

The Civil Rights Act of 1964 as a Teacher of Virtue

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KEY TAKEAWAYS

Some conservatives argue that the Civil Rights Act of 1964 laid the foundation for a campaign to replace the Constitution with a new civil rights regime.

These critics argue either that the act's promise of finally realizing color-blind governance was false or that its corruption was inevitable.

Their argument is at best incomplete because they have overlooked the role that the Civil Rights Act has played as a teacher of virtue.

Is the Civil Rights Act of 1964 a good law or a bad one? There are people of all political stripes on both sides of that debate. Many of the act's supporters consider it to be “the final triumph of the color-blindness principle.”¹ Some of its critics agree and dislike the act for that very reason. Collectivists on the political Left, such as critical race theorists and Antiracists, object to the Civil Rights Act because its general and equal protection of individuals' rights forbids “benign” or “reparative” racial discrimination.²

On the other side of the political divide, some conservatives criticize the act because, in their view, it handed power to those collectivists, who now use it to discriminate among groups based on ascriptive qualities.³ These conservative critics argue that the act created or, at a minimum, laid the foundation for a new constitution that replaced the old one. This new constitution, they argue, concentrates power in the

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hands of an out-of-touch elite, severely restricts the freedoms of speech and association, destroys the national identity that is necessary to unite a diverse people, and inflames tribalism and race hatred.⁴ In short, they argue either that the act's promise of finally realizing color-blind governance was false or that its corruption was inevitable.

In this paper, I engage this latter group of critics. I claim that their argument is at best incomplete because they have overlooked the role that the Civil Rights Act has played as a teacher of virtue.

I do not engage with the act's collectivist critics for two reasons: They are likely to reject out of hand the virtue-ethics framework that I employ here,⁵ and with respect to arguments to which they are likely to listen, there is little to say that has not been said before. Their argument that discrimination is a necessary and efficacious evil has already taken considerable criticism along the lines that "benign" or "reparative" race discrimination tends to produce abundant harms but few if any goods.⁶ Their argument that discrimination can be a positive good has likewise taken considerable criticism,⁷ and insofar as their arguments are reformulations of old collectivist arguments, old responses to those arguments still apply.⁸ There is little if any new ground to attack.⁹

The act's critics on the modern Right, however, having arrived on the field later, enjoy a more peaceful sector. It is not my intention here to commence shelling them. Rather, my intention here is only to shine a spotlight on one important gap in their position. Building on the work of Cathleen Kaveny, who brings "Aquinas's legal theory into critical conversation with the work of Joseph Raz," I argue that, at least as to race, the Civil Rights Act of 1964 has been an effective teacher of virtue and that any final judgment about whether the act is good or bad must take its educative effect into consideration.¹⁰ It might yet be that the act's educative effect does not outweigh other considerations. Or it might be that my analysis of its educative effect is erroneous or incomplete. Nevertheless, conservatives who recognize that laws have more than mere material implications must grapple with the question of how the act shapes souls.

Before I begin, I must make two points. First, I engage with the act only on the issue of race (broadly defined to include color, ethnicity, and national origin). The act also includes religion, and Title VII includes sex. Both religion and sex raise issues different from race: religion because in limited circumstances, such as employment in a particular church,¹¹ religious belief or practice may be a legitimate reason to discriminate, and sex because there are differences between all males and all females, but that is not the case with respect to any two people placed in any two of the

government-created race categories upon which civil-rights enforcement focuses.¹² Rather, because the categories that the government uses are arbitrary, there are infinite types and degrees of diversity among the individuals who may be placed into any of them. I acknowledge that a conclusion that the act has been a good teacher as to race does not end the inquiry into whether it is on the whole a good teacher, but because racial discrimination was the act's primary target (and to keep this paper to a reasonable length), I limit myself only to the question of race.

Second, although I do not challenge here the argument that the Civil Rights Act is the primary cause of the many ills that its conservative critics identify, I do not concede the argument. I am, in fact, skeptical that conservative critics of the act have isolated the causal effect of the act itself from the causal effect of the myriad other philosophical, cultural, political, and legal developments that came before and after it.¹³ But that is an argument for another time. Here, I focus only on something that I think conservative critics of the act have neglected: that the act, at least as to race, is likely an effective teacher of virtue.

The Law as a Teacher of Virtue

Law may be downstream of culture, but culture is sometimes downstream of law.¹⁴ This is so because, as Cathleen Kaveny puts it, “[a]lways and everywhere, law teaches a moral lesson—it imbues a vision of how the members of a particular society should live their lives together.”¹⁵ The law may teach people what is good simply, or it may teach them what is good in relation to the regime alone, but no matter what the law aims to teach, the people it teaches are shaped by its effort.¹⁶ Sometimes, the law aims to teach a good lesson and teaches it effectively. Sometimes, the law aims to teach an evil lesson (think laws in Nazi Germany) and teaches it effectively.¹⁷ And sometimes the law teaches ineffectively and either accomplishes something other than what it intends or sparks backlash against itself and its intended lesson.¹⁸

America's checkered history with respect to race means that laws on that topic can be profoundly influential teachers. Of course, the law is not the only teacher. Religious beliefs, political theories, influential leaders, public crises, government policies, and myriad other factors inform the American culture on race and in many cases are themselves shaped by that culture. Every law that touches on race plays a part in this swirling river of rapids, eddies, and backflows. It may be difficult to isolate the contribution of any one law, but whenever one of those laws finds itself under the harsh lights

of new and renewed criticism, it is good to make the attempt. The insights that this yields may allow the people to improve the law and therefore themselves. Even if it does not, the attempt is necessary to minimize the risk of wrongly tearing down one of Chesterton's metaphorical fences.¹⁹

To undertake this attempt, we need a framework for evaluating whether a law has taught well. That framework must do three things: It must identify what law ought to teach, must prescribe how law ought to teach, and must provide a way to measure whether the law has taught well. Building such a framework is a difficult undertaking in any regime, but it is particularly difficult in a pluralistic and liberal republic characterized by nearly limitless choice among conceptions of rightness and among actions. Kaveny has provided a useful framework that I borrow here with some emendations.²⁰

On the question of what law ought to teach, Kaveny starts from the Thomistic principle “that the major purpose of the law is to lead human beings to virtue.”²¹ For law to do that well, two things must be true. First, the message that the law teaches must be objectively good.²² A law that teaches evil (again, for example, Nazi laws about Jews) cannot teach well because it cannot lead people to virtue. But moral content is not enough; the law must also inculcate its moral message effectively.²³ A law that intends to teach a good lesson but is ignored by the people will not teach well. Thus, Kaveny's core observation is that a law's pedagogical function is determined both by the law's moral content and by its practical ability to impart that content.

There are many virtues that law ought to teach, but different laws are suited to teaching different virtues. Tax law, for example, might be good at teaching the virtue of charity by rewarding it, and administrative law might teach government officials the virtue of practical reason by encouraging them to practice it. Kaveny seems to assume that her framework applies to all sorts of laws, but her framework seems to me best (and perhaps exclusively) suited to coercive laws—laws that prohibit or require certain actions and enforce those demands with penalties. This is so because Kaveny's primary concern is backlash against laws and the rule of law generally if laws are flouted.²⁴ But if someone refuses to use a tax deduction for charitable giving, there will be no backlash either against the law or against the rule of law. The deduction simply goes unused. The risk of backlash is present only when the law forbids or mandates certain actions. At any rate, because I am concerned here with the Civil Rights Act of 1964, a coercive law that forbids racial discrimination in zones of federal power, Kaveny's framework is useful even if it does not reach quite as far as she seems to say it does.

