Jurisprudence Transcending Time and Space: Affirmative Action and the Revolution of 1937

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I. Introduction

Many constitutional scholars divide the Supreme Court's role in American democracy into concrete eras between which the Court distinctly and fundamentally shifts its constitutional outlook.[1] While I wholeheartedly agree that the Rehnquist Court approaches constitutional quandaries in a much different manner than the Marshall Court, dividing the Court into isolated categories is too uncompromising an approach. By treating the Court throughout its history as simply the Marshall Court, the Taney Court, the *Lochner* Era Court, the Warren Court, etc., we miss the chance to explore jurisprudential similarities that bind the different Courts together over time.[2]

This paper will confront two of the most controversial issues the Court has faced in the 20th century: affirmative action and economic rights articulated through the Revolution of 1937. That year, in the case of *West Coast Hotel v. Parrish*,[3] the Supreme Court first sustained a minimum wage law, representing the triumph of the New Deal over the infamous *Lochner* Era. On its face, it seems that these controversies raise distinctly different kinds of issues. Affirmative action deals with civil rights and equal protection, while the minimum wage involves questions about economic rights and due process/ freedom of contract. Yet if we look past the surface of the substantive questions raised by these constitutional issues, we can see that, on a jurisprudential level, a strong likeness between the two debates exists.

This connection centers on the principle of government neutrality, which, according to Howard Gillman's definition, holds, "[G]overnment power could not be used to gain special privileges or to impose special burdens on competing groups." The state may only interfere with individual liberty to promote a valid public purpose, such as public health, safety, and morality. The neutrality principle is steeped in Jeffersonian and Jacksonian traditions as a means of reducing the influence of political factions that might take away individual rights, especially to property.[4] Government neutrality is best known as the basis for the Supreme Court's opposition to progressive economic legislation during the *Lochner* Era. For example, the Court in *Lochner v. New York* (1905)[5] reasoned that a maximum workweek law for bakers constituted a special benefit to workers at the expense of bakery owners. Since the Court found that law was not designed to promote a valid public purpose – such as protecting the health of the bakers – the law was struck down on government neutrality grounds.

The traditional definition of government neutrality is quite similar to the anti-discrimination principle. Under this theory, which is sometimes called the anti-classification or color-blindness principle, government must make decisions in an impartial (or meritocratic) manner, and irrelevant characteristics, such as race, cannot be a factor. Richard Posner writes, "The proper constitutional principle is ... no use of racial or ethnic criteria to determine the distribution of government benefits and burdens."[6] Proponents of this jurisprudence claim argue that it is the true intent of the 14th Amendment's Equal Protection Clause – the prohibition that "no person" be denied "equal protection of the laws" refers to all people, not just members of minority racial groups.[7]

The one scholar of the Court to explore the possibility of a jurisprudential connection between affirmative action and the Revolution of 1937 is Cass Sunstein, who writes, "Many of the constitutional arguments for and affirmative action thus track the arguments for and against minimum wage legislation."[8] Sunstein points out that in order for the Court to determine whether a unique government benefit has been granted or a unique burden imposed to one class over another, it must employ a baseline standard. The most frequently used baseline, such as in *Lochner*, is the status quo distribution of rights, privileges, assets, resources, etc. Government inaction allows the market – viewed as a natural and just arbiter of benefits – to function legitimately; he labels this view status quo neutrality. In fact, Sunstein contends that the term itself – affirmative action – is based on notions of status quo neutrality, because government is actively interfering in market-based activities otherwise thought to be natural and just.[9] Sunstein contends that a new version of government neutrality emerges in *West Coast Hotel*, a view that considers distributions of rights and resources as a product of law and past (oftentimes unjust) decisions; the Court's new baseline in the case was the guarantee of a basic standard of living.[10]

As an extension to Sunstein's argument, this post-*Lochner* conception of government neutrality is at the core of the anti-caste principle. Also known as the equal citizenship or anti-subordination principle, the anti-caste principle is perhaps most clearly associated with the work of Kenneth Karst. He writes, "the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant. The principle thus centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community." Karst argues that

