

PART ONE

Equal Rights and Nondiscrimination



# Historic Exclusion and Persisting Inequalities

## *Advancing Equal Rights on the Basis of Race and Ethnicity*

The history of international human rights as we know it today is deeply intertwined with national and global efforts to end violence and discrimination based on religion, race, and ethnicity. When world leaders gathered in 1945 to form the United Nations, discrimination and violence were central concerns; the minister for foreign affairs of Uruguay, for example, argued in his opening speech that the “repudiation of doctrines of racial division and discrimination” was a prerequisite for lasting global peace, a sentiment shared by delegates from a wide range of countries.<sup>1</sup> At the same time, colonial powers and countries that still had systems of *de jure* discrimination expressed concern about their national sovereignty.<sup>2</sup> The compromise was a U.N. Charter that expressly affirmed “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”—but also clarified that the U.N. would not “intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>3</sup>

Over the following few years, however, the U.N. built on these commitments in drafting the Universal Declaration of Human Rights (UDHR). These international-level developments coincided with country-level movements to advance racial and ethnic equality, and the two came to inform one another. The UDHR Drafting

Committee consulted national constitutions submitted by over 50 countries,<sup>4</sup> and drew inspiration from equal rights provisions that explicitly addressed race from countries spanning different regions.<sup>5</sup> In 1948, the U.N. adopted the UDHR, which proclaimed that “All human beings are born free and equal in dignity and rights,” and entitled to fundamental rights and freedoms “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>6</sup>

Yet even as some countries’ laws served as models, these international commitments to equal rights regardless of race/ethnicity were clearly ahead of other countries’ policies and practices: the UDHR preceded the Civil Rights Act in the United States by over 15 years, and the fall of apartheid in South Africa by over four decades. In a 1944 report, the Commission to Study the Organization of Peace, a U.S.-based organization founded in 1939 to promote the establishment of the U.N., acknowledged this tension, arguing: “We cannot postpone international leadership until our own house is completely in order . . . Through revulsion against Nazi doctrines, we may, however, hope to speed up the process of bringing our own practices in each nation more in conformity with our professed ideals.”<sup>7</sup>

In some cases, the U.N.’s new commitments to equality enabled activists and governments to bring national-level struggles against racism to the global stage. For example, in 1946, India filed a complaint with the U.N. about discrimination against its citizens living in South Africa, citing the charter. While the South African government protested that it was an issue of domestic jurisdiction, this complaint triggered the U.N. system’s first examination of apartheid, laying the foundation for a global campaign that supported national movements in bringing about apartheid’s downfall.<sup>8</sup>

Likewise, in 1947, U.S. civil rights leader W.E.B. Du Bois submitted a report to the U.N. on behalf of the National Association for the Advancement of Colored People (NAACP), calling attention to how racial discrimination within the United States not only hurt its own people but also undermined the U.N.’s potential, especially given the establishment of U.N. headquarters in New York. Citing one recent example of discrimination against a high-profile foreign visitor—an Illinois restaurant’s refusal to serve Mahatma Gandhi’s personal physician, whom they perceived as black—Du Bois urged that “a discrimination practiced in the United States against her own citizens . . . cannot be persisted in, without infringing upon the rights of the peoples of the world.”<sup>9</sup>

Further, the UDHR’s approach to race/ethnicity established a critical precedent that would influence subsequent international agreements and national laws. In 1965, the U.N. Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which as of February 2019 had 179 states parties, established detailed commitments to eliminating racial discrimination, segregation, and violence.<sup>10</sup> Likewise, international human rights treaties targeting other groups—including children, women, refugees, and people with disabilities—all explicitly prohibit

racial discrimination.<sup>11</sup> In its preamble, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) calls for “the eradication of apartheid, all forms of racism, [and] racial discrimination,”<sup>12</sup> while the Convention on the Rights of the Child (CRC) guarantees fundamental rights “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour . . . or . . . ethnic [origin].”<sup>13</sup> Similarly, key international treaties and agreements on civil, political, social, and economic rights make clear that their protections must apply regardless of race/ethnicity.<sup>14</sup>

### THE PERSISTENCE OF RACIAL DISCRIMINATION IN PRACTICE

Seventy years since the UDHR’s adoption, the world has achieved substantial progress on some measures of social and economic inclusion, but racism continues to shape health and opportunity in nearly every society. Surveys reveal the persistence of discrimination and bias: in the United States, for example, 84% of black adults report that black people are treated less fairly by the police than white people, a perception shared by 50% of white respondents.<sup>15</sup> In a nationally representative survey in Brazil, 37% of self-identified black respondents reported experiencing racial discrimination, compared to 6.7% of white respondents.<sup>16</sup> In Japan, a 2017 survey of 18,500 foreign-born residents found that nearly 30% frequently or occasionally heard racial insults directed toward them.<sup>17</sup>

Individual-level experiences of racial discrimination have been linked with increased risk of anxiety and depression, higher blood pressure, and lower overall ratings of health and well-being.<sup>18</sup> Meanwhile, population-level discrimination on the basis of race/ethnicity, including discrimination embedded in the law, has contributed to marked disparities in access to education,<sup>19</sup> health,<sup>20</sup> income<sup>21</sup> and employment,<sup>22</sup> and wealth.<sup>23</sup> Spanning 18 countries from 2005 to 2016, a review of research on racial discrimination in hiring found that in 34 of 37 studies, discrimination had a negative effect on the callback rates of racial and ethnic minorities.<sup>24</sup>

Finally, more blatant racism has reemerged in the context of recent political campaigns and the rhetoric of elected leaders, especially as race/ethnicity intersects with migration status. While experiences of racism and even definitions of race/ethnicity vary across regional and historical contexts, the impacts of racial/ethnic discrimination are global.<sup>25</sup>

In addition to the human rights necessity of guaranteeing equal rights and opportunities regardless of race/ethnicity, a growing body of evidence demonstrates why doing so is core to creating sustainable and thriving societies. More diverse groups, across a range of characteristics including race/ethnicity, take more information into account when making decisions.<sup>26</sup> This can lead to more effective problem-solving<sup>27</sup> as well as greater creativity<sup>28</sup> and cooperation.<sup>29</sup> The benefits of

diversity for decision-making may also help explain why companies with more diverse governance structures tend to perform better; a 2017 study found that those with the most racially and ethnically diverse executive teams were 33% more likely to outperform their peers on profitability.<sup>30</sup> These economic benefits extend across low- and high-income countries alike. In a 2018 study spanning 492 firms across 23 countries in sub-Saharan Africa, researchers found that ethnic and linguistic diversity had a strong positive effect on revenue and productivity.<sup>31</sup> Similarly, a study of the executive boards of 127 large companies in the United States found that those with higher numbers of women and racial/ethnic minorities were associated with better financial performance.<sup>32</sup>

The benefits of diversity and integration also extend to improved individual outcomes. College students who have more interactions with peers of other racial backgrounds, whether as roommates or classmates, demonstrate improved leadership skills, higher intellectual engagement,<sup>33</sup> greater self-confidence and cognitive development,<sup>34</sup> and increases in civic attitudes, such as the belief that individuals can make a difference in solving community problems.<sup>35</sup>

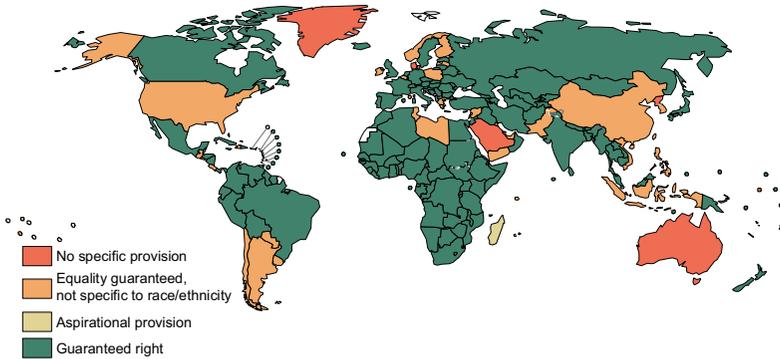
In short, while ensuring equal rights and opportunities regardless of race/ethnicity is of profound importance for historically marginalized groups, the benefits ultimately extend to everyone. Advancing racial equality is therefore both a human rights imperative and a prerequisite for countries and institutions to realize their full potential.