Coercive laws aim to teach people virtue by showing them how they should and should not live together.²⁵ Thus, the two virtues that coercive

laws must especially teach are prudence and justice.²⁶ Prudence is “the habit of practical reason; it is the virtue that applies right reason to action.”²⁷ Prudence will counsel different actions in different societies because different societies provide different choices to different peoples. A modern, pluralistic, liberal society like ours, for example, provides a greater range of choices than any other.²⁸ The people of that society also view choice itself as essential to human flourishing.²⁹ We need, therefore, a “specification” of prudence suited to our society.³⁰ That specification, Kaveny argues, is “autonomy as conceived by [Joseph] Raz.”³¹ For Raz, autonomy is not negative freedom—that is, the freedom to act in any way one may wish to act.³² Rather, autonomy is “positive freedom”—the freedom to shape one’s own life toward what is morally good.³³ Autonomy requires three things: the mental, emotional, and physical capacity to make choices; the freedom to do so without coercion or manipulation; and an array of morally valuable options from which to choose.³⁴ It does not require the freedom to choose among evil and morally empty options.³⁵

Prudence is a habit, and autonomy is a type of freedom, so it is not obvious how the latter can be a “partial instantiation” of the former.³⁶ Kaveny argues that the conditions necessary for autonomy are those things that prudence requires for humans to flourish in our social and political context.³⁷ In other words, she seems to argue that in our society, the law should teach prudence by providing and protecting the three requirements of autonomy. It therefore follows that to promote autonomy, the law should support the development of the capacity for choice and prevent others from interfering with that capacity. But it also follows that the law itself may need to be coercive because it must restrict certain evil or empty options.³⁸

This raises a question that Kaveny does not clearly answer: What source of morality ought to draw the line between good and bad options? As a Catholic, Kaveny might point to the Church’s moral traditions. For my limited purposes here, I need only one moral rule: that it is wrong to discriminate against another person or a group of persons based on their race. I can ground this principle in the classical tradition, the Christian tradition, or the American tradition.³⁹ The point is that if it is immoral to choose to discriminate based on race, then the law might foster autonomy if it eliminated that choice.⁴⁰

Autonomy has a social dimension: People cannot be autonomous in isolation.⁴¹ If people are to shape their lives toward what is morally good, others must provide and protect autonomy’s three requirements,⁴² none of which can exist without “a firm and steady social commitment.”⁴³ For example, someone must teach a child what is true and right if the child is to form the capacity to choose. Likewise, someone must protect that child

from coercion by bad actors. Finally, someone must protect the availability of good options and limit evil ones. Other people, then, have a duty to form and educate individuals, to protect them from coercion and manipulation, and to make available good choices while limiting the availability of bad or empty ones.⁴⁴ In other words, every individual owes these duties to the people he encounters and to his society in general.⁴⁵ This duty is fulfilled through the second virtue that law must teach: justice.

Aquinas's conception of justice, which Kaveny incorporates into her framework, includes general justice, which "directs man immediately to the common good," and particular justice, which "direct[s] a man immediately to the good of another individual."⁴⁶ As with prudence, justice needs a specification suited to our society.⁴⁷ Our society is enormous and impersonal.⁴⁸ The common good seems like a distant abstraction and our ability to contribute to it like a raindrop in the sea. Most of the people that we live with are unseen or anonymous, and the effects of most of our choices on them are unknown or unconsidered. It is therefore very easy for individuals simply to detach their thoughts from the common good and from the particular justice that they owe to the people with whom they interact.

Given all this, Kaveny argues that the specification of justice that is suited to our society is "solidarity" as defined by Pope John Paul II.⁴⁹ Solidarity is "a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all."⁵⁰ Kaveny argues that solidarity "provide[s] necessary shape" to justice in three ways.⁵¹ It focuses individuals' attention on the needs of their many fellow citizens who live out of sight;⁵² encourages individuals to "transcend consideration of the justice of [their] actions in isolation" and to think of their larger effects across society;⁵³ and attunes individuals to society's duty to protect the three requirements of autonomy: capacity for choice, freedom from coercion, and morally good options.⁵⁴

Solidarity seems to serve a modest role in Kaveny's framework because it provides no clear instruction with respect to how people ought to treat others in particular circumstances and, with respect to any particular choice, adds no guidance beyond that already provided by the maxim "give[] to every man his due."⁵⁵ Rather, solidarity seems only to say that as people in huge and anonymous societies go about their daily lives, they should be mindful of the effects of their choices on other people and on the common good. In that case, to say that the law should teach solidarity is to say that the law ought to foster a sense of national unity or civic friendship. It ought to remind people that they are not islands in a sea of faceless bodies, or even members of culturally isolated tribes, but friends, citizens, and countrymen—equals.

The next question that Kaveny’s framework answers is: How should law teach and, just as important, *not* teach? As with the question of what law ought to teach, Kaveny starts with Aquinas and his recognition that there are “practical and moral limitations on the power of positive law.”⁵⁶ Again, her core claim is that law can fail to teach well in two ways: either by teaching an evil lesson or by failing to teach a good lesson. She cites Aquinas, who in turn relies on Isidore of Seville, who said that “[l]aw shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit but for the common good.”⁵⁷ From this, Kaveny derives a list of limitations on coercive laws’ ability to teach. First, coercive laws must not ask men to be angels. Those laws teach their lessons to ordinary people under threat of punishment, so they must offer “only the most elementary lessons in the ways of virtue.”⁵⁸ Second, coercive laws must not deviate too far from the culture of the people they govern; if they do, they will be ineffective because the people will ignore, rebel against, or refuse to enforce them. Finally, coercive laws must be concrete and intelligible so that they clearly guide the people toward the common good.⁵⁹ If coercive laws ignore these constraints, they are likely to fail to teach anything, and it will not matter that the lesson they aim to teach is good.

The practical concern that Kaveny identifies is the backlash that can erupt when the law is flouted. Thus, again, Kaveny’s framework seems suited particularly, if not exclusively, to coercive laws. Coercion can be an effective teaching tool, but its use carries risks. Consider Kaveny’s example of a criminal law against wantonly killing small bugs in the wild.⁶⁰ It is immoral to kill any creature wantonly, but a law against killing small bugs wantonly would violate Isidore’s practical limitations. For one thing, detecting that crime would involve government agents following people out into the wilderness—intrusive surveillance out of proportion to the act. For another, that surveillance would hinder other goods such as peacefully enjoying nature and the private association that makes community possible.⁶¹ Likewise, prosecuting that crime would consume scarce resources that could be used to prosecute more serious crimes, and the manifest unreasonableness in the eyes of most people of punishing others for killing a bug might cause people to flout the law.⁶²

If a law is flouted, there is a risk that the people will disdain not only that law, but the rule of law generally. Even more concerning is the risk that if the law deviates greatly from the people’s customs, they will come to disdain the entire legal regime.⁶³ Prudence therefore counsels lawmakers to shift

custom gently rather than crash the law into it, for if the law crashes into custom and fails to shift it, the law, the rule of law, and the entire system of laws could be dashed to bits.⁶⁴ Consider Kaveny's example of a small, isolated, and lawless mining town in the Wild West.⁶⁵ A citizens' brigade wants to end the town's many vices, including robbery, murder, and dueling, but the brigade is vastly outnumbered by brigands. The brigade would accomplish nothing by outlawing those vices. The law would be revealed as impotent—a thing for the brigands to mock and flout simply because they can.⁶⁶ In that situation, Kaveny argues that the brigade should change the law slowly without reforming “too much too fast.”⁶⁷ In general, Kaveny calls for a “gradualist approach toward eliminating even serious moral wrongs.”⁶⁸

On this point, Kaveny has attracted criticism that is relevant to my use of her framework. Kevin Flannery interprets Kaveny as saying that where a society holds strongly to an evil custom, law should not try to change that custom.⁶⁹ I doubt, however, that this is the best way to read Kaveny. In my view, Kaveny does not argue that laws should not try to change evil customs, but that there are times when *coercive* laws alone cannot change evil customs and that, in those circumstances, other means are necessary. Again, her example of the lawless Wild West town is instructive. There, the law wields no force sufficient to prevent the brigands from ignoring it,⁷⁰ so Kaveny urges the citizens' brigade to make great efforts to change the culture first so that it is primed to accept a change in the law.⁷¹ But even then, she does not rule out use of the law as part of those efforts. For example, if the goal is to outlaw dueling, she suggests that the law should first set down a dueling code that forbids duels that do not conform to it.⁷² That code might, for example, mandate “cooling off periods” or require a dueler who kills his opponent to take some measure of financial responsibility for his opponent's family.⁷³ People might obey a dueling code even if they would disobey a dueling prohibition, and although the code would not eradicate dueling, it might bolster a larger campaign aimed at teaching people that dueling is wrong. This seems to me the best reading of Kaveny's argument.

Kaveny does, however, seem to miss something important: The law's ability to change an evil custom depends partially on how strongly the custom is held, who holds it, and how much force the law can bring to bear against it or them. For example, if dueling is a weakly held custom, then there is little reason to fear backlash against a law forbidding it. Likewise, if the evil custom is strongly held by only a small but powerful minority of people, a lawmaker need worry less about backlash if the law can eliminate that minority's power. In fact, in that circumstance, it may be good for the law to move quickly and forcefully to depose that minority. The point is

that the prudential concerns about whether the law is appropriate to the nature and customs of the people cannot be distilled so easily into a general rule of gradualist reform. Sometimes, the law can and should move quickly.