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"formal equality" alone, by which he means the absence of racial classifications in law, is not satisfactory to ensure social justice and inclusion. Instead, government must proactively ensure that all citizens have the tools needed to pursue their conception of the good life.[11]

The purpose of this paper is to demonstrate the jurisprudential parallels between the debate over the minimum wage during the *Lochner* and New Deal Eras and the current debate over affirmative action. Specifically, this paper will demonstrate that opponents of progressive economic legislation, using the status quo conception of government neutrality, and opponents of affirmative action, using the anti-discrimination principle, are essentially making the same theoretical argument in different substantive contexts. Similarly, this paper will illustrate the congruities between the anti-caste principle as a defense of affirmative action and the conception of government neutrality developed in *West Cost Hotel*. This connection is one that has largely been ignored legal theory literature, and it deserves a much more thorough consideration.

II. Government Neutrality and Anti-Discrimination Principle

A. Government Neutrality and Economic Liberty Through the *Lochner* Era

The doctrine of government neutrality is as old as the Constitution itself. The Supreme Court first articulated the principle in the 1798 case *Calder v. Bull*. The Court ruled that a legislative change to probate court regulations did not amount to an ex post facto law, but it also stated the limits of governmental power: "[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers."[12] As mentioned above, the neutrality principle was the judicial manifestation of the philosophies of Madison, Jefferson, and Jackson. In Federalist 10, James Madison famously warned against "the violence of factions," by which he means "a number of citizens…united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[13] What both Madison and the *Calder* Court are saying is that allowing competing groups in society to use political power to redistribute resources and benefits turns government into an agent promoting favoritism rather than the public interest. The requirement that government actions serve public rather than private interests was first articulated in Aristotle's theory of politics, which was certainly influential to the Founding Fathers. For example, Aristotle wrote, "It is evident, then, that those regimes which look to the common advantage are correct regimes…while those which look only to the advantage of the rulers are errant."[14]

Similarly, Thomas Jefferson's conception of the good life centered on the virtuous yeoman farmer. To help foster that American ideal, Jefferson believed that government largely should not interfere with the workings of the economy. Jefferson wrote, "We remark with special satisfaction those [favorable circumstances] which, under the smiles of Providence, result from the skill, industry and order of our citizens managing their own affairs in their own way and for their own use…"[15] Jefferson's view of the market reflected his optimistic view of society – they are both naturally harmonious. Therefore, capable and ambitious workers and farmers should be able to achieve success on their own because of the relative equality in bargaining power of the actors in the economy. Jefferson also presupposed that the availability of land on the frontier would be an escape mechanism for Americans who occasionally fell victim to a malfunctioning market.[16]

Jefferson also viewed the potential source of socio-economic tension between "republicans" and "anti-republicans." The "republicans" consisted of yeoman farmers and laborers who aligned politically with Jefferson. On the other hand, "anti-republicans" were merchants and bankers who supported Alexander Hamilton. While the former outnumbered the latter, the "anti-republicans" possessed the power to threaten the interests of the rest of society. Jefferson viewed Hamilton's economic plan as impermissibly partisan as it utilized government power to give advantage to an elite minority.[17] Government neutrality to Jefferson was a logical weapon to protect the interests of the less powerful majority.

Andrew Jackson perhaps offered the most resolute defense of government neutrality as a means of providing equal opportunity. In his veto of legislation extending the Second Bank of the United States, Jackson stated, "[W]hen the laws undertake to add to these natural and just advantages artificial distinctions…to make the rich richer and the potent more powerful, the humble members of society…have a right to complain of the injustice of their Government."[18] Two important arguments stand out from this message. First, Jackson's conception of government neutrality is that it protects vulnerable classes from abuse by the politically powerful.[19] Second, Jackson viewed the status quo distribution of resources and benefits to be "natural and just." These two different beliefs set up a potential contradiction that lies at the heart of this paper – how can government neutrality protect the interests of the disadvantaged if any change to the status quo is an unjust disruption of a natural ordering of resources?