## CURRENT CONSTITUTIONAL PROTECTIONS

National constitutions hold power not only as instruments for protecting and enforcing equal rights, but also as mechanisms for shaping norms and communicating values on behalf of the state. To ensure that they fully recognize every person's human rights and provide the foundation for responsive governance, constitutions should explicitly include unequivocal protections for the full equality and inclusion of all racial and ethnic groups. But how many do so—and how can these provisions be further strengthened?

### *Equal Rights on the Basis of Race and Ethnicity*

As of 2017, 76% of countries explicitly protect against discrimination on the basis of race/ethnicity in their constitutions (see Map 1). For example, the Constitution of Colombia provides that “All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of . . . race.”<sup>36</sup> Likewise, Andorra's constitution states that “1. All persons are equal before the law. No one may be discriminated against on grounds of . . . race . . . 2. Public authorities shall create the conditions such that the equality and the liberty of the individuals may be real and effective.”<sup>37</sup>



MAP 1. Does the constitution explicitly guarantee equality or nondiscrimination across race/ethnicity?

Another 20% of countries protect against discrimination generally, without explicitly mentioning race/ethnicity. Paraguay's constitution, for instance, provides that "All residents of the Republic are equal as far as dignity and rights are concerned. No discrimination is permitted. The State will remove all obstacles and prevent those factors that support or promote discrimination."<sup>38</sup> An additional two countries use aspirational language. For example, Madagascar's constitution commits to "privileging a framework of life allowing for living together without distinction of region, of origin, of ethnicity, of religion, of political opinion, or of gender."<sup>39</sup>

*Hungary: Using Constitutional Protections against Racial/Ethnic Discrimination to Challenge Separate (and Unequal) Education*

At the Ferenc Pethe School in Tiszavasvari, a small town in northeast Hungary, 250 of 531 students were Roma, Europe's largest ethnic minority.<sup>40</sup> All but five of the Roma students were assigned to Roma-only classes or classes for students with disabilities. These classes were held in a separate, auxiliary building that was in disrepair, and for over a decade, the vast majority of Roma students had not been allowed to access the cafeteria or gymnasium in the main building.<sup>41</sup> The school kept records for the Roma-only classes marked with a "C" for "Cigany," the Hungarian word for "Gypsy"—long considered a derogatory term for the Roma. According to a Hungarian newspaper, the separate and decidedly unequal facilities had been established at the request of non-Roma parents.<sup>42</sup>

The school also held separate graduation ceremonies for each group. In 1997, after media coverage of the separate ceremonies got the public's attention, 14 Roma students, together with the Foundation for Romani Civil Rights, brought a lawsuit alleging violations of their rights to equality and education,<sup>43</sup> which eventually reached the Supreme Court. In 2002, the Court ruled that the school's

practice of segregation violated the constitution's protections against discrimination, as well as the Civil Code, the public education law, and the Law on Rights of National and Ethnic Minorities.<sup>44</sup> The constitution in place at the time prohibited discrimination "on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."<sup>45</sup>

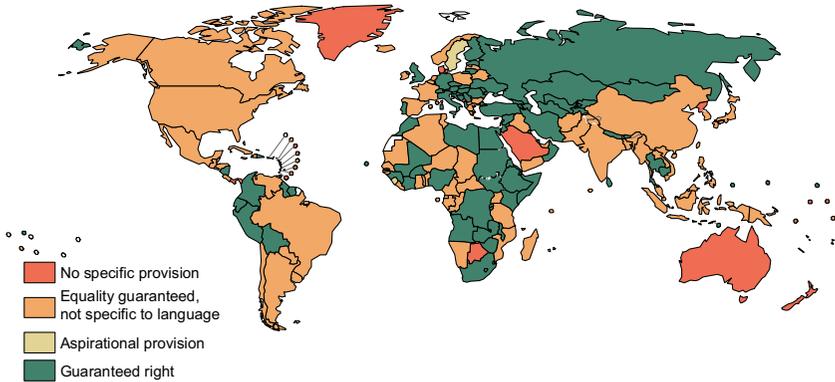
In 2002, the government adopted a National Integration Program, which pledged to desegregate all schools by the year 2008.<sup>46</sup> While challenges remain for achieving *de facto* integration in Hungary,<sup>47</sup> the Ferenc Pethe case was the first legal challenge to racial/ethnic segregation in schools in Central and Eastern Europe, and helped stimulate a wave of litigation throughout the region.<sup>48</sup> Legal action at the national level has also inspired stronger regional rulings and commitments.<sup>49</sup>

### *France: Why Addressing Racism Requires Acknowledging Race*

Protections of equal rights have made a difference in addressing racial discrimination in many areas of public life. For example, France's Constitutional Council ruled in 2017 that police cannot stop someone for questioning or ask them to show their immigration documents simply because they do not look "French."<sup>50</sup> The case was targeting a widespread problem: according to a 2009 report analyzing 500 police stops in Paris, "blacks were between 3.3 and 11.5 times more likely than whites to be stopped; while Arabs were stopped between 1.8 and 14.8 more times than whites."<sup>51</sup> While the Constitutional Council stopped short of invalidating the law that gave police wide latitude to conduct stops, it cited the principle of equality before the law in cautioning against discriminatory implementation.<sup>52</sup>

Interestingly, though, the Constitutional Council relied on the broad guarantee of equality before the law found in the 1789 Declaration of the Rights of Man and the Citizen, rather than the guarantee that explicitly protects equal rights regardless of race in Article 1 of France's constitution. The constitution's preamble establishes that the declaration's principles have constitutional status. This example thus illustrates how even general guarantees of equality can provide an important foundation for protecting against racial discrimination.

However, using these broad guarantees to protect against racial discrimination may become much harder if "race" itself is no longer legally recognized—a shift increasingly embraced by French policymakers. In 2018, the National Assembly voted to remove the word "race" from the constitution's equal rights guarantee. The stated intent of the proposed amendment is to move away from treating race as a scientific fact, rather than a social and legal construct. Yet critics of the proposal argue that erasing "race" will not reduce racism, and in fact will eliminate one of the most important tools to fight it. In the words of one opponent, "Race may not exist, but racism still does, and it kills."<sup>53</sup>



MAP 2. Does the constitution explicitly guarantee equality or nondiscrimination across language?