In summary, Kaveny argues that laws in a pluralistic liberal society ought to teach autonomy and solidarity, and she argues that certain practical limitations constrain the means of teaching. From these conclusions she derives several characteristics common to coercive laws that teach well, to which I add one of my own:

1. They show citizens a positive vision of how they should live their lives together that “exemplifies the fruitful relationship between autonomy and solidarity;”
2. They signal lawmakers’ hope that citizens will not merely comply with the law, but will embrace the law’s positive vision in their lives and relationships;
3. They do not punish citizens for failing to exhibit all virtues, but rather limit themselves to punishing vicious external actions; and (my own)
4. They move with speed and force prudentially tailored to the nature and customs of the people.⁷⁴

Kaveny asserts without discussion that the Civil Rights Act of 1964 fulfills her requirements. I agree that it fulfills hers, as well as mine, and explain why in the following section.

The Civil Rights Act as a Good Teacher

To understand whether the Civil Rights Act of 1964 fulfills these four requirements, it is first necessary to understand where it came from and what it does. The act’s context and provenance will reveal the customs and nature of the people it governs.⁷⁵ Its content will reveal whether its lesson is good and whether its means of teaching are appropriately constrained.⁷⁶

In a direct sense, the act’s context and provenance were the customs and laws of Jim Crow and the civil rights movement that sought to end them. But in a proximate—yet more meaningful sense—the act’s roots stretch back to the principle that “all men are created equal [and] endowed by their Creator with certain unalienable Rights.”⁷⁷ That principle, enshrined in the nation’s creedal document, established a key national custom—a custom often more

aspirational than real, but one that served as the linchpin of the perpetual debate about what national virtue looks like. Those who wanted civic equality to transcend race built their arguments on that principle. Frederick Douglass, for example, called it “the ringbolt to the chain of your nation’s destiny” and a “saving principle.”⁷⁸ Abraham Lincoln called it the animating principle of the Republic and the “immortal emblem of humanity.”⁷⁹ Meanwhile, those who wanted race to determine civic standing had to wrestle with the same principle. Some, like Stephen Douglas, denied that black people were “men,” and others, like Alexander Stephens, dismissed the principle as “an error.”⁸⁰ But everyone on every side of the ancient yet ever-living debate about natural and civic equality has had to engage with the principle.

The principle animated early opposition to slavery, the Union cause in the Civil War, Reconstruction, the Reconstruction amendments, and the diverse civil rights laws passed during the hundred years between the end of the Civil War and the 1964 act.⁸¹ Yet throughout that time, the American people were only ever riven over racial equality. To be sure, the debate was never static. At times, those who embraced racial equality seemed to have won resounding victories just moments before suffering devastating defeats. Reconstruction, for example, likely seemed to some to be a great victory. Consider Homer Adolph Plessy, the man who would give his name to the infamous case and famous dissent.⁸² Born in New Orleans in the late 1850s or early 1860s, he lived in a Louisiana when he was young that was very different from the Louisiana of his old age. Early in his life, schools were integrated, interracial marriage was legal, and black men voted and held high state offices including the governorship.⁸³ All of this was enforced by Union soldiers and the custom rekindled by abolition’s triumph.⁸⁴ Neither would last. Both retreated, and Jim Crow swept over the South and smothered what must have felt to some like the final victory of the equality principle.⁸⁵ Yet for nearly a century, in the South, the custom of Jim Crow would win out over the custom of the Declaration.

About one hundred years after Plessy’s birth, Congress passed the Civil Rights Act of 1964.⁸⁶ President John F. Kennedy had sent the bill to Congress the year before “not merely for reasons of economic efficiency, world diplomacy and domestic tranquility—but, above all, because it is right.”⁸⁷ The bill followed a long civil rights campaign that marched explicitly under the banner of the “immortal emblem of humanity”⁸⁸—the “magnificent words” that “all men are created equal.”⁸⁹

To give legal effect to a principle that, despite all of the other laws on the books that were meant to uphold it, was derelict in much of the country, the act:⁹⁰

- Declared that its purposes were to “enforce the constitutional right to vote,” “protect constitutional rights in public facilities and public education,” “prevent discrimination in federally assisted programs,” and give the executive and judicial branches the power to enforce it;⁹¹
- Prohibited state election officials from applying different standards and procedures to different voters and from using literacy tests to exclude voters;⁹²
- Prohibited intentional race discrimination in public accommodations and facilities (exempting private clubs), education, federally assisted programs, and employment (with the caveat that the act could not be interpreted to require preferential treatment);⁹³
- Established civil penalties for violations and, in cases of contempt, misdemeanor criminal penalties;⁹⁴
- Created or empowered institutions to investigate and enforce these provisions;⁹⁵ and
- Created a Community Relations Service and other “training institutes” without investigative or enforcement power whose mission it is to teach the act’s underlying aims through training and dispute mediation.⁹⁶

A Positive Vision of Autonomy and Solidarity. The Civil Rights Act provided Americans with a positive vision of how they ought to live together. Although everyone knew that its primary target was discrimination that targeted black Americans, the act was universal in all of its terms. It declared its intent to protect the constitutional rights of all Americans, not only the rights of a specific group. It declared its intent to prohibit all racial discrimination within its reach, not only discrimination against specific races.⁹⁷ And it applied to “any individual,” “all persons,” and “citizens.”⁹⁸

No poll worker could discriminate against black voters under the act’s terms, but neither could poll workers discriminate against white voters. No official could exclude black Americans from public parks, but neither could officials exclude Mexican Americans from those spaces.⁹⁹ No federally funded program could deny its resources to black Americans, but neither could it deny them to Japanese Americans. No employer could fire someone

because of his skin color, but neither could an employer be forced to hire someone because of his skin color.¹⁰⁰ No school board could keep black and white children in separate schools, but neither could it assign students to schools “in order to overcome racial imbalance.”¹⁰¹ The tool of discrimination was forbidden no matter the intent behind it.¹⁰²

True, everyone knew that the act mainly targeted discrimination against black Americans, but by employing universal language, it targeted not only that particular evil, but also the general evil underneath it: the idea that it is right to discriminate against any person because of his race. In this way, the act gestured to a high moral principle with roots in both the Judeo-Christian and American traditions. Supporters of that principle could claim to march under the banners of *Imago Dei* and Saint Paul’s declaration that “ye are all one in Christ Jesus.”¹⁰³ They could count on their side the best vision of the Founders—“statesmen, patriots and heroes” who “contended for no class, nor condition [but] for humanity.”¹⁰⁴ And they could find in their arsenal all the moral authority of those who had fought and died for the ideal that “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹⁰⁵ So armed, they fought for black people not because they were black but because they were people.

That vision fostered autonomy and solidarity. In accordance with its vision, the act restricted an evil choice while preserving a range of good choices. It also opened a range of good choices that Jim Crow had closed through coercion. Not only did Jim Crow encourage (and in some contexts require) Americans to separate themselves according to immoral customs and rules, but so too did it discourage (and in some contexts forbid) Americans from interacting with each other in fruitful ways. For example, Jim Crow’s customs and laws forbade black and white children from playing and learning together and thus restricted a fruitful freedom of association.¹⁰⁶ Similarly, Jim Crow forbade white and black Christians from worshipping together and thus restricted a fruitful freedom of religious association and exercise. So too did Jim Crow’s customs punish speech that challenged it, thus restricting fruitful uses of that freedom.¹⁰⁷ Finally, the act told each American that he was united with his neighbor, no matter his color, through shared humanity, citizenship, and legal equality. Everyone had the same rights and was entitled to the same protections.

Hope for a Broader Embrace of that Vision. The act did more than just convey that positive vision. It also expressed lawmakers’ hope that the vision would be more broadly embraced. Its universal language and rejection of a general evil reminded Americans of the higher principle that it aimed to teach. The act recognized that there is no legitimate difference between people of one color and another that justifies differential treatment

in any zone within the law's reach. Thus, it suggested that if there was no just reason to exclude people from all of those zones because of their color, there also must be no just reason to exclude people from purely private zones on that basis. It suggested, too, that if there was no just reason to exclude people even from private zones because of their color, there could be no just reason privately to hate them on that basis. Thus, it encouraged Americans to see people as fellow citizens before seeing them as members of a racial group.¹⁰⁸

Moreover, despite Supreme Court decisions taking an expansive view of the Commerce Clause, which extended the act's reach, the act was still limited in scope.¹⁰⁹ Even so, it reached as broadly as it could so that even spheres beyond its reach were never very far from spheres where its moral vision shone, and where it could not extend its reach directly, it invited people to approach it by establishing the Community Relations Service and training programs, which have no power but exist to help people deal with "difficulties relating to discriminatory practices" and to foster "peaceful relations among the citizens of the community."¹¹⁰ The act requires no one to use these services, but it hopes that people will choose to do so. The Community Relations Service, for example, provides its services to any "interested person."¹¹¹ The act likewise attempts to remove practical hurdles that might prevent someone from using these services. For example, it encourages the Commissioner of Education to pay stipends and travel expenses to any educators who choose to attend the training institutes.¹¹² In all of these ways, it hopes to inspire a broader embrace of its moral vision.

