VITALIZING THE FOURTEENTH AMENDMENT IN THE CONTEXT OF RACE

Review of Donald E. Lively, THE CONSTITUTION AND RACE

RANETA J. LAWSON*

I. INTRODUCTION

Donald E. Lively's book *The Constitution and Race* exposes in a methodological way the historical origin of the conflict between symbolism and substance in the context of race.[1] Lively chronicles two centuries of constitutional jurisprudence pertaining to race from the initial deferral of race-based issues at the nation's founding[2] to the modern day catering to majoritarian interests that continues to subordinate racial concerns.[3] Throughout this jurisprudential retrospective, Lively demonstrates how race-based considerations have permeated nearly every aspect of society[4] and yet such considerations remain significantly unattended because of national policies that ultimately indulge competing priorities.[5] Lively argues that a recognition of the ties be-

* Assistant Professor of Law, Creighton University School of Law. J.D., *cum laude*, University of Toledo, 1988; B.A., *cum laude*, University of Toledo, 1985.

1. As an example of this conflict, Lively recounts how the African Methodist Episcopal Church was founded as a direct result of a policy of segregation at Old St. George's Methodist Church that required black members to sit in segregated seating and prohibited them from kneeling in prayer with the rest of the congregation. Ironically, Old St. George's Church was not far from the site of the constitutional convention where the founders would draft a document outlining basic rights and liberties. *See* DONALD LIVELY, THE CONSTITUTION AND RACE 2 (1992). *See also* RICHARD ALLEN, THE LIFE AND EXPERIENCE AND GOSPEL LABORS OF THE RT. REV. RICHARD ALLEN 6-7, 25 (1960).

2. "In the interest of forming a union, [c]oncessions were made to a focused and fixed southern faction . . . ; what was considered as less significant was traded off for what was perceived as important." LIVELY, *supra* note 1, at 5.

3. *See, e.g.*, Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990) (race-dependent measures must serve important governmental objectives within the power of Congress); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (race conscious remedies are permissible if narrowly tailored to ameliorate a specific constitutional violation).

4. *See, e.g.*, LIVELY, *supra* note 1, at 129 (describing how post-*Brown* civil rights legislation prohibited discrimination in employment, education, voting, housing and public contracting).

5. For example, in the controversial context of affirmative action, critics maintain that

tween the nation's doctrinal past as it pertains to race and present racial conditions is not only essential for contextual purposes, but is a prerequisite for reckoning with the unfinished business of the constitutional convention.[6]

In addition to identifying the incongruity between constitutional ideals and racial truth, Lively offers a bold alternative for completing the business of racial justice.[7] As a basis for this alternative, Lively outlines two competing views of the original purpose of the Fourteenth Amendment. The "liberal view," according to Lively, reflects the belief that the Fourteenth Amendment incorporates the Bill of Rights, fundamental liberties and guarantees and is a vehicle for equality in the broadest sense.[8] At the other end of the spectrum, however, the restrictive or "minimalist" view of original purpose is reflective of the "core concerns" of the Fourteenth Amendment that encompass narrow ideals such as basic opportunity for material self-development and equal standing before the law.[9] Lively theorizes that an emphasis on the restrictive or "minimalist" view affords more potential for pressing the concerns of racial justice. This theory is premised upon Lively's belief that the expansiveness of the liberal view has historically attracted extensive criticism and engendered too much debate given its non-democratic underpinnings.[10] Thus, a focus on the minimalist view or the "core concerns" of the Fourteenth Amendment is more likely to quell majoritarian concerns about judicial overreaching and consequently offers a more effective alternative for remediating intransigent racial concerns.[11]

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preferential policies designed to redress past wrongs result in present harm to blameless white victims. *See* FREDERICK R. LYNCH, INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION (1989).

6. LIVELY, *supra* note 1, at x. In support of the proposition that the doctrinal past has been dissociated from the present, Lively describes the failure of modern constitutional law casebooks to include racially significant decisions that have influenced the Constitution which, at the very least, suggests "a discontinuity between past and present." *Id.* at ix.