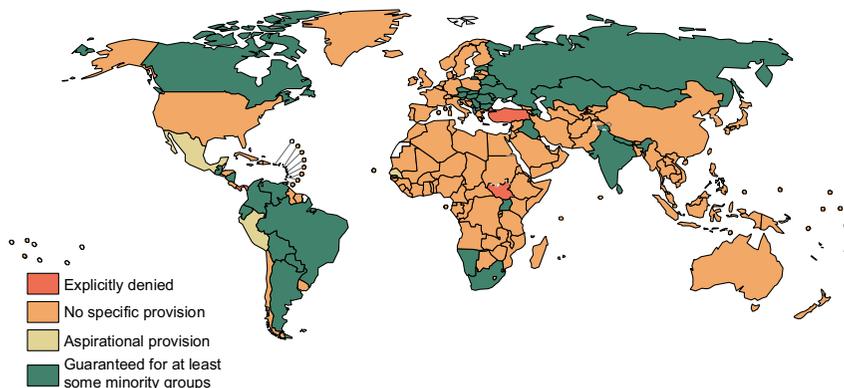
More concretely, a potential consequence of the amendment is that rulings broadly prohibiting “discriminatory” treatment, such as the 2017 decision on police searches, might not clearly extend to discrimination on the basis of race/ethnicity, since such discrimination will no longer be constitutionally recognized. In other words, while broad guarantees of equality before the law are important, their impact will be limited if governments adopt a “colorblind” approach and refuse to acknowledge how perceived race/ethnicity can lead to unequal treatment. This possibility is illustrated by a 2007 U.S. Supreme Court decision that used the idea of a “colorblind Constitution” to dismantle a voluntary public school desegregation program, reasoning that its mere consideration of race was unconstitutional.<sup>54</sup> In the years since, the decision has chilled efforts to desegregate schools throughout the country.<sup>55</sup>

### *Equal Rights on the Basis of Language*

In addition to race/ethnicity, some constitutions address equal rights on the basis of language. Discrimination on the basis of language often acts as a proxy for discrimination on the basis of race/ethnicity, making explicit protections in this area important for a comprehensive commitment to equality.

In total, 44% of constitutions explicitly protect against language discrimination, while an additional two countries include aspirational provisions (Map 2).

In addition, 19% of countries guarantee students who are linguistic minorities the right to learn in their own language, while three countries have aspirational provisions (Map 3). For example, Ukraine’s constitution establishes that “Citizens who belong to national minorities are guaranteed in accordance with the law the right to receive instruction in their native language, or to study their native



MAP 3. Does the constitution explicitly provide for the right to education in their own language for linguistic minorities?

language in state and communal educational establishment and through national cultural societies.”<sup>56</sup> However, another three countries have restrictions on the provision of education in foreign languages. Panama’s constitution, for example, provides that “Education shall be imparted in the official language. Only in specially qualified cases of public interest can an educational establishment be permitted by law to teach in a foreign language.”<sup>57</sup>

#### *South Africa: Dismantling Language Discrimination, a Relic of Apartheid*

South Africa’s constitution establishes 11 national languages, including nine indigenous languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu, the most commonly spoken language at home.<sup>58</sup> Afrikaans derived from the language of the Dutch settlers who arrived in the 1600s, and although many black South Africans now speak Afrikaans, among other languages, it remains the primary language of the country’s white Afrikaner minority. Afrikaans is also often associated with racial oppression due to an apartheid-era requirement that black students learn in Afrikaans, which spurred the Soweto student uprising in 1976—an event that catalyzed broader resistance to the apartheid regime.<sup>59</sup> Meanwhile, English, initially the language of the British colonizers, became the main language of the post-apartheid government, making it one of the country’s most widely spoken languages.<sup>60</sup>

In 2007, South Africa’s Mpumalanga Department of Education determined that a public school’s Afrikaans-only policy violated English-speaking students’ right to an education and perpetuated apartheid-era inequalities, and ordered the school to begin providing instruction in both languages. Because of its Afrikaans-only policy, which had been in place for 93 years, the school maintained a remarkably

low student-to-teacher ratio compared to other local schools, even as neighboring English-language schools were so overcapacity that some students were being taught in old laundry facilities rather than classrooms.<sup>61</sup>

After the school challenged the order, the case eventually reached the Constitutional Court. In 2007, the Court found that the Department of Education could not force the school to make the change, given the authority of individual schools to determine their languages of instruction under the Schools Act, but also ordered the school's governing body to reconsider its language policy in light of constitutional mandates, including the right to education and the prohibition of discrimination on the basis of language, race, and social origin.<sup>62</sup> In addition, Section 29(2) of the South African Constitution provides for education in the language of one's choice where feasible taking into account "(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices."<sup>63</sup> The school was required to report back to the Court within 90 days, by which point it had changed its policy to begin instruction in both languages.

*Mexico: Addressing the Impact of Language Discrimination on Indigenous Peoples*

A recent court case in Mexico illustrates how discrimination on the basis of language can also intersect with discrimination on the basis of indigenous status. In a range of countries, particularly in Latin America, constitutions explicitly protect the rights of indigenous groups—often focusing on the right to be consulted on development projects and other initiatives that will affect indigenous communities and lands, as is consistent with international agreements.<sup>64</sup> Some of these constitutions also establish individual or collective protections from discrimination based on indigenous group membership. For example, Ecuador's constitution provides that "Indigenous communes, communities, peoples and nations are recognized and guaranteed . . . the following collective rights: . . . (2) To not be the target of racism or any form of discrimination based on their origin or ethnic or cultural identity."<sup>65</sup>

The Mexico case focused on a 2014 telecommunications law that required all radio and television broadcasts to be in Spanish, with the exception of broadcasts produced under "social licenses" specifically granted to indigenous groups. The plaintiff, Mardonio Carballo, was a poet and journalist who worked in both Spanish and náhuatl, an indigenous language.<sup>66</sup> Deeming the law a "totally discriminatory" barrier to his livelihood, Carballo initiated a constitutional challenge that reached the Supreme Court the following year.<sup>67</sup>

In its decision, the Supreme Court cited Mexico's constitutional provisions on indigenous groups, which include commitments to "promote equal opportunities for indigenous people and to eliminate discriminatory practices" and protect the rights of indigenous peoples to "preserve and enrich their languages" and "acquire, operate and manage media."<sup>68</sup> In addition, the Court cited Articles 26 and 27 of the

International Covenant on Civil and Political Rights (ICCPR). Article 26 prohibits discrimination on any grounds, including language, while Article 27 protects the rights of ethnic and linguistic minorities to use their own language. Under a 2011 amendment to the Mexican constitution, these provisions are directly applicable in court.<sup>69</sup> After taking all these national and international laws into account, the Court declared the law unconstitutional.<sup>70</sup>

Because Mexico has a civil law system and Carballo's challenge was filed as an *amparo*, or individual action, the Court's decision was initially applicable only to him; it did not change the law for others. However, a few months after the decision, the challenged law was amended to allow for broadcasts in any national language. Based on the list of national languages established by the General Law for Linguistic Rights of Indigenous Peoples in 2003, this meant that journalists, artists, and others could freely use both Spanish and indigenous languages.

### *Expansion of Equal Rights over Time*

Importantly, protections of equal rights on the basis of race, ethnicity, and language are all on the rise. While fewer than half of constitutions adopted before 1970 include race/ethnicity-specific guarantees, 89% of those adopted between 2000 and 2009 and 79% of those adopted between 2010 and 2017 do so (see Figure 1).

Likewise, while just 20% of constitutions adopted before 1970 prohibit discrimination on the basis of language, 75% of those adopted between 2010 and 2017 include these guarantees (see Figure 2).