Punishment Limited to Vicious External Action. Nevertheless, the act did not attempt to outlaw private thoughts or actions beyond the reach of Congress's Commerce Clause powers. It prohibits only certain discriminatory external actions. People can hate privately if they choose to do so. They can say horrible things if they choose to do so. They are free even to discriminate in their private clubs and social groups if they choose to do so. This restraint is important in coercive laws not only because it reduces the risk of backlash, but also because it does not endanger the goods that can be found in private thought, association, and speech.¹¹³ As Kaveny explains with an analogy to the Supreme Court's free speech doctrine, "[w]e refuse to prohibit all sorts of malicious and useless speech because we are afraid that such measures will also impede the sort of vigorous political discussion so necessary in a representative democracy."¹¹⁴ The Civil Rights Act follows the same thinking, prohibiting only certain plainly immoral actions that harm others.

On this point, the act's conservative critics might disagree vigorously. Even if they concede Gail Heriot's argument that the restrictions on free

speech and free association that they lament are largely caused by amendments and judicial decisions, they might still argue that the act, unamended, is at least a partial cause.¹¹⁵ Christopher Caldwell, for example, quoting Herbert Wechsler, argues that “integration forces an association upon those for whom it is unpleasant or repugnant.”¹¹⁶ Quoting Leo Strauss, Caldwell argues that “[t]he prohibition against every ‘discrimination’ would mean the abolition of the private sphere, the denial of the difference between the state and society, in a word, the destruction of liberal society.”¹¹⁷

I concede the truth of both statements but deny that the Civil Rights Act of 1964 either mandates integration or prohibits every discrimination. As to forced integration, the act prohibits it with respect to both education and employment.¹¹⁸ To be sure, the Supreme Court has required integration and race-based employment decisions, and the 1991 amendment to the act, which codified the Court’s disparate impact theory, also does so.¹¹⁹ But the 1964 Act, by its own terms, does not.

As to discrimination, the act does not prohibit every discrimination; it chiefly prohibits only one particular and morally repugnant sort and only in certain spheres. It hopes for the abolition of race discrimination everywhere, but it does not require it. If some of the act’s critics argue that no meaningful line can be drawn between prohibiting some discrimination in some places and prohibiting all discrimination everywhere, then I respond that this is true only if we lack the means to distinguish between moral and immoral discrimination.¹²⁰ But we do not.

It is not impossible to draw lines between permissible and impermissible sorts of discrimination: We do so constantly. No reasonable person, for example, would say that it is unjust to discriminate against a small person when hiring a linebacker, just as no reasonable person would say that it is unjust to discriminate against a large person when hiring a jockey. Nor would any reasonable person say that it is unjust for the Civil Rights Act to allow churches to discriminate based on religious belief when hiring ministers.¹²¹ But no reasonable person would say that is right to discriminate against small people, large people, or religious people when hiring a software engineer. What we do naturally in these cases is match discriminatory actions with the contexts in which they are just. Simply put, we require that ends be just and that the means match them. We do this constantly, and so does the judicial system.

This “means–end fit” analysis is the essential stuff of equal protection doctrine.¹²² The doctrine’s fundamental purpose is to give life to the maxim that “like things should be treated alike, and differently things differently” by making sure that disparate treatment is done with proper means aimed

at proper ends.¹²³ We need not explore further here how that analysis works; we need only observe that the doctrine governing these questions is incredibly sophisticated, even if imperfect.¹²⁴ Put simply, a ban on racial discrimination in certain spheres by no means implies a ban on all forms of discrimination in all spheres.

Speed and Force Prudentially Tailored. Finally, the speed and force that the Civil Rights Act used to teach its moral lessons were prudentially tailored to the nature of the people and to their customs. Recall that the Civil Rights Act of 1964 was not the first attempt to teach the American people this moral lesson. Far from it: It followed a long list of other laws that tried and failed to teach what the 1964 act later taught. The Reconstruction Amendments failed as soon as Union troops and the post-war moral fervor retreated (to say nothing of the judiciary's role in undermining the amendments).¹²⁵ The Civil Rights Act of 1866 failed.¹²⁶ The Enforcement Acts failed.¹²⁷ The Civil Rights Act of 1875 failed.¹²⁸ So too did the Civil Rights Acts of 1957 and 1960.¹²⁹

Three things had changed. First, the custom of Jim Crow was at its weakest, and the custom of the Declaration was the strongest it had been since the end of the Civil War. Second, the custom of Jim Crow was strongly held by a small but powerful minority. Third, the act arrayed sufficient force against that minority to prevent much of the anticipated backlash.

Support for these claims comes readily to hand from C. Vann Woodward's remarkable observation that what followed the 1964 act's passage was not the "wave of defiance" that some predicted, but rather "a wave of peaceful compliance" everywhere but in certain rural parts of the South.¹³⁰ No doubt this was likely due to the cultural foundation laid under the law by the civil rights movement and other positive developments in race relations like President Harry Truman's decision to integrate military units.¹³¹ Its appeal to Christianity and to the nation's founding creed and its stoic suffering in the face of violence whittled down "[a]ll but the most incorrigible white resistance."¹³² By 1960, both political parties had made opposition to segregation and support for sit-in demonstrations parts of their platforms,¹³³ and with passage of the act, the federal government, for the first time since Reconstruction, had the power (along with the political will provided by the changing culture) to enforce its moral vision against public and private actors who enforced an immoral vision. The act was well tailored to these circumstances, capitalizing on the return to the custom of the Declaration while arming people who embraced that custom with the powers necessary to depose the powerful minority that rejected it.

Given the changing culture, critics might argue that the Act was not

necessary: that circumstances would have improved without it. Insofar as their claim is that the conditions of daily life for black Americans would have improved eventually on their own, that is a question of alternative history, and because I am not a historian, the only answer I can give is: Perhaps. Perhaps the changing culture alone would have been enough eventually to persuade Southern legislators to repeal segregationist laws. Perhaps the changing culture alone would have been enough eventually to persuade Southern poll workers to stop using their discretionary authority to exclude black Americans from the voting booth. Perhaps it alone would have been enough eventually to convince immoral sheriffs and unlawful posse comitatus to stop lynching black Americans and civil-rights workers.¹³⁴ In many places and in many ways, life was improving for many black Americans. They were, for example, becoming wealthier and professionally more successful.¹³⁵ But perhaps the improvements in the conditions of daily life for black Americans owe their endurance, at least in part, to the “promptness and dispatch” with which the government enforced the act against pockets of Southern resistance.¹³⁶ Or perhaps, as happened with Reconstruction, the cultural winds would have shifted once again against the equality principle, leaving it to wither on the vine. The violent riots instigated by the black-power movement, which rejected the equality principle and often resorted to violence, sparked backlash against the civil rights movement, but the backlash faded quickly.¹³⁷ Perhaps the lesson that the act taught was partly responsible for its fading.

I cannot reach firm conclusions about these historical hypotheticals, but the questions they raise support my earlier claim that if one aims to pin the blame on the Civil Rights Act for the myriad cultural, political, and legal ills that the country faces today, one must carefully analyze the complex strands of causation, which includes giving credit where it is due to the act’s positive outcomes.

But insofar as the claim is that the act was not necessary to teach virtue, then my response is that thinking about the law as a teacher of virtue in terms of necessity is a mistake. If, as Aquinas says, law’s purpose is to make men moral, then it is good for the law to teach virtue whenever it can teach it effectively. It is immaterial that other things are also teaching virtue. In other words, if culture is trending toward virtue, that is no reason for the law to quit its job. There are other reasons—the pragmatic reasons that Kaveny borrows from Aquinas and Isidore—why some laws might avoid trying to teach virtue by some means. For example, if a particular law would be flouted, it should not try to teach.¹³⁸ Likewise, if a law, in trying to forbid certain evil choices, would forbid certain moral ones, perhaps it too should not try to teach.¹³⁹

However, subject to those constraints, law ought to lend its authority to the wider effort to teach moral lessons, especially where, as in America, there is a constant clash between one custom that embraces natural and civil equality and another that rejects both. It is right that the law should prudentially lend its authority to the former against the latter, and that is what the Civil Rights Act of 1964 did.

Is the Civil Rights Act Still a Good Teacher?