7. LIVELY, *supra* note 1, at 1. Although Lively articulates this alternative as a thesis of the book in the introduction, a discussion of it is relegated to the final chapter. Thus, one criticism of the book's organization is that Lively devotes far too much time to historical analysis and too little time on the development and discussion of this thesis.

8. LIVELY, *supra* note 1, at 7; *See also* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT (1983).

9. LIVELY, *supra* note 1, at 7; *See also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

10. According to Lively, "[u]nder any circumstances when minority concerns are being pressed and doctrine propounded without clear [constitutional] sanction, judicial renderings are susceptible to allegations of usurping legislative power." *See* LIVELY, *supra* note 1, at 174.

11. While the implications of the "core concerns" of the Fourteenth Amendment might be debatable, Lively argues that "the essential agenda is so indisputable [that] . . . [c]onsequent doctrine [emanating from this agenda] would begin with the significant advantage of immunity

As a means of exploring the practicality and feasibility of Lively's proposal, Parts II and III of this article will trace the development of his alternative; Part IV will examine the potential impact of the alternative; and Part V will offer a critical analysis of Lively's theory.

II. THE FOURTEENTH AMENDMENT AND ORIGINAL PURPOSE

At the outset, Lively undertakes the heroic task of defining the elusive "original purpose" of the Fourteenth Amendment.[12] Relying upon extensive analysis of historical events as a basis for his conclusions, Lively turns the clock back to the birth of the republic and argues that "the finessing of [the slavery issue] at the republic's founding effectively accommodated the institution, albeit in terms that obscured the Constitution's connection to it."[13] As a consequence of this accommodation, Congress maintained explicit authority to eventually terminate slave importation,[14] while each state retained the right to determine whether to prohibit or allow continuation of slavery within its borders.[15] Such individualistic and necessarily self-interested state determinations on the slavery issue presaged greater difficulties as the nation expanded geographically. In fact, the subsequent struggles between North and South over the issue of slavery in the territories ultimately precipitated a debate concerning whether the Constitution itself was pro- or anti-slavery and whether the federal government was indeed an agent in the perpetuation of slavery.[16] The focal point of this debate was the initially non-controversial fugitive slave clause of the Constitution,[17] and later the Fugitive Slave Act of 1793[18] that directly impli-

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to anti-democratic perceptions and debate that respectively cripple and enervate other alternatives." LIVELY, *supra* note 1, at 176.

12. LIVELY, *supra* note 1, at 48.

13. *Id.* at 11. For example, many provisions of the Constitution were written in facially race-neutral terms. Among them were the apportionment formulas for political representation that referred to the "whole Number of free Persons and . . . three fifths of all other Persons." *Id.* at 1 (quoting U.S. CONST. art. I, § 2, cl. 3).

14. Congress was constitutionally prohibited from interfering with the slave trade until 1808. U.S. CONST. art I, § 9, cl. 1.

15. LIVELY, *supra* note 1, at 11.

16. Pro-slavery proponents argued an "assertive interpretation" of the Constitution as prohibiting interference with the institution. Conversely, anti-slavery adherents variously argued that the nation should be dissolved because the Constitution endorsed slavery, and that the due process and privileges and immunities clauses were potential reference points for an anti-slavery charter. *Id.* at 14.

17. U.S. CONST. art. IV, § 2, cl. 3. The fugitive slave clause provided that:

> [n]o person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

cated the federal government in the slavery issue.[19] According to Lively, this legislation, which constituted an exercise of federal power, presented an early paradox in that slavery had originally been accommodated "pursuant to the premise of federal neutrality and individual state determination."[20] Consequently, the reaction to both the fugitive slave clause and the federal legislation "was effective in illuminating sectional incompatibility and enhancing mutual disaffection."[21]

During this period of intense political agitation, Lively reveals that judicial response was largely calculated to avoid disrupting the premises of federal neutrality and state determination.[22] However, despite the Court's non-confrontational posture, as the problem of slavery became more intractable, attention nevertheless focused upon the Court for a possible resolution of this increasingly complex issue.