Still, for the quarter of countries that have yet to enact a race/ethnicity-specific equality guarantee, the widespread persistence of racial discrimination underscores the urgency of doing so. Further, to address discrimination and exclusion in all its forms, countries may need to take more targeted approaches in key areas, as discussed in the following section.

## BEYOND DIRECT DISCRIMINATION: ADDRESSING SPECIFIC CHALLENGES

### *Addressing Segregation*

While the increase in race/ethnicity-specific constitutional provisions is encouraging, even with broad nondiscrimination provisions, racial segregation may persist. Segregation imposed by law has a long global history, and intensified during colonialism, when colonial officials would often reserve certain parts of cities in Asia and Africa for Europeans. South Africa was far from alone in the segregation of populations. An 1811 map of Madras, India, reveals a government-segregated "Black town" and "White town."<sup>71</sup> In early twentieth-century West Africa, colonial officials established separate residential areas for Europeans and Africans, arguing

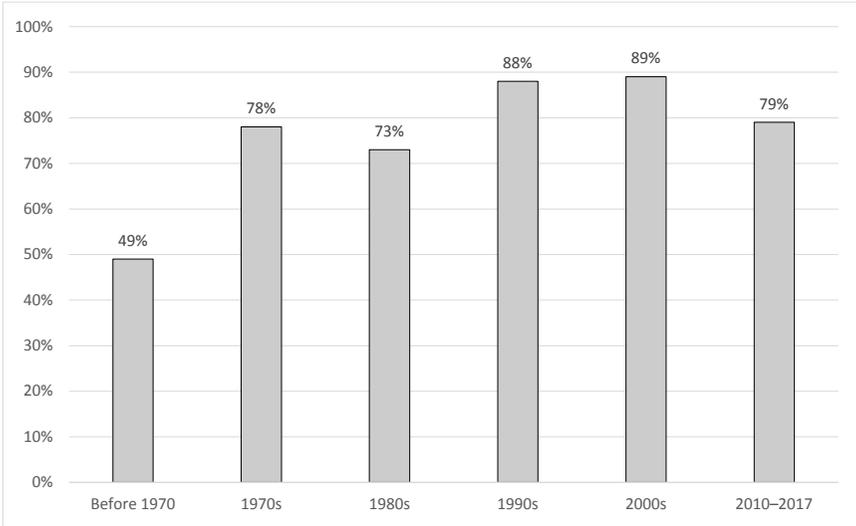


FIGURE 1. Explicit constitutional guarantee of equality or nondiscrimination across race/ethnicity by year of constitutional adoption

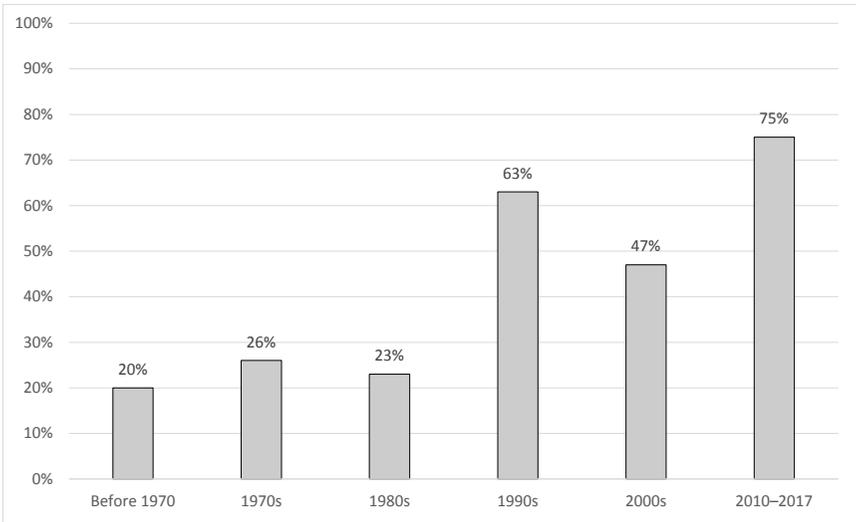


FIGURE 2. Explicit constitutional guarantee of equality or nondiscrimination across language by year of constitutional adoption

that segregation was necessary for preventing the Europeans' exposure to malaria and the plague.<sup>72</sup>

Devastating segregation persists across countries, as illustrated by “spatial segregation indices.”<sup>73</sup> These indices, which usually range from zero (indicating a particular group's complete integration into the population at large) to one (indicating complete segregation), have found extremely high levels of segregation—0.75 and above—in multiple African countries,<sup>74</sup> as well as in major urban areas in the United Kingdom.<sup>75</sup> In the United States, African Americans remain the most segregated racial group, though even higher levels of segregation persist among South Asian populations in cities like London and Birmingham.<sup>76</sup>

Segregation often perpetuates racial disparities and discriminatory attitudes. In Europe, ethnic groups segregated into poorer neighborhoods are more likely to be unemployed.<sup>77</sup> A 2016 study of 16 African countries found that ethnic segregation was clearly correlated with mistrust among ethnic groups.<sup>78</sup> In the United States, residential segregation has been identified as a “fundamental cause” of racial health disparities, and a primary cause of disparities in socioeconomic status and education.<sup>79</sup>

Meanwhile, a growing body of evidence finds that school desegregation both improves outcomes for students who are members of disadvantaged racial or ethnic groups and decreases societal racism.<sup>80</sup> This may be explained by research showing that increased contact with other racial groups reduces prejudice.<sup>81</sup> Likewise, living in close proximity to families from other racial, ethnic, or cultural backgrounds has been found to reduce stereotyping.<sup>82</sup>

#### *United States: The Promise—and Pitfalls—of Brown v. Board of Education*

Constitutions have been demonstrated tools for dismantling segregation. In 1954, the U.S. Supreme Court famously ruled in *Brown v. Board of Education* that “separate but equal” racially segregated schools violated the Fourteenth Amendment, which broadly guarantees “equal protection of the laws.” In the decades since, *Brown* has become perhaps the most celebrated decision of the U.S. Supreme Court, garnering numerous citations even in foreign courts.<sup>83</sup>

Yet despite its tremendous symbolic value and initial impacts, *Brown's* promise has gone unfulfilled. While modest integration was achieved in the 1970s and '80s, American schools have been resegregating as court orders are lifted.<sup>84</sup> From 1988 to 2014, the percentage of “hyper-segregated schools,” in which 90% or more of students are minorities, grew from 5.7% to 18.4%.<sup>85</sup>

The barriers to integration are many, and illustrate how exclusion in one setting leads to exclusion in others. Mid-twentieth-century housing policies—including restrictive covenants that limited the neighborhoods in which black families could live, as well as banks' “redlining” practices that prevented black families from accessing loans—gave rise to the housing segregation that has persisted to this day in the United States. When black families did move into white neighborhoods,

once their numbers reached a “tipping point,” white families moved out, in a phenomenon famously dubbed “white flight” by economist Thomas Schelling.<sup>86</sup> Meanwhile, a significant portion of funding for public education has historically come from local property taxes, leading to inadequate investment in the schools that need it most (where average incomes are lower) and perpetuating racial disparities in access to quality education, given the association of race/ethnicity and class in the context of a history of discriminatory barriers.<sup>87</sup>

But the persistence of segregation also has to do with the constitution. To start, the U.S. lacks a race-specific equality provision—and it is noteworthy that numerous decisions upholding segregation predated *Brown* but were based on the exact same constitutional language. Most notoriously, in 1896, the Supreme Court ruled in *Plessy v. Ferguson* that the establishment of separate train cars for white and “colored” passengers did not amount to unconstitutional discrimination. The *Plessy* decision also pointed to the existence of segregated schools, and state courts’ approval of them, as justification for its conclusion.<sup>88</sup> Similarly, in a lesser-known case from 1924, just three decades before *Brown*, the Supreme Court ruled against a nine-year-old Chinese American student in Mississippi who had enrolled at a white school when no “colored” school was available, finding that school segregation “does not conflict with the Fourteenth Amendment.”<sup>89</sup>

For the U.S., a first clear priority is enacting a race-specific constitutional equality provision. But given the courts’ narrow interpretation of equality—and insistence that the “enforced separation of the two races” was not intended to be discriminatory<sup>90</sup>—even this may not have been enough to yield a different outcome during the eras these cases were decided. Meanwhile, in modern times, the constitution’s silence on desegregation, racial equality, and the right to education leaves advocates for equal educational rights with limited tools to correct course.