Times have changed since 1964. If I am right that the Civil Rights Act has been a good teacher, then the American people have changed for the better because of it. And if other laws, philosophies, cultures, leaders, etc., have also been effective (if not necessarily good) teachers during the years between then and now, then the American people have changed in other ways as well. Moreover, the act itself has changed since 1964. Judicial decisions have reinterpreted parts of it, and Congress has amended parts of it. Given these developments, it could be that the act either no longer teaches a good lesson or is no longer prudentially tailored to the American people.

Some evidence supports both conclusions. Racially discriminatory language, practices, and government policies are still (and perhaps increasingly) common, although their targets are usually white and Asian Americans rather than black Americans,¹⁴⁰ and the reigning ideology among those who control so many levers of public and private power—Antiracism—explicitly endorses race discrimination and rejects the act’s moral lesson.¹⁴¹ The act seems to have lost its ability to teach effectively, at least with respect to that powerful minority.¹⁴²

Usefully, the framework employed here can diagnose the cause of the act’s diminished effectiveness and can help reformers to identify changes that are needed to restore it. Each of the judicial and legislative changes in the act reduced its ability to satisfy one or more of the framework’s four criteria and therefore weakened the act’s ability to teach well. For example, the disparate-impact approach of *Griggs v. Duke Power*,¹⁴³ *United Steelworkers of America v. Weber*,¹⁴⁴ and their 1991 codification holds that to avoid liability for discriminating under Title VII, employers must sometimes discriminate.¹⁴⁵ That makes the act’s message unclear, which causes people to misunderstand its moral teaching.¹⁴⁶ Worse, the act now both prohibits and tolerates the same vicious action, which greatly diminishes the apparent strength of the moral lesson it teaches. Meanwhile, the changes in Title VII’s damages remedies functionally punish good and neutral actions if they might be interpreted as malicious, so the act no longer limits its lesson to

a plainly wrong action.¹⁴⁷ In other words, it no longer teaches a lesson fit for ordinary people, but instead teaches one fit for people who are more angelic than anyone can claim to be. Furthermore, the Court's (now largely abandoned) decisions permitting race discrimination in college admissions tended to heighten tribal identification and thus to undermine rather than promote solidarity.¹⁴⁸

Each of these changes weakened the act with respect to one of the requirements that makes coercive laws good teachers. If they were removed, the act might yet be more effective because, once again, it would better satisfy our four requirements.

Consider the reaction to the decision in *Students for Fair Admissions v. Harvard College*, which forbade racial preferences in college admissions.¹⁴⁹ The Court's previous decisions had given schools, and only schools, an exception from the usual strictures of equal protection doctrine and the Civil Rights Act.¹⁵⁰ Thus, the Court's decision to reverse those precedents had no legal effect on any other sphere regulated by the act. And yet, in the wake of the decision, lawyers published endless analyses of whether the decision would limit employers' use of certain discriminatory diversity, equity, and inclusion programs.¹⁵¹ Proponents of the color-blind principle found renewed zeal (and material support) after the decision and successfully used the decision to persuade federal courts to strike down racial preferences in other contexts.¹⁵²

These developments cannot be attributed to any direct legal effect of *Students for Fair Admissions*. They suggest, rather, a renewal of the lesson that the Civil Rights Act teaches. The Court's decision reinvigorated the act's ability to teach well by eliminating one of the changes that had reduced its ability to satisfy the criteria of our framework. It is reasonable to assume that similar restorations would also reinvigorate the act.

One small final point: The act continues, without question, to teach one small but uniquely powerful group of Americans well: textualist judges. Judges who believe that "only the words on the page constitute the law" will likely consider and apply the act on its own terms, rejecting invitations either to ignore the text or to impose on it a gloss that obscures its moral lesson.¹⁵³ Consider again *Students for Fair Admissions* and Justice Neil Gorsuch's concurring opinion.¹⁵⁴ Upon reading the act, he concluded that its "message for these cases is unmistakable."¹⁵⁵ It forbids schools "from intentionally treating one person worse than another similarly situated person because of race, color, or national origin," and "[i]t does not matter if the recipient discriminates in order to advance some further benign 'intention' or 'motivation.'"¹⁵⁶

Textualist judges reject (consistent with the text of subsequent legislative amendments to the act) the effort by collectivists to reimagine the act as permitting, even protecting, discrimination that they believe is good. To be sure, some textualist judges already learned this lesson elsewhere. Justice Antonin Scalia, for example, learned it from the Constitution, whose universal language permits “no such thing as either a creditor or a debtor race.”¹⁵⁷ Justice Clarence Thomas learned it from the Declaration of Independence and the Fourteenth Amendment, which together create “a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”¹⁵⁸ But not every textualist has been convinced by those sources, and it is good that multiple laws teach the same good lesson.¹⁵⁹ As collectivists continue their attempts to ignore or rewrite those laws, they will likely find textualist judges unwilling to forget what the Civil Rights Act still teaches them.

Conclusion

The Civil Rights Act of 1964 finds itself the target of conservative critics who argue that it is responsible for the many cultural, political, and legal ills that plague the United States today. The act is, its critics argue, either the cause or at least a major cause of a largely successful campaign to replace the Constitution with a new civil rights regime. Putting aside the complicated question of tracing the causal factors (philosophical, cultural, political, legal, etc.) of each identified ill and of weighing their causal effects, I have argued that the argument advanced by conservative critics cannot be complete until they have considered whether the Civil Rights Act has been a good teacher of virtue. In my view, it has been a good teacher, at least with respect to race.

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Endnotes

1. Peter C. Myers, *The Case for Color-Blindness*, HERITAGE FOUND. FIRST PRINCIPLES No. 75 (2019) (celebrating the Act from the political Right); see also, e.g., COLEMAN HUGHES, *THE END OF RACE POLITICS: ARGUMENTS FOR A COLORBLIND AMERICA* 56 (2024) (celebrating the Act from the political Left, saying that it “embodied the colorblindness that anti-racist activists had been fighting for throughout the past century”).
2. See, e.g., Richard Delgado & Jean Stefancic, *CRITICAL RACE THEORY: AN INTRODUCTION* 23, 28 (2d ed. 2001) (describing critical race theorists as “discontent[ed]” with and “suspicious” of civil rights for this reason); IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 19 (2019) (“The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”). Although Kendi does not make his opposition to the Civil Rights Act explicit, the ideology that he lays out necessarily rejects any law that forbids discrimination regardless of the race, color, or ethnicity of the victims or beneficiaries. For a detailed explanation of how Kendi’s Antiracism necessarily rejects any color-blind law, see GianCarlo Canaparo, *Permissions to Hate: Antiracism and Plessy*, 27 TEX. REV. OF L. AND POL. 97, 169 (2023) (“Antiracism rejects the Fourteenth Amendment and the Civil Rights Movement while rhetorically co-opting their legacy.”).
3. See, e.g., CHRISTOPHER CALDWELL, *THE AGE OF ENTITLEMENT: AMERICA SINCE THE SIXTIES* (2020); DINESH D’SOUZA, *THE END OF RACISM* (1995); Wanjiru Njoya, *The Tyranny of the 1964 Civil Rights Act*, MISES INST., Feb. 24, 2024, <https://mises.org/mises-wire/tyranny-1964-civil-rights-act>.
4. See CALDWELL, *supra* note 3 at 6 (“The changes of the 1960s, with civil rights at their core, were not just a major new element in the Constitution. They were a *rival* constitution, with which the original one was frequently incompatible—and the incompatibility would worsen as the civil rights regime was built out.”); Ryan P. Williams & Scott Yenor, *Why America’s “Anti-Discrimination” Regime Needs to Be Dismantled*, AM. MIND, Jan. 21, 2023, <https://americanmind.org/salvo/why-americas-anti-discrimination-regime-needs-to-be-dismantled/> (conceding that although the Civil Rights Act “could have finally ushered in the promise [of] a truly colorblind constitution,” it instead “warped American law and culture and traded one set of racial preferences for another.”).
5. See generally ANDRE ARCHIE, *THE VIRTUE OF COLORBLINDNESS* (2024) (explaining in the first part of the book how the identitarian Left rejects the teachings and implications of the virtue-ethics tradition and defending in the second part of the book that tradition and the color-blind principle that flows from it).
6. See, e.g., THOMAS SOWELL, *SOCIAL JUSTICE FALLACIES* (2023) (chronicling the logical and empirical errors underpinning collectivist arguments in favor of race-based policies); HUGHES, *supra* note 1 (same); GianCarlo Canaparo, *The Intellectual Failings of Antiracism*, HERITAGE FOUND. LEGAL MEMO. No. 347 (Dec. 2023) (collecting empirical studies tending to show that race-based remedies to racial disparities not only will fail to cure the disparities complained of, but also may make them worse or create new ones).
7. See, e.g., EDWARD FESER, *ALL ONE IN CHRIST: A CATHOLIC CRITIQUE OF RACISM AND CRITICAL RACE THEORY* 133 (2022) (arguing from a Christian perspective that race-based policies are immoral because “the Church teaches that any theory or form whatsoever of racial discrimination is morally unacceptable”) (internal quotations and citations omitted); Canaparo, *supra* note 2 at 114 (arguing that Antiracism revives the “morally bankrupt” premises that undergirded the *Plessy* decision); Myers, *supra* note 1 (collecting arguments and sources); Debra Satz, *Countering the Wrongs of the Past: The Role of Compensation*, 51 NOMOS 129, 130 (2012) (“Efforts to respond to and repair the wrongs of the past raise both practical and philosophical concerns.”).
8. See, e.g., Winston Churchill, *Mass Effects in Modern Life*, reprinted in WINSTON S. CHURCHILL, *THOUGHTS AND ADVENTURES* 192–202, 195 (1948) (“The individual becomes a function: the community alone is of interest.... No one is to think of himself as an immortal spirit, clothed in the flesh, but sovereign, unique, indestructible. No one is to think of himself even as that harmonious integrity of mind, soul and body, which, take it as you will, may claim to be ‘the Lord of Creation.’”).
9. That does not mean that there is no value in remarking those counterarguments. Old truths ought constantly to be retold in new ways for new audiences. Coleman Hughes’s new book, for example, is a good example of how this is done. See HUGHES, *supra* note 1. But this paper is not the place to do that.
10. CATHLEEN KAVENY, *LAW’S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY* 29 (2012).
11. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 702 (1964) (“This title shall not apply to...a religious corporation, association, or society with respect to the employment of individuals of a particular religion...”).
12. See generally DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATIONS IN AMERICA* (2020) (revealing the arbitrary origins and contours of America’s racial and ethnic categories); MIKE GONZALEZ, *THE PLOT TO CHANGE AMERICA: HOW IDENTITY POLITICS IS DIVIDING THE LAND OF THE FREE* (2020) (recounting how activists without any sociological or anthropological expertise pressured the federal government to create several of America’s racial categories for no purpose other than to create identity-based voting blocs); see also GianCarlo Canaparo & Jameson Payne, *Equal Protection and Racial Categories*, 33 GEO. MASON U. CIV. RTS. L. J. (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4592694 (exploring whether the use of these racial categories can ever satisfy the principle that animates equal protection doctrine, which is that like things should be treated alike and different things differently.).
13. Caldwell refers interchangeably to the Civil Rights Act, “civil rights,” the “civil rights regime,” “civil rights reform,” “civil rights ideology,” “the reforms of the sixties,” “integration,” and “anti-discrimination law” when making causal claims about their deleterious effects on the American regime. See generally CALDWELL, *supra* note 3. But each of these things has multiple components. Even the Civil Rights Act itself is not a monolith; it has different parts that do different things, and since its original enactment in 1964, it has been amended several times. Those amendments (rightly in my view)