The case of *Scott v. Sanford*[23] invited the Court's attention to the constitutionality of slavery. *Scott* concerned the slave of a military doctor who claimed freedom as a result of residing for extended periods in free jurisdictions. Rather than decide the case on one of two alternative grounds and thereby avoid the constitutionality of slavery, Chief Justice Taney chose to comprehensively address "questions of black citizenship, congressional and territorial power, and the rights of slave owners."[24] In *Scott*, Chief Justice Taney framed the question as simply whether a black person could become a "member of the political community formed and brought into existence by the Constitution of the United States and as such become entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen."[25] Chief Justice Taney concluded that black people did not qualify as citizens in the manner in which the word was used in the

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18. 1 Stat. 302 (1793). The Act essentially imposed a duty upon a state to return fugitives upon demand and permitted a slave owner to cross state lines to apprehend, reclaim and remove fugitive slaves.

19. LIVELY, *supra* note 1, at 15.

20. *Id.* at 16.

21. *Id.* Lively further explains that the controversy also illuminated Northern complicity in the slavery dilemma. While blacks were nominally free in the North, legal burdens in the form of the denial of voting rights and prohibitions on immigration, as well as social exclusion were profound. *Id.*

22. For example, fugitive slave jurisprudence reflected the general ordering of priorities that inspired the Constitution. Essentially, the Court evinced complete deference to Congress' legislative resolution of the fugitive slave problem and "invariably decided fugitive slave issues in terms favorable to slavery." *Id.* at 19.

23. 60 U.S. (19 How.) 393 (1857).

24. LIVELY, *supra* note 1, at 27.

25. *Sanford*, 60 U.S. (19 How.) at 403.

Constitution, and that any rights or privileges afforded them were merely a function of governmental discretion and did not emanate from the Constitution.[26] Through a detailed exploration of the *Scott* opinion and its explicitly racist underpinnings and rationalizations,[27] Lively argues that the opinion is more than an "idiosyncratic reflection of southern values."[28] Indeed, its smug assumption of racial superiority reverberated throughout subsequent jurisprudence.[29]

Lively then chronicles how the *Scott* opinion and the resulting turbulence resulted in the Civil War and ultimately the transformation of the Constitution in an effort to finally resolve the slavery issue.[30] This transformation was actualized in the creation of the Thirteenth, Fourteenth and Fifteenth Amendments. As Lively articulates, the Civil Rights Act of 1866, an extension of the Thirteenth Amendment and a preface to the Fourteenth Amendment, was rooted in the concept of national citizenship and federal obligation to protect the incidents of national citizenship.[31] Neither the Civil Rights Act nor the Fourteenth Amendment, however, catalogued any specific rights to be protected.[32] Hence, Lively argues that while the civil rights bill established fundamental freedom as a federal interest, it reflected neither a congressional nor public mandate for an expansive definition of civil rights.[33] In-

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26. The result of Chief Justice Taney's opinion was that the privileges and immunities clause, which was construed to protect the incidents of national citizenship, was rendered inapplicable to black persons. The states however retained the power to confer limited rights and privileges on black persons. *See* LIVELY, *supra* note 1, at 28.

27. Chief Justice Taney's conclusion that black people had no rights that the white man was bound to respect and thus "might justly and lawfully be reduced to slavery for his benefit" did not finally resolve the slavery issue, and instead further estranged northern and southern interests. *Id.* at 31.

28. *Id.* at 33. According to Lively, the notion of racial group inferiority comported not only with the imperatives of slavery, but also with the "priorities of general society which by law had pervasively and overtly expressed its racism." *Id.*

29. The most notable reverberation of the Scott opinion was the Court's opinion in Plessy v. Ferguson which was criticized for being "quite as pernicious as . . . the Dred Scott Case." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

30. *See* LIVELY, *supra* note 1, at 39-41.

31. *Id.* at 45.