#### *Namibia, Sierra Leone, and New Zealand: Divergent Approaches to Segregation*

Several countries provide examples of more explicit constitutional language committing to the eradication of segregation and promotion of integration. For example, Namibia’s constitution provides that “The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited.”<sup>91</sup> In Sierra Leone, the constitution’s chapter on “fundamental principles” proclaims that “the State shall promote national integration and unity and discourage discrimination on the grounds of place of origin, circumstance of birth, sex, religion, status, ethnic or linguistic association or ties.”<sup>92</sup>

Globally, however, few constitutions explicitly address segregation. Further, those that do may address only a fraction of the segregation that persists in schools and workplaces. Unless constitutional provisions are clearly applicable to both public and private institutions, exceptions will undercut the intent of desegregation

efforts. Meanwhile, a few countries still explicitly allow for separate education. New Zealand's constitution, for instance, declares: "An educational establishment maintained wholly or principally for students of one sex, race, or religious belief, or for students with a particular disability, or for students in a particular age group, or the authority responsible for the control of any such establishment, does not commit a breach of section 57 [nondiscrimination in education] by refusing to admit students of a different sex, race, or religious belief, or students not having that disability or not being in that age group."<sup>93</sup> Although in a minority of cases separate education for marginalized groups has been designed to address historical disparities, establishing in the constitution that schools can exclude students on any of these grounds opens the door for widespread discrimination and puts at risk all the benefits of integration.

While "separate but equal" is now widely understood as inherently unequal—an interpretation underscored by international human rights bodies<sup>94</sup>—language that more thoroughly articulates this principle can provide a stronger foundation for reducing the salience of race/ethnicity in shaping opportunity.

#### *Addressing Indirect Discrimination*

Beyond direct discrimination and segregation, a third key area constitutions can address is indirect discrimination—policies or practices that are "race-neutral" on their face but disproportionately harm particular racial/ethnic groups.

Indirect discrimination is also known as "disparate impact" discrimination, which speaks to its focus on the outcomes of a particular policy or practice rather than its stated intention. Indirect discrimination can take several forms. In some cases, indirect discrimination intentionally targets a racial/ethnic group through a seemingly race-neutral policy. An example of this is the use of literacy tests as a requirement for voting across the Jim Crow-era American South, which did not explicitly prohibit voting on the basis of race but was clearly intended to disenfranchise black Americans who had been denied a formal education.

In other cases, criteria that have disparate impacts may be necessary to achieve an important purpose, and are generally not viewed as legally discriminatory. For example, a fire department's requirement that applicants be able to carry 100 pounds up a flight of stairs may disproportionately exclude women, but tests an ability that is essential for fulfilling a firefighter's duties.

Finally, in some cases, disparate impact may be unintentional but is also unnecessary. The use of certain tests and hiring practices that disproportionately disadvantage certain groups, but have not been shown to closely relate to the actual duties of the job they are applying for, generally fall into this category.

Protections against indirect discrimination are intended to advance more equitable outcomes, and to root out more "invisible" forms of bias that lead to disproportionate exclusion on the basis of race/ethnicity or another characteristic. Rather than just limiting the judicial analysis to whether all people are subject

to identical rules, by looking at the goal and impact of rules, protections against indirect discrimination can help advance substantive equality. Court rulings have shown that it is feasible to parse out the different types of indirect discrimination, and to distinguish between genuinely needed policies or practices that have a disparate impact and those that derive from or perpetuate bias without demonstrating their necessity. Cases from a range of countries illustrate how courts have dealt with indirect discrimination across various constitutional contexts.

*South Africa: Indirect Discrimination Is Unconstitutional*

In a 2011 case from South Africa, the plaintiffs were three women who had been badly injured in traffic accidents. Two of them had been riding in minibus taxis, and one had been a passenger in her employer's car. Their injuries were severe and interfered with their ability to work: two of the plaintiffs had been hospitalized for two months, and one underwent a foot amputation.<sup>95</sup>

South Africa had established a Road Accident Fund to provide compensation to individuals who were injured by others' negligent or illegal driving. However, the legislation establishing the fund capped compensation for victims who were injured while riding public transportation or while being transported by their employer. While other third parties could receive full compensation from the fund, those who fell into these exceptions were only eligible to receive a maximum of 25,000 rand (a little more than 2,000 USD), regardless of the extent of their injuries or the accident's impact on their livelihood.

In a challenge to the relevant section of the Road Accident Fund Act, the plaintiffs argued that the cap on reimbursement indirectly discriminated against black South Africans, who, because they were more likely to be poor, were significantly more likely than white South Africans to take public transportation. The Constitutional Court agreed, finding that because the "impugned provisions . . . overwhelmingly affect black people, they create indirect discrimination that is presumptively unfair," in violation of Section 9(3) of the Constitution.<sup>96</sup> Moreover, while the Court acknowledged that the government could legitimately limit the compensation available to accident victims, it could not "singl[e] out" one group of South Africans for a reduced benefit under a piece of social security legislation.<sup>97</sup>

*United Kingdom: Measures Have to Be Justified*

A case from the United Kingdom found against indirect discrimination in a different context. In *Essop v. Home Office*, an experienced immigration officer challenged the use of a Core Skills Assessment (CSA) exam as the basis for promotions. The CSA was a generic exam administered to all employees of the Home Office, the U.K.'s national security and immigration agency, who were seeking promotion to a certain level. In 2010, a Home Office-commissioned study of the CSA found that "black and minority ethnic" employees passed the test only 40% as often as

white employees. The report estimated that there was only a 0.1% probability that this disparity was by chance.<sup>98</sup>

The U.K. has no codified constitution, but a collection of parliamentary acts regarded as having constitutional status.<sup>99</sup> While there is some debate about precisely which acts rise to the level of constitutional law, a range of sources attribute this status to the Equality Act, a comprehensive piece of legislation that expressly prohibits indirect discrimination.<sup>100</sup>

In an important ruling, the Supreme Court found that individuals claiming indirect discrimination were not required to explain *why* an “apparently neutral provision, criterion or practice” had a disproportionate impact on a particular group; it sufficed to show that it did. At the same time, the Court noted that no finding of discrimination would result if the employer could show that the CSA was a justified condition for promotions, though the opinion suggested that a reasonable employer who became aware of a policy’s disparate impact would “try and see what can be modified to remove that impact while achieving the desired result.”<sup>101</sup> Moreover, the Court explained that the person alleging discrimination did not need to prove they personally experienced the “same disadvantage” shared by the group, though the employer would also have the opportunity to show that “the particular claimant was not put at a disadvantage by the requirement”—maybe he just didn’t study, or went to the wrong test center. Having provided this analysis, the Court granted Essop’s appeal and remanded the case to the Employment Tribunal.