- have attracted criticism that does not apply to the unmodified act itself. See, e.g., Roger Clegg, *The Bad Law of “Disparate Impact,”* 138 THE PUB. INTEREST 79, 90 (Winter, 2000) (tracing “[m]ost of the worse abuses of civil-rights laws” to the disparate-impact doctrine, which developed years after 1964); Gail Heriot, *The Roots of Wokeness: Title VII Damage Remedies as Potential Drivers of Attitudes Toward Identity Politics and Free Expression*, 27 TEX. REV. OF L. & POL. 1, 181–83, n. 23 (2022) (tracing the increase in identity politics and weakening support for free expression to the 1991 changes in remedies for violations of Title VII of the Civil Rights Act of 1964 and to the Supreme Court’s various decisions upholding race and sex preferences in certain circumstances, which provide “an incentive for individuals to see themselves in terms of those factors”).
14. See H.L.A. HART, *THE CONCEPT OF LAW* 200 (2d ed. 1994) (“Though the law of some societies has occasionally been in advance of the accepted morality, normally law follows morality...”). This is how the common law developed. See Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 353 (2016) (“The original laws, such as the ones forbidding homicide, rape, theft, and burglary, grew out of then-contemporary mores, including religious doctrine, and they were known throughout England.”).
 15. KAVENY, *supra* note 10 at 17; see also ROBERT P. GEORGE, *MAKING MEN MORAL* 26–27 (1993) (“Nevertheless, it is an evident fact that laws regularly, and often profoundly, affect notions abroad in society about what is morally acceptable, forbidden, and required.... For example, American society is very different today from what it was thirty-five years ago because many people’s moral views and attitudes toward race have changed dramatically. Any account of this transformation that failed to note the significance of both the decision of the Supreme Court of the United States in *Brown v. Topeka Board of Education* in 1954 and the Federal Civil Rights Act of 1964 in shaping American perceptions of the morality of, say, forced segregation or interracial marriage would seem naïve.”). One important caveat: If a law is to teach, it must be known. The Civil Rights Act of 1964 is well known, so the issue does not arise here, but our modern administrative regime administers more laws spread across more pages than anyone knows. It seems doubtful to me that many of those laws teach. Cf. GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson, & Liya Palagashvili, *Count the Code: Quantifying Federalization of Criminal Statutes*, HERITAGE FOUND. SPL. REP. NO. 251 (2022) <https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes> (estimating the number of crimes in the United States Code alone at 5,199 and observing that nobody can know them all and that, even if someone did, some are so vague that “no reasonable person could understand what they mean.”).
 16. THOMAS AQUINAS, *SUMMA THEOLOGICA*, I-II, q. 92, art. 1 (Fathers of the English Dominican Province, trans., Benziger Bros. ed., 1947) (hereinafter *SUMMA THEOLOGICA*).
 17. GEORGE, *supra* note 15 at 26–27 (1993) (observing that when law deviates from a people’s values, they will tend to rebel against it but including the caveat that when legal prohibitions are general or noncoercive, the likelihood of rebellion is reduced); Harry C. Bredemeier, *Law as an Integrative Mechanism*, in *LAW AND SOCIOLOGY* 73, 82–83 (William M. Evan ed., 1962) (observing that incongruity between a people’s mores and the moral teaching of the law may lead to a “dislike of justice”).
 18. These observations have a long pedigree. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* x. 9. 1179b–1180b (Joe Sachs, trans., 2002); ARISTOTLE, *POLITICS* iii. 5. 1280b (Carnes Lord, trans., 2013); *SUMMA THEOLOGICA*, I-II, q. 92, art. i; 95, art. lii; 96, arts. i–iii.
 19. See G.K. CHESTERTON, *THE THING* 27 (1930) (“In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, ‘I don’t see the use of this; let us clear it away.’ To which the more intelligent type of reformer will do well to answer: ‘If you don’t see the use of it, I certainly won’t let you clear it way. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it.’”).
 20. KAVENY, *supra* note 10 at 272. Note that I am using Kaveny’s framework only to understand how a law like the Civil Rights Act teaches. I do not concede what Kaveny seems to suggest, which is that law’s only purpose is to serve as a teacher. Additionally, for reasons not relevant to this paper, I do not follow the conclusions she reaches about voting in the later portions of her book.
 21. *Id.* at 18. Kaveny seems to argue that this is law’s only purpose and that law cannot also serve “as police officer.” I am not convinced that law cannot and does not serve both purposes. See, e.g., Kevin L. Flannery, *Voting Conscience*, FIRST THINGS, June 2015, <https://www.firstthings.com/article/2015/06/voting-conscience> (“the division she describes between conceiving of the law as police officer and as teacher is a rhetorical device with little basis in socio-ethical reality”). But again, my goal is not to endorse her claims in that regard; my goal is to employ her useful framework about how law teaches.
 22. *Id.* at 8.
 23. *Id.*
 24. See *id.* at 60–65.
 25. See *id.* at 51–53.
 26. *Id.* at 52–53 (citing ALSDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988)). Of course, as Kaveny explains, “[t]he web of right relationships mandated by justice cannot be promoted and protected by a citizenry that lacks prudence, fortitude, and temperance,” but prudence and justice are “particularly appropriate to our time and place.” *Id.* at 33.
 27. *Id.* at 53 (citing *SUMMA THEOLOGICA*, II-II, q. 47, art. 4).
 28. *Id.*
 29. *Id.*