32. Lively reasons that the failure to catalogue rights is consistent with the "imprecise nature and extent of civil rights." *Id.*

33. *Id.* at 46-47. Lively relies upon the congressional record that disclaims any intention to secure voting rights or integrated educational systems. The civil rights enactment instead provided that:

> "there shall be no discrimination in civil rights or immunities . . . on account of race . . . but the inhabitants of every race shall have the same rights to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property and to full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment."

stead, the Civil Rights Act and the Fourteenth Amendment were a function of a qualified civil rights agenda that sought to satisfactorily account for citizenship and its incidents rather than as a means for implementing broad concepts of rights and equality.[34] Thus, according to Lively, while the Fourteenth Amendment may not have sought to eliminate all racial prejudice, at the very least, "[b]road support existed . . . for ensuring . . . that racism did not deny basic opportunities for material development and equal standing before the law."[35]

Lively's discernment of the core principles of the Fourteenth Amendment sets the stage for his subsequent argument that, given the original limited purpose of the Fourteenth Amendment, it has indeed been the subject of a great deal of judicial attention and creativity with the results being plentiful, complex and convoluted.[36] The Court, for example, has identified fundamental rights unrelated to race and clearly beyond the original vision of the framers through the liberty component of the due process clause.[37] Most notably, the Court has recognized a myriad of personal rights including a guarantee of economic liberty.[38] The Court's flexible approach in the economic arena compels Lively's conclusion that although the Court has willingly displaced state economic regulation when necessary to comport with the dictates of the Fourteenth Amendment, the Court has been generally reluctant to do so in the context of race.[39] Consequently, while the "federal interest reflected by the Fourteenth Amendment . . . was defined expansively, [it was not broad] enough to reckon with racial discrimination and the consequent compromise of civil status and rights."[40]

III. ENHANCED EQUAL PROTECTION

As a means of further analyzing Fourteenth Amendment jurispru-

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CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

34. LIVELY, *supra* note 1, at 49.

35. *Id.* at 56.

36. *Id.* at 66.

37. *Id.* For instance, the Court eventually construed the fourteenth amendment as a source of substantive rights and liberties to protect against the invasion of general contractual liberty. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897) (utilizing substantive due process to defeat a state law prohibiting the operation of insurance policies not issued in compliance with legislative requirements).

38. *See* Lochner v. New York, 198 U.S. 45 (1905) (the liberty of contract found to be a fundamental right).

39. LIVELY, *supra* note 1, at 84.

40. *Id.* In that respect, Justice Harlan appropriately questioned whether "the recent Amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the Nation." Civil Rights Cases, 109 U.S. 3, 48 (1883).

dence in the context of race, Lively traces the destruction of the "separate but equal" doctrine that climaxed with the Court's repudiation of official segregation.[41] Lively notes that although the Court's eventual repudiation of official segregation was largely responsive to NAACP challenges, it was also attributable to the general evolution and expansion of equal protection theory.[42] The new analytical "strict scrutiny" model, which the Court articulated in *Korematsu v. United States*[43], had the potential for animating the Fourteenth Amendment as its original purpose intended.[44] Thus, when the Court announced in *Korematsu* that legal restrictions that curtail the civil rights of a single racial group are immediately suspect and that the Court must subject them to the most rigid scrutiny, it seemed that the "principle [of separate but equal] was living on borrowed time."[45]

The enhanced equal protection analytical model was then applied in the educational setting where the inequality of "separate but equal" was perhaps most apparent. In *Brown v. Board of Education*,[46] although the Court could not discern an original intent of the framers of the Fourteenth Amendment,[47] the Court nevertheless found a critical nexus between individual development and educational opportunity.[48] Accordingly, based upon the amply documented harmful effects of segregation in the area of education, the Court determined that the children in *Brown* were deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[49] Lively's analysis of the Court's decision in *Brown* is particularly noteworthy because of his observation that some legal theorists find the *Brown* mandate unsettling because it represented an "anti-democratic exercise" not rooted in the Fourteenth Amendment.[50] Lively however counterargues that "it is at least credible if not certain that, upon recognizing how closely related education would be to economic opportunity, the framers might have

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41. *See* LIVELY, *supra* note 1, at 89-104.