#### *United States: The Constitution Prohibits Only “Intentional” Discrimination*

In the absence of a constitutional protection against indirect discrimination, courts have ruled differently on testing requirements in the United States.<sup>102</sup> In 1970, two black police officers who had applied for positions in the District of Columbia Police Department challenged the constitutionality of a written exam used throughout the civil service that was “designed to test verbal ability, vocabulary, reading and comprehension.”<sup>103</sup> The two plaintiffs argued that the test had not been shown to predict job performance as a police officer, and had the effect of disproportionately excluding black applicants: between 1968 and 1971, 57% of black applicants failed the test, compared to just 13% of whites.

The sources of bias in testing, which have been long studied, include racially and culturally biased content, methodological bias, and the psychological effect of “stereotype threats.”<sup>104</sup> As just one example, studies have found that the election of Barack Obama as the first black president of the United States had a positive effect on the test scores of black Americans, which researchers suggest is due to the reduction of stereotype threat; President Obama’s high-profile disruption of black stereotypes had a psychological effect on test-takers.<sup>105</sup> Similarly, the subject matter of standardized tests often advantages test takers with higher socioeconomic status,

measuring not just relevant knowledge but also what they have been exposed to outside the classroom.<sup>106</sup>

However, in *Washington v. Davis*, the Supreme Court ruled that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, [is not] unconstitutional solely because it has a racially disproportionate impact.”<sup>107</sup> In so doing, the Court emphasized that the racial trends in the test outcomes were irrelevant to the test’s constitutionality; the black plaintiffs “could no more successfully claim that the test denied them equal protection than could white applicants who also failed.”<sup>108</sup> As a consequence of this ruling, the Court has consistently held since 1976 that the constitution protects against racial discrimination only where the plaintiff can prove it was “intentional”—a high burden of proof that has significantly limited the potential of the Equal Protection Clause.<sup>109</sup>

The consequences of this ruling were especially apparent in the 1987 case of *McCleskey v. Kemp*, in which attorneys representing a black man on death row presented a significant body of statistical evidence showing that prosecutors were more likely to pursue capital punishment when there was a white victim and a black defendant (as in McCleskey’s case), and that juries were 4.3 times more likely to impose the death penalty when crime victims were white than when they were black.<sup>110</sup> However, the Court held that this statistical evidence was insufficient to prove intent to discriminate, and that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”<sup>111</sup> Through these rulings, the Court effectively rendered the constitution powerless to address indirect racial discrimination.

### *Lessons for Protecting against Indirect Discrimination across Contexts*

The U.K. and South Africa cases illustrate that courts have the capacity to address indirect discrimination in nuanced ways—but as the U.S. case reveals, they may be unlikely to address it at all without a foundation in the constitutional text. In the U.K., the Court emphasized that if the employer could show the test was necessary for the job, it would still be constitutionally valid. In South Africa, the Court clarified that the government was within its rights to limit compensation to accident victims; it just could not do so in a discriminatory manner. But in the U.S., the Court simply refused to acknowledge indirect discrimination *as* discrimination, without reaching the more nuanced question of whether the test at issue was an essential and effective means of achieving its stated objective.

Altogether, only 5% of countries prohibit indirect discrimination. Serbia’s constitution, for example, states: “All direct or indirect discrimination based on any grounds, particularly on race . . . shall be prohibited.”<sup>112</sup> Similarly, Zambia’s constitution defines discrimination as “directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status.”<sup>113</sup>

*Advancing Equality through Affirmative Measures*

In many parts of the world, contemporary racial inequalities are shaped by long histories of slavery, colonialism, discriminatory laws, or other systematic racial oppression. Guaranteeing equal rights regardless of race/ethnicity is a first and essential step toward creating a level playing field. Yet in many countries, this is insufficient to undo the material and expressive harms caused by centuries of state-sanctioned discrimination, particularly given the persistence of segregation and concentrated disadvantage.

To accelerate progress toward racial equality and mitigate the impact of historic injustices, some countries have enacted affirmative measures, which may permit schools, employers, and other institutions to take race/ethnicity and the impacts of past discrimination into account when making decisions about admissions, hiring, or other areas that shape representation and access to resources. While their design raises complex questions, as discussed in more detail below, affirmative measures provide one of the most promising mechanisms for accounting for cumulative disadvantage, implicit bias, and ongoing and historic discrimination.<sup>114</sup> Moreover, when well-designed and implemented, affirmative measures can advance at least three goals: restorative justice, human rights, and diversity and inclusion.

*The Case for Affirmative Measures—and Its Implications for Human Rights*

The restorative justice case for affirmative measures focuses on the responsibility of governments to enact remedies for harms done in their name. This rationale acknowledges that past injustices often have enduring consequences and that true equality will not immediately flow from the removal of formal barriers. In the words of former U.S. president Lyndon Johnson, “You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please . . . We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.”<sup>115</sup> Likewise, as observed by Dikgang Moseneke, former deputy chief justice of the Constitutional Court of South Africa: “Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.”<sup>116</sup>

Today, the impact of past racial discrimination on persisting socioeconomic inequalities remains profound, providing a powerful example of why a restorative justice approach is important for advancing equality in practice. In South Africa, 25 years since apartheid ended, black South Africans still own only 4% of the land, while white South Africans own 72%.<sup>117</sup> In Brazil, poverty rates among Afro-Brazilians are twice those of white Brazilians.<sup>118</sup> In the United States, the median black family earned \$39,490 in 2016, compared to \$65,041 for the median white family.

The wealth gap is even wider: median net worth for black families in the U.S. is \$17,600, or around 10% of the median net worth of white families (\$171,000).<sup>119</sup> The greater disparities in wealth compared to income arise because wealth gets passed down intergenerationally—and even long after slavery’s abolition, black Americans were routinely excluded from the laws and policies that helped white Americans buy homes, attend college, and build assets to pass on to their children.<sup>120</sup> And crucially, access to resources—whether it is just money to pay for a car repair or a college savings account—can shape whether someone can access opportunities and social networks, and withstand periods of unemployment or other hardship. These foundations provide a crucial complement to protections against discrimination.

Accordingly, a restorative justice framework seeks to both redress past injustices and build a foundation for the full exercise of human rights and capabilities in the present. This explains the strong commitment to affirmative steps in the ICERD: “States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”<sup>121</sup>

A second rationale for affirmative measures is that by increasing diversity in schools, workplaces, and other institutions, they benefit everyone. Indeed, representation helps to ensure a diversity of views, advance innovation, and facilitate effective decision-making that addresses the needs and experiences of all people. Diversity in the classroom has been shown to benefit all students, and workplaces report similar results.<sup>122</sup> Evidence also shows that leaders and role models matter to the aspirations of the next generation.<sup>123</sup> Well-designed affirmative measures have been effective at more rapidly changing representation in universities, workplaces, and positions of power and leadership.

### *Questions That Arise in the Design of Affirmative Measures*

Across countries, affirmative measures are undeniably controversial, and raise legitimately complex questions—some pragmatic, others more philosophical. While the issues that follow are not comprehensive, they reflect some considerations that commonly arise in discussions of affirmative measures across a wide range of settings.