30. *Id.* at 54.
31. *Id.* at 53 (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 391 (1986)).
32. *Id.* at 23 (citing RAZ, *supra* note 31 at 410).
33. *Id.* at 53.
34. *Id.* at 25, 53 (citing RAZ, *supra* note 31, ch. 14).
35. RAZ, *supra* note 31 at 379–81.
36. KAVENY, *supra* note 10 at 53.
37. *Id.* at 53–54.
38. Kaveny would likely agree but for the reasons discussed below, see *infra* pp. 11–14, would counsel that the immorality of an option is not sufficient grounds to outlaw it.
39. See, e.g., ARCHIE, *supra* note 5 (grounding the principle in the classical tradition); FESER, *supra* note 7 (grounding the principle in the Christian tradition); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”); Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (Statement of Rep. John Bingham arguing that the Fourteenth Amendment, of which he was the primary author, upheld the “foundation[al] principle” that “all citizens of the United States” enjoy “absolute equality” both “politically and civilly before their own laws.”).
40. “Might” is the right modifier for reasons discussed below—namely, that if the people will not comply with a law, the law is unlikely to teach them what it intends to teach them. See *infra* pp. 11–14.
41. KAVENY, *supra* note 10 at 7.
42. *Id.* at 25, 53 (citing RAZ, *supra* note 31, ch. 14).
43. *Id.* at 7.
44. *Id.* at 26 (citing RAZ, *supra* note 31 at 410).
45. *Id.* at 27 (quoting RAZ, *supra* note 31 at 320 (“the morally good person is he whose prosperity is so intertwined with the pursuit of goals which advance intrinsic values and the well-being of others that it is impossible to separate his personal well-being from his moral concerns.”)).
46. SUMMA THEOLOGICA, II-II, q. 58, art. 7.
47. KAVENY, *supra* note 10 at 54.
48. *Id.*
49. *Id.* at 27, 54 (citing Pope John Paul II, *Sollicitudo rei socialis* (*The Social Concern*) para. 38 (1987), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html).
50. Pope John Paul II, *supra* note 49.
51. KAVENY, *supra* note 10 at 54.
52. *Id.*
53. *Id.*
54. *Id.* at 55. Kaveny concedes that autonomy and solidarity are only “partial” instantiations of prudence and justice. *Id.* at 52.
55. See THE INSTITUTES OF JUSTINIAN 3 (J.B. Moyle, trans., 4th ed., 1905).
56. KAVENY, *supra* note 10 at 30 (citing SUMMA THEOLOGICA, I-II, q. 95, art. 3).
57. SUMMA THEOLOGICA, I-II, q. 95, art. 3 (quoting Isidore of Seville).
58. KAVENY, *supra* note 10 at 30–31.
59. *Id.* at 30. This requirement, of course, applies to all laws, not just coercive ones.
60. *Id.* at 31.
61. See GEORGE, *supra* note 15 at 212 (“Valuable communities, such as families, require significant privacy if the goods that they realize for their members, or enable their members to realize for themselves, are to be realized, or if they are to co-operate with other families in building up a community of communities.”).
62. KAVENY, *supra* note 10 at 30–31; see also *id.* at 55 (noting that part of the Supreme Court’s decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held unconstitutional a law prohibiting married couples from using contraception, was the fear that detecting violations would require police to invade the privacy of the marital bed).
63. *Id.* at 60.
64. See *id.* at 60–61.

65. *Id.* at 62–65.
66. *Id.* at 62.
67. *Id.* at 65.
68. *Id.*
69. See Flannery, *supra* note 21.
70. KAVENY, *supra* note 10 at 63–65.
71. *Id.* at 64.
72. *Id.* at 65.
73. *Id.*
74. See *id.* at 34. Again, an unspoken requirement is that the law be known: that is, promulgated and clearly expressed. An unknown law is unlikely to teach much, if anything, to many, if any. See *supra* note 15.
75. See SUMMA THEOLOGICA, I-II, q. 95, art. 3 (quoting Isidore of Seville).
76. See *id.*
77. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
78. For a prime example of how some defenders of the equality principle conceived of it as a guide to national virtue, see Frederick Douglass, *The Meaning of the Fourth of July for the Negro*, speech at Rochester, New York (July 5, 1852), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS at 185–86 (Philip S. Foner, ed., reprint 2021) (“I have said that the Declaration of Independence is the ringbolt to the chain of your nation’s destiny; so, indeed, I regard it. The principles contained in that instrument are saving principles.”).
79. Abraham Lincoln, Address at Gettysburg, Penn. (Nov. 19, 1863) (“Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”); Abraham Lincoln, Speech at Lewistown, Ill. (Aug. 17, 1858), in CREATED EQUAL? THE COMPLETE LINCOLN–DOUGLAS DEBATES OF 1858 at 101 (Paul M. Angle, ed., 1958).
80. Stephen Douglas, Speech at Ottawa, Ill. (Aug. 21, 1858), in CREATED EQUAL? THE COMPLETE LINCOLN–DOUGLAS DEBATES OF 1858, *supra* note 79 at 111 (“I do not regard the negro as my equal, and positively deny that he is my brother or any kin to me whatever.”); Alexander H. Stephens, *Cornerstone Speech*, speech at Savannah, Ga. (Mar. 21, 1861) (“Those ideas [of the Declaration], however, were fundamentally wrong.”).
81. See generally RACE AND THE CONSTITUTION (The Heritage Foundation, 2024), <https://www.heritage.org/sites/default/files/2024-02/RaceandConstitution.pdf>.
82. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).
83. See, e.g., KEITH WELDON MEDLEY, WE AS FREEMEN: PLESSY V. FERGUSON 25 (2003); JAMES HASKINS, PINCKNEY BENTON STEWART PINCHBACK (1973) (exploring the “swashbuckling” life of Governor P.B.S. Pinchback).
84. See generally C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 45–74, 81 (commemorative ed., 2002) (recounting the early success and later failure of Reconstruction and laying the blame for the latter chiefly on good people who, for a variety of reasons, gave up fighting for and enforcing the equality principle).
85. See *id.* at 67–69.
86. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).
87. John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963), available at <https://www.presidency.ucsb.edu/documents/special-message-the-congress-civil-rights-and-job-opportunities>.
88. Abraham Lincoln, Speech at Lewistown, *supra* note 79.
89. Martin Luther King, Jr., Speech at Washington, D.C. (Aug. 28, 1963).
90. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).
91. *Id.*, preamble.
92. *Id.*, Tit. I.
93. *Id.*, Tit. II, Tit. III, Tit. IV, Tit. VI, Tit. VII.
94. See generally *id.*, Tit. XI.
95. *Id.*, Tit. V, Tit. VI, Tit. VII, Tit. VIII, Tit. IX.
96. *Id.*, § 404, Tit. X.
97. *Id.*, preamble.