42. LIVELY at 104. According to Lively, until the middle of the twentieth century, equal protection was reviewed by the courts on a reasonableness standard that resulted in a large measure of judicial deference to legislative judgment. *Id.*

43. 323 U.S. 214 (1944).

44. LIVELY, *supra* note 1, at 103.

45. *Id.* at 104.

46. 347 U.S 483 (1954).

47. The Court apparently resolved that original intent was unfathomable. *See* LIVELY, *supra* note 1, at 111.

48. *Brown*, 347 U.S. at 493.

49. *Id.* at 495.

50. LIVELY, *supra* note 1, at 129. These observations are based upon an "original record that did not contemplate racially mixed schools." *Id.*

made similar adjustments to their thinking."[51] Nevertheless, Lively concedes that subsequent limitations on *Brown* and the duty to desegregate may indicate a realization that broad anti-discrimination principles were not consistent with the original limited equalization concerns of the Fourteenth Amendment.[52]

In the context of equal protection, Lively also addresses the notion of a color-blind Constitution and the impact of that notion on remedies designed to alleviate the effects of past discrimination.[53] In particular, Lively describes the contentious history of affirmative action and the Court's establishment of a "limited constitutional tolerance for remedial classifications."[54] Lively explains that the "[d]octrinal resistance to racial preferences comports with dominant attitudes, which strongly disfavor them."[55] However, outside the context of race, the Court has had little difficulty with remedial measures of a redistributive nature.[56] Thus, modern equal protection jurisprudence in the context of race reflects the fact that the desegregation mandate was only sufficient to establish the unconstitutionality of official discrimination.[57] The challenge remains to "actualize doctrine that accounts effectively for original concern with race dependent impediments to opportunity."[58]

IV. BACK TO THE FUTURE

Lively thus effectively builds the case for a response based upon the core aims and original meaning of the Fourteenth Amendment. Lively contends that since the detailed history of the Amendment reflects the fact that it is an extension of supreme democratic will,[59] "a redirection of attention to original meaning might help to ameliorate the abiding tension between doctrinal possibility and actuality."[60] Thus, to

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51. *Id.* at 130

52. *Id.*

53. *See* LIVELY, *supra* note 1, at 137-68.

54. *Id.* at 142.

55. LIVELY, *supra* note 1, at 158. As evidence of this phenomenon, Lively recounts the results of a Newsweek poll that asked the question, "Do you believe that because of past discrimination against black people, qualified blacks should receive preference over equally qualified whites in such matters as getting into college or getting jobs?" Seventy-two percent of whites and forty-two percent of blacks answered negatively. *Newsweek Poll of April 23-25, 1991*, NEWSWEEK, May 6, 1991, at 24.

56. For example, Lively describes how the antitrust laws originated from a sense that production would become concentrated in the hands of a few men at the expense of small enterprises. LIVELY, *supra* note 1, at 160.

57. *Id.* at 161.

58. *Id.*

59. *See supra* note 34 and accompanying text.

60. LIVELY, *supra* note 1, at 169. A return to original meaning according to Lively would

the extent that society and its governing agents are bound by constitutional baselines that reflect democratic consent, such baselines provide a departure point for enhancing equal protection doctrine by identifying and effectuating the original design of the Fourteenth Amendment.[61]

With respect to a standard for judicial review when effectuating original design, Lively proposes that reviewing courts should examine the nexus between original design and modern policy.[62] More specifically, Lively proposes that the "Fourteenth Amendment analysis should focus upon (1) whether a challenged policy or action implicates a clear original or consensual concern and (2) whether the policy or action credibly conforms with or contravenes amplified original interest."[63] Pursuant to this standard, race conscious policies advancing elements of the Fourteenth Amendment's historical agenda should be subject to less than strict scrutiny.[64] Conversely, to the extent that the relationship between original design and modern policy becomes less fathomable, scrutiny would intensify. Essentially, "[r]eview would be in inverse proportion to the close or distant association with original agenda and the consensual glosses on it."[65]

V. A THEORETICAL DIVIDE

Although Lively's argument for a new analytical scheme to invigorate the Fourteenth Amendment in the context of race is persuasive, the relative vagueness and ambiguity of a standard premised upon "equal opportunity for material advancement and equal status before the law" is seemingly self-defeating. Lively devotes a considerable amount of time to developing a detailed historical basis for the new analytical scheme, but fails to provide the same detailed explanation and analysis of the impact of his alternative. This relative lack of specificity yields the impression that Lively's proposed solution is simplistic in that it ignores the attendant complexities surrounding issues of race.