*Duration:* The ultimate goal for affirmative measures is to create a society that genuinely provides for equal opportunities, both by removing material barriers and by dismantling stereotypes that fuel discrimination. Yet even if everyone agrees that past discrimination has shaped present inequalities, how can policymakers anticipate how long change will take, or establish when affirmative measures have succeeded? While affirmative measures are generally agreed to be temporary rather than permanent fixes for inequality, deciding upon the time horizon is a recurring challenge.

*Which Groups Are Included:* Another question is how to design affirmative measures to address residual discrimination as well as ongoing bias and discrimination. Many groups have faced and continue to face different types and degrees of discrimination and bias, and identifying the appropriate remedies in the present is rarely straightforward. Further, even within these groups, not everyone has experienced the same consequences of past and ongoing discrimination that affirmative measures seek to remedy. Ensuring that affirmative measures are fair and effective requires taking these considerations into account.

*Targeting Benefits:* Similarly, there are valid reasons to believe that affirmative measures in some countries disproportionately benefit the most advantaged members of the targeted group (such as those with the highest incomes), leaving those facing the greatest marginalization behind; the intersection of socioeconomic status (SES) and race/ethnicity is a persistent subject of debate when it comes to affirmative measures.

In countries where race/ethnicity and SES are highly correlated, some have argued that affirmative measures based on SES would more effectively benefit individuals from marginalized racial/ethnic groups who are also economically disadvantaged. Moreover, this approach could also potentially meet with a lower level of discriminatory political or popular backlash. At the same time, targeting SES alone, even when strongly associated with marginalized racial/ethnic groups, will not fully address the racial/ethnic discrimination and exclusion that often occurs across social class.

*How to Address Disparities:* Countries have taken various approaches not only to *whether* but to *how* schools and employers can take race/ethnicity into account. With regard to “how,” successful approaches include focusing on ensuring a richly diverse applicant pool; valuing diversity, all else being equal; and explicitly recognizing the value of a diversity of experiences and perspectives at each step of the selection process.

While perhaps no existing national policy is without its shortcomings, a range of countries offer insights into how to craft affirmative policies in nuanced and effective ways. Sample cases illustrate how considerations about remedies, evaluation criteria, and time horizons have played out in the courts in countries that have taken different constitutional approaches and prioritized different goals.

#### *South Africa: Targeted and Time-Bound Action to Address Economic Inequalities*

In South Africa, the post-apartheid government has focused over the past two decades on increasing the representation of black South Africans who were long excluded from educational opportunities, access to resources, and positions of power in government and the economy. These efforts have had tangible impacts,

although South Africa's commitment to remedying long-standing injustices and inequalities within a short time frame has also presented challenges and generated controversy.<sup>124</sup> Yet even as debates about the most effective ways to accelerate progress toward equity continue to unfold, South Africa has demonstrated the feasibility of addressing some of the economic impacts of past discrimination through restitution, as illustrated by a 2004 case.

In *Minister of Finance v. Van Heerden*, the Constitutional Court addressed whether a new pension fund that temporarily provided for higher state contributions to members of Parliament first elected in 1994, relative to those who had been members since the apartheid era, violated the constitution's equality provision.<sup>125</sup> The new pension was established as a restitutionary measure to account for economic inequality created by apartheid. Between 1994 and 1999, new members of Parliament would receive pension contributions equaling 17% (for those under age 49) or 20% (for those 49 and over) of their annual salary, while those who had been members prior to 1994 would receive only 10%. After that period, everyone would receive 17%. The group temporarily receiving lower pension contributions under the new scheme included 105 white members (including the plaintiff), two black members, 11 Indian members, and 28 "colored" members (the South African term for mixed-race people).

In evaluating whether the differential treatment was nevertheless consistent with equal rights, the Court based its judgment on Section 9, the constitution's equality provision. Section 9(1) provides that everyone is equal before the law, while 9(2) allows for "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" to "promote the achievement of equality." The Court explained that these two sections were complementary, and that in order to be valid under 9(2), an affirmative measure had to satisfy three criteria: it had to (1) "target persons or categories of persons who have been disadvantaged by unfair discrimination," (2) be designed to protect or advance those persons, and (3) promote the achievement of equality.

Addressing these requirements one by one, the Court found that the new pension satisfied the first criterion, since "an overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief." The Court also found that the higher pension contributions were designed to benefit this group, and that the government was not required to show that there was no less onerous way to accomplish their objective (in other words, the government did not have to prove that the 10% threshold for the apartheid-era members of Parliament was the maximum they could afford while providing the 17% and 20% benefits to the new members). Finally, the Court found that the new pension scheme was a reasonable and time-bound effort to "distribute pension benefits on an equitable basis with

the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians.”

The powerful judgment, written by then-Deputy Chief Justice Moseneke, explained how affirmative measures were not only constitutional but also critical to achieving the constitution’s transformative aims:

[O]ur Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework . . . [O]ur constitutional understanding of equality includes . . . “remedial or restitutionary equality.” Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not “reverse discrimination” or “positive discrimination” as argued by the claimant in this case. They are integral to the reach of our equality protection.<sup>126</sup>

In addition to applying a clear restorative justice frame, by providing a discrete and time-bound remedy, the ruling made clear its goal was equality. However, as the next cases will underscore, when it comes to reducing barriers to employment and education, rather than more equitably compensating those already in leadership positions, designing affirmative measures is rarely as straightforward.

#### *United States: Advancing Diversity through Holistic Evaluations*

In the United States, many universities have enacted policies that emphasize the holistic evaluation of applicants’ experiences, skills, and qualifications and take into account the value of a diverse student body. While the constitution’s lack of clear language permitting affirmative measures has left these programs vulnerable (as will be detailed later), the Supreme Court has historically found these policies to be constitutional. They offer one approach to diversifying student bodies.

In *Grutter v. Bollinger*, the Supreme Court affirmed the constitutionality of an admissions policy at the University of Michigan Law School that considered race/ethnicity as “one factor among many” in its process for selecting among the top candidates in its applicant pool. The law school had implemented the policy in 1992 to ensure that the student body included a “critical mass” of underrepresented minority students, in an effort to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”<sup>127</sup>

In a 5–4 decision in 2003, the Court found that the law school used race/ethnicity as a “plus” factor in the context of a comprehensive, individualized review, and that race/ethnicity was not the “defining feature” of any prospective student’s application.<sup>128</sup> Second, although achieving a “critical mass” of underrepresented students required “some attention to numbers,” Justice O’Connor acknowledged that the proportion of minority applicants enrolled each year varied significantly, indicating that the school’s policy was not equivalent to a quota.<sup>129</sup>

The *Grutter* decision was a landmark for affirmative measures, and Michigan Law School's holistic approach became a model for other universities across the country seeking to ensure diverse student bodies without triggering constitutional claims. Nevertheless, without constitutional text permitting affirmative measures, the decision rested on somewhat shaky ground, and the wave of affirmative action challenges since the ruling indicates that the debate is far from over.<sup>130</sup>

In addition, whereas the U.S. Supreme Court once considered equal rights and remedying past discrimination to be the core justifications for efforts to integrate schools at all levels, more recently, the Court has generally viewed the broad-based benefits of diversity as the sole constitutional rationale.<sup>131</sup> In so doing, the Court has diminished the potential of the Equal Protection Clause to address historic disparities.<sup>132</sup> Moreover, cases challenging affirmative measures typically invoke the Equal Protection Clause, arguing that any policies that take race/ethnicity into account are inherently discriminatory. This trend illustrates how neglecting to specify that affirmative measures are consistent with equality can undermine a constitution's potential to advance equal rights in practice.