98. See generally *id.*
99. See, e.g., CLARENCE THOMAS, *MY GRANDFATHER'S SON* 21–22 (2007) (“In the Fifties and Sixties, blacks steered clear of many parts of Savannah, which clung fiercely to racial segregation for as long as it could.... No matter how curious you might be about the way white people lived, you didn’t go where you didn’t belong. That was a recipe for jail, or worse. That’s why I never saw much of the fancy houses in the center of town, except through the windows of Daddy’s truck.”).
100. Civil Rights Act of 1964, §703(j) (“Nothing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin....”).
101. *Id.*, § 401(b).
102. See, e.g., Transcript of Oral Argument, *Briggs v. Elliott*, 342 U.S. 350 (1952) (No. 273), reprinted in *ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN Brown v. Board of Education of Topeka*, 1952–55, at 36, 47 (Leon Friedman ed., 1969) (reprinting Thurgood Marshall’s argument wherein he categorically rejected the idea that the Supreme Court should require schools to use race to rebalance the composition of schools that had previously been segregated).
103. See Martin Luther King, Jr., Pamphlet for the National Council of Churches, New York, N.Y. (Feb. 10, 1957), available at <https://kinginstitute.stanford.edu/king-papers/documents/all-non-segregated-society-message-race-relations-sunday#ftnrefl> (quoting Galatians 3:28 (“There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus.”)); GENESIS 1:27 (“So God created man in his own image, in the image of God created he him; male and female created he them.”). For this reason, it was not surprising that the act attracted much support from Christian clergymen. See WOODWARD, *supra* note 84 at 182.
104. Douglass, *supra* note 78 at 186 (“They were statesmen, patriots and heroes, and for the good they did, and the principles they contended for, I will unite with you to honor their memory.”); Cong. Globe, 35th Cong. 1st Sess. 344 (1858) (statement of Rep. John P. Hale).
105. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). The link between the principle and Christianity and the moral weight of the principle were famously celebrated in the *Battle Hymn of the Republic*. See Julia Ward Howe, *Battle Hymn of the Republic*, ATLANTIC MONTHLY, Feb. 1862 (“As He died to make men holy, let us die to make men free.”).
106. See Canaparo, *supra* note 2 at 102 (“It was apparently lost on the Court [in *Plessy*] that segregation made it unlikely for black and white people to meet, interact, and form those affinities.”).
107. See, e.g., *The Klan at Its Old Work in North Carolina. Republican Meetings Attacked and the Stars and Stripes Insulted. The Murder of John W. Stephens—Attempts to Intimidate Judge Settle—The Kuklux Cheering for Greeley as Their Candidate*, N.Y. TIMES, June 19, 1872, at 1, available at <https://timesmachine.nytimes.com/timesmachine/1872/06/29/79023873.html?pageNumber=1> (reporting on the assassination of John W. Stephens, a Republican state senator in North Carolina who opposed segregation and championed Reconstruction).
108. See KAVENY, *supra* note 10 at 34 (making a similar observation with respect to the Americans with Disabilities Act).
109. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the federal government could regulate as “interstate commerce” a small amount of wheat grown purely for personal use); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that the Commerce Clause gave Congress the power to adopt Title II of the Civil Rights Act of 1964, which forbids discrimination in public accommodations.).
110. Civil Rights Act of 1964, § 1002; see also § 404 (training programs for educators).
111. *Id.*, § 1002.
112. *Id.*, § 404.
113. See KAVENY, *supra* note 10 at 59 (citing SUMMA THEOLOGICA, I-II, q. 91, art. 4).
114. *Id.*
115. See generally Heriot, *supra* note 13.
116. CALDWELL, *supra* note 3 at 14 (quoting Herbert Wechsler).
117. *Id.* at 15 (quoting Leo Strauss).
118. Civil Rights Act of 1964, §§ 401(b), 703(j).
119. See *Brown v. Board of Education II*, 349 U.S. 294 (1955) (requiring schools to integrate, which mandated racial balancing); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (creating the disparate-impact theory); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (requiring employers to racially balance their employees when racially neutral merit tests produce racial disparities); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codifying disparate impact and expanding damage remedies under Title VII of the Civil Rights Act of 1964).
120. In fairness, it is not clear that this is Caldwell’s argument because he does not clearly distinguish the act from the broader “civil rights regime,” but it seems to me a not unreasonable reading. See CALDWELL, *supra* note 3 at 14–15.
121. See Civil Rights Act of 1964, § 702 (“This title shall not apply to...a religious corporation, association, or society with respect to the employment of individuals of a particular religion....”).

122. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”).
123. See *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (recognizing that the Equal Protection Clause “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”); see also *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“But so too, ‘the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.’”) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); see also Canaparo & Payne, *supra* note 12 (exploring how this doctrine interacts with new research revealing the arbitrariness of America’s racial categories).
124. For a deeper exploration of how this analysis works, see Canaparo & Payne, *supra* note 12; cf. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 142 (1975) (“The computing principle that Burke urged upon us can lead us then to an imperfect justice, for there is no other kind.”).
125. See WOODWARD, *supra* note 84 at 67–72 (documenting their failure); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (hollowing out the Privileges or Immunities Clause of the Fourteenth Amendment); *United States v. Cruikshank*, 92 U.S. 542 (1876) (same).
126. See Civil Rights Act of 1866, 14 Stat. 27–30 (1866).
127. See Enforcement Act of 1870, 16 Stat. 140–146 (1870); Second Enforcement Act of 1871, 16 Stat. 433–440 (1871); Third Enforcement Act of 1871, 17 Stat. 13 (1871).
128. See Civil Rights Act of 1875, 18 Stat. 335–337 (1875).
129. See WOODWARD, *supra* note 84 at 180 (“both measures provided a disappointment to civil rights leaders” and, with respect to voting protections, “were not effective and demonstrated the need for stronger laws.”) (citing the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960)).
130. WOODWARD, *supra* note 84 at 183.
131. See *id.* at 137–38 (“Race relations took a turn for the better instead of for the worse as feared.... Hundreds of thousands of men discharged from the services entered civilian life with an experience that very few, whether Northerners or Southerners, would have ever duplicated elsewhere.”).
132. *Id.* at 170.
133. *Id.* at 171–72.
134. See, e.g., *id.* at 183–84 (recounting the murder of several civil-rights workers at the hands of a group of men led by the sheriff of Neshoba County, Mississippi).
135. See *id.* at 187 (recounting the improving economic situation for many black Americans and the increase in black voter registrations).
136. See *id.* at 186.
137. *Id.* at 183.
138. See KAVENY, *supra* note 10 at 63–65.
139. See, e.g., GEORGE, *supra* note 15 at 190 (“[I]t is impossible to say in abstraction from a detailed understanding of the circumstances obtaining in a political community whether particular acts reasonably judged to be immoral ought or ought not to be prohibited by the laws of that community.”); 218 (“[A] properly constrained freedom of assembly, which does not lose sight of the rooting freedom in the protection and promotion of valuable human goods, will minimize the danger of its own abuse.”).
140. See generally Canaparo, *supra* note 2 (gathering examples including discrimination against Asian and white applicants to elite universities, discrimination against black and Hispanic students in public schools done to maintain a particular racial balance, employment discrimination against white people, and discrimination in government benefits against white people and non-white people who own businesses jointly with white people).
141. KENDI, *supra* note 2 at 19 (2019) (“The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”); see also Canaparo, *supra* note 2 (collecting examples of Antiracist race discrimination).
142. Its lesson is still widely embraced by the American people. See Justin McCarthy, *Post-Affirmative Action, Views on Admissions Differ by Race*, Gallup, Jan. 16, 2024, <https://news.gallup.com/poll/548528/post-affirmative-action-views-admissions-differ-race.aspx> (finding that 68 percent of Americans support the decision in *Students for Fair Admissions* to end the use of race in college admissions). Even in very liberal California, voters recently rejected an amendment that would restore the use of racial preferences even though supporters of the amendment outspent opponents by more than 14-to-one. Gail Heriot, *Not Taking No for an Answer*, CITY J., Mar. 10, 2024, <https://www.city-journal.org/article/california-legislators-trying-to-gut-proposition-209-again>.
143. 401 U.S. 424 (1971).
144. 443 U.S. 193 (1979).
145. See *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (“Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.”).
146. See SUMMA THEOLOGICA, I-II, q. 95, art. 3 (quoting Isidore of Seville).

147. See Heriot, *supra* note 13 at 183 (“Suddenly, it could pay for employees to interpret events in terms of those identity factors and to view common interactions—‘Ms. Smith you look nice today’—as somehow on the wrong side of the law.”).
148. See *id.* at 181 (“Affirmative action preferences greatly accentuate this problem [of identifying more rather than less with ascriptive categories].”).
149. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).
150. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). The Court collapsed the difference between the Equal Protection Clause and the Civil Rights Act with the careless and atextual line: “In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* at 287.
151. See, e.g., Lara A. Flath, David E. Schwartz, & Amy Van Gelder, *The Supreme Court’s Affirmative Action Opinion Continues to Spawn Challenges to DEI Programs*, SKADDEN’S 2024 INSIGHTS, Dec. 13, 2023, <https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion>; Katheryn Bradley & Priya B. Vivian, *Not Just Academic: How the Supreme Court’s Opinion on Affirmative Action in College Admissions May Impact Employers’ Recruiting, Hiring, and DEI Programs*, Lane Powell, Sept. 22, 2023, <https://www.lanepowell.com/Our-Insights/267602/Not-Just-Academic-How-The-Supreme-Courts-Opinion-on-Affirmative-Action-in-College-Admissions-May-Impact-Employers-Recruiting-Hiring-and-DEI-Programs>.
152. See, e.g., *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-CV-00278-P, 2024 WL 965299 (N.D. Tex. Mar. 5, 2024) (relying in part on *Students for Fair Admissions* to strike down a government contracting preference for minority-owned businesses); *Ultima Servs. Corp. v. U.S. Dept. of Agric.*, No. 220CV00041DCLCCRW, 2023 WL 4633481 (E.D. Tenn. July 19, 2023) (same).
153. *Students for Fair Admissions*, 600 U.S. at 287 (opinion of Gorsuch, J.) (quoting *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 654 (2020)).
154. *Id.*
155. *Id.* at 288.
156. *Id.* at 289 (internal quotations and citations omitted).
157. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race.”).
158. *Id.* at 240 (Thomas, J., concurring) (“There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.”) (citing THE DECLARATION OF INDEPENDENCE, para 2).
159. See generally Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013) (documenting the debate over whether an originalist interpretation of the Constitution compels the color-blind principle).