For example, some would argue that it is not the specific standard used by the Court over the years that has engendered popular resistance, but rather the Court's *actualization* of those standards. This difference has been described as "one based upon two distinct rhetorical

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reveal that even the core aims of the Fourteenth Amendment have not yet been fully realized.

61. *Id.* at 176.

62. *Id.* at 178.

63. *Id.*

64. *Id.* at 178-79.

65. *Id.* at 178. Consensual glosses on the original agenda would include the equal protection criteria established by the Court in 1954.

visions in the body of anti-discrimination law."[66] Crenshaw uses the terms "expansive" and "restrictive" to describe the two rhetorical visions and observes that the terms denote a fundamental tension that exists between equality as a process and equality as a result.[67] Those, like Lively, who adhere to an expansive view[68] stress "equality as a result, and [look] to real consequences for African Americans."[69] The goal of the expansive view is to ultimately eradicate "substantive conditions of Black subordination and . . . to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression."[70]

Conversely, the restrictive vision of anti-discrimination law "treats equality as process, downplaying the significance of actual outcomes."[71] The restrictive view envisions limited judicial interference and then only to the extent that competing interests are not overburdened.[72]

Therefore, even if the standard for assessing race-conscious remedies evolves to reflect a discernable original intent as Lively proposes, while such a standard is likely to be immune from criticism for lack of popular consensus, the Court's actualization of the standard is likely to be subject to the "competing visions [of anti-discrimination law] and the values that lie within them."[73] Consequently, if, in fact, the various competing visions and values are the primary forces driving the resistance to remedial measures, then the practical utility of a new judicial standard is questionable. As Lively explains, "[w]ith or without judicial inspiration, equal protection over the course of its existence has

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66. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988).

67. *Id.*

68. Although Lively argues for a restrictive interpretation of the original purpose of the Fourteenth Amendment, his overall goal is *actualizing* original design which is consistent with the expansive view of anti-discrimination law.

69. Crenshaw, *supra* note 66, at 1341.

70. *Id.*

71. *Id.* at 1342. According to Crenshaw, the restrictive view does not envision the courts playing a role in "redressing harms from America's racist past." *Id.* As evidence of this, Crenshaw observes that the Court has stated that "[a] discriminatory act . . . which occurred before the [Civil Rights Act of 1964] was passed . . . may constitute relevant background [regarding present conduct] but . . . is merely an unfortunate event in history which has no present legal consequence." *Id.* at 1342 n.49 (quoting United Airlines v. Evans, 431 U.S. 553, 558 (1977)).

72. *See* Crenshaw, *supra* note 66. Thus, the "innocence of whites weighs more heavily than do the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs." *Id.* at 1342.

73. *Id.* at 1346.

not amounted to much more than cultural norms will allow."[74] Perhaps this reality argues for a readjustment of those norms rather than a calibration of equal protection standards.[75]

VI. CONCLUSION

Lively's emphasis on the "core aims" and original intent of the Fourteenth Amendment offers an encouraging and potentially non-controversial means of reckoning with the unfinished business of the constitutional convention. Lively, however, perhaps overstates the likely impact of a simple retreat to original soil given the myriad of complexities that have shaped the competing values and visions of race over the last two centuries.

74. LIVELY at 174.

75. In this regard, Crenshaw's article provides an excellent analysis of how racist stereotypes and beliefs have rationalized the subordination of blacks. Crenshaw argues that to a large extent these stereotypes led to distinct characterizations of the races with "[whites generally being] associated with normatively positive characteristics and Blacks being associated with subordinate, even aberrational, characteristics." Crenshaw, *supra* note 66, at 1373-74.