*Rwanda and Brazil: The Rapid Change Associated with Quotas—but Not without Risks*

The question of how rigid or flexible affirmative measures should be, whether for race/ethnicity or for other categories, is a challenge that emerges across countries. Rigid approaches like quotas may quickly change representation of marginalized groups and increase the diversity of historically exclusive institutions. Rwanda, for example, introduced a legislative quota in its 2003 constitution that reserved 30% of government seats for women, and quickly became the world's first country with a female majority in parliament, compared to a global average of only around 20%.<sup>133</sup>

However, quotas may not fundamentally change power dynamics. In some countries, for example, researchers have raised concerns that male party leaders select women to fill quota seats based on their loyalty; in others, male relatives of elected women may have undue influence on their decisions in office.<sup>134</sup> Similarly, some quotas have functionally established ceilings, rather than floors, for representation. Further, depending on prevailing attitudes in institutions where they are enacted, quotas may stigmatize beneficiaries and do not always provide opportunities to fully consider other aspects of a person's background or experience that may be relevant. Finally, while the specifics of their design vary,<sup>135</sup> quotas and other mechanical measures that make certain demographic characteristics central to decision-making may reinforce stereotypes.

A recent example comes from Brazil. Although Brazil did not enforce racial segregation in the same way as the United States or South Africa, its own legacy of slavery and legal discrimination has created deep disparities in resources and

economic opportunities. Seeking to remedy this inequality, after the Supreme Court ruled that affirmative action was constitutional in 2012, the government enacted a quota system targeting public school students who were low-income and/or identified as black, indigenous, or mixed-race.

The effort has successfully increased the representation of marginalized groups in higher education. However, its race-based allocation of a specific number of seats has also inadvertently reinforced racial classifications, in a country where citizens have historically provided as many as 136 different descriptions of their race in the census.<sup>136</sup> More broadly, quotas present the risk of reifying stereotypes about a group's characteristics, both during the process of determining who belongs to the group, and through reactions to and assumptions about those who benefit.

### *India: A Commitment to Periodic Evaluation of Progress*

Whatever approach is taken, countries benefit from building in periodic reviews of affirmative measures. In India, recognizing how the caste system's rigid hierarchy of inherited social status had excluded a large segment of the population from political representation for centuries, the independence constitution reserved legislative seats for members of designated castes and tribes, proportional to their share of the population.<sup>137</sup> According to the provision's "sunset clause," the reservation policy would apply to elections for the next ten years. However, the political reservations have been extended via constitutional amendment six times, with the most recent reform extending them through 2020.<sup>138</sup> In effect, ten-year windows have become a mechanism for periodic reevaluation of whether the quotas remain needed.

Courts from Washington to Johannesburg have debated how long affirmative measures should be in place. In *Grutter*, Justice O'Connor predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." In South Africa, the Labour Court issued two conflicting opinions about whether employers could continue to consider race and gender in their hiring decisions even after legislative quotas were met, evaluating the duration of affirmative measures not just in policy but in practice.<sup>139</sup> In a 2006 decision, the Court found that continuing to consider race and gender after quotas were filled would be "unfair"; in a 2007 ruling, it questioned whether setting aside these considerations "advances the spirit and purpose of employment equity and the notion of substantive equality."<sup>140</sup>

As these examples suggest, committing to periodically evaluating the efficacy of affirmative measures is a practice that has potential to facilitate the identification of successful approaches and the monitoring of government actions to ensure policies are working as intended. Establishing specific benchmarks and the evidence of impact may provide a valuable strategy for accelerating progress and identifying persisting barriers.



MAP 4. Does the constitution explicitly allow for affirmative measures to advance equal opportunities across race/ethnicity?

Constitutions can provide frameworks for affirmative measures by including language that allows countries to take steps designed to both address past inequality and advance future equality without violating their guarantee of equal treatment under the law. While a range of countries have adopted affirmative measures without clear support in the constitutional text, these policies are subject to persistent constitutional challenges and political vulnerability.

In total, 17% of countries permit affirmative measures on the basis of race/ethnicity (Map 4), and 5% allow for affirmative measures to promote linguistic equality.

## CONCLUSION

As a modern ideal, democracy rests on the premise of equal voice and representation in governance. A true democracy is a system in which human rights are universally respected, all people have an equal opportunity to participate fully, and elected leaders are accountable to all of their constituents.

The history of democracies, however, is one of exclusion, with broad classes of people barred from full participation or citizenship on the basis of race/ethnicity, gender, socioeconomic status, and other characteristics. In ancient Greece, often hailed as the world's first democracy, only free men could vote; women, slaves, and foreigners, who were not considered citizens, were denied the franchise. In the United States, the 1789 constitution defined African slaves as less than human through the Three-Fifths Compromise, while permitting states to restrict voting rights to white, male property owners.<sup>141</sup> In France, the Declaration of the Rights of Man and of the Citizen, a precursor to the constitution that proclaimed “liberté, égalité, fraternité,” banned slavery in France—but did not explicitly extend its commitments to France’s colonies, laying the groundwork for the Haitian revolution.<sup>142</sup>

And throughout Latin America, during the nineteenth-century independence movements, women and slaves were excluded from political citizenship.<sup>143</sup>

Since the mid-twentieth century, the world has made remarkable progress on addressing racial discrimination through constitutions and courts. Constitutional reforms catalyzed progress on racial justice in many nations, and often served as a point of transition for countries seeking to inaugurate a new era of civil rights. In many of these, including South Africa, Brazil, and Colombia, inclusive drafting processes that involved historically marginalized racial and ethnic groups were critical to establishing and leveraging new guarantees of racial equality to have broader impacts.<sup>144</sup> While transformative constitutional protections were also introduced in landmark court rulings, these were more vulnerable to regress.

Still, nearly a quarter of constitutions include no explicit protections against discrimination on the basis of race/ethnicity. Many more are silent on indirect discrimination, which can shape racial disparities in outcomes even in the absence of conscious discriminatory intent. Fewer than one in five explicitly allow the government to take affirmative steps to advance equality, while only a handful of constitutions specifically address segregation, despite growing research evidence that living, learning, and working alongside members of other racial or ethnic groups helps reduce bias.<sup>145</sup> Given the overwhelming evidence that racism continues to harm individuals, families, and societies all over the world, it is clear that more concerted efforts are needed.

Yet although discrimination persists and even the most celebrated rulings face implementation challenges, it is important to note that norm shifts related to racial/ethnic equality have happened, both at the global level and in individual countries. As in other areas, cases and constitutional reforms sometimes change before norms, rather than after. Even when popular opinion narrowly supports a court finding, the constitutional case and changes it leads to may contribute to further reductions in bias.

Over the past few years, we have witnessed the troubling resurgence of more overt racism across countries, as well as the demonstrated vulnerability of democracies. Against this backdrop, the foundational role of constitutions in protecting rights for everyone is all the more important. In the decades to come, continuing to develop more representative schools, workplaces, and societies—and eliminating discrimination in all its forms—will be key to moving toward a world where race and ethnicity genuinely have no bearing on health, opportunity, resources, or full social, economic, and political participation.