At the turn of the 19th century, the Court faced that very contradiction as state governments enacted progressive economic legislation to combat the social injustices of industrialization. For example, the State of New York passed a maximum workweek law for bakery workers. The challenge to that law resulted in the 1905 Supreme Court decision *Lochner v. New York*.[20] Attorneys for Joseph Lochner, a bakery owner, contended that the New York law did not serve a legitimate public purpose. Instead, the measure was "purely a labor law,"[21] meaning a law seeking to use government power to grant special benefits to a single class. Other critics of New York's position reasoned that the true intent of the law was to benefit rival bakeries, whose unionized workers already worked less than ten hours a day. Forcing all bakeries to abide by a maximum workweek law would eliminate the advantage enjoyed by non-unionized bakeries.[22]

Intriguingly, the first line of reasoning in Lochner's brief addressed equal protection, not freedom of contract. Lochner's attorneys argued that the New York law exempted certain classes of bakers – such as restaurant bakers and ordinary housewives – from its provisions.[23] Even the freedom of contract arguments in the brief for Lochner have strong

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overtones of equal protection claims. Lochner's attorneys included a lengthy Brandeis-like[24] appendix with statistical evidence demonstrating that baking was not an unhealthy occupation.[25] Thus, according to Lochner, the New York law exceeded the reach of the police power, on the first hand, because it did not serve a public purpose. Second, the law singled out bakers for special treatment while not imposing similar restrictions on more dangerous professions.[26]

In the end, Lochner's arguments prevailed, as the Court ruled five to four to strike down the labor law. Justice Rufus Peckham, the author of the majority opinion, utilized government neutrality claims in his reasoning, but he employed a more extreme form of the neutrality principle. A layperson, reading the opinion in *Lochner* without prior knowledge of the case, would likely assume that a bakery worker, not an owner, brought the challenge to the workweek law. For example, Justice Peckham noted that many bakers might desire to earn extra money through working longer hours, an opportunity denied to them under the labor statute.[27] Notice the way that the Court posed the question of the case: "Is this [measure]…an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate…?"[28]

It would have been easier for the Court to draw on the line of argument advocated by Joseph Lochner in his briefs. The Court did declare that baking was not a dangerous livelihood compared to other occupations not subject to state regulation. At this point, the Court could have ruled that arbitrary regulation of bakeries violated the neutrality principle by advantaging workers at the expense of employers. This would make sense, given that it was a bakery owner challenging the law. However, the Court instead chose to put the liberty of bakery workers at the center of the debate.

Underlying the paradigm that the Court chose in *Lochner* is a crucial assumption. As we shall see below, opponents of affirmative action offer a similar assessment of minorities. Justice Peckham writes:

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.[29]

If the Court is correct that limiting the length of the workweek abridged the liberty of workers, it must be because workers already possess that liberty to choose terms of employment. This is a controversial assumption at best, given the massive socioeconomic changes occurring at the time. Did poor bakery workers in 1905 have the bargaining power to negotiate favorable terms of employment? *Lochner*'s opponents certainly did not believe so, and I will address that point of view in the next section.

Government neutrality developed out of socioeconomic conditions that existed at the time of the nation's founding, a stark contrast from the beginning of the 20th century. Whether the Court recognized that the American economy had changed such that this assumption was no longer valid is unclear, although legal progressives certainly were only beginning to advance that case.[30] Given the Court's relative political independence from the other branches of government and its relative isolation from prevailing notions of public opinion, it is conceivable that the Fuller Court did not fully appreciate the socioeconomic landscape of the year 1905.

The outgrowth of the assumption of equal bargaining power between economic classes is a reliance on status quo neutrality. Assume that workers are in a position such that they do not need special benefits from government. Under this situation, if government does grant those benefits, it is violating the neutrality principle. To view whether government is acting neutrally or not depends on the baseline standard of comparison. According to Cass Sunstein, "[The *Lochner*] Court took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality."[31] In the sphere of economic rights, using the status quo as the baseline seems logical if one views previous market outcomes as just. This faith in the legitimacy of the free market is not simply a view invented by uncaring conservative judges on the Supreme Court, as some critics have contended.[32] Rather, faith in the free market was a belief passed down from the Founding Fathers, especially Jefferson.[33]

B. Government Neutrality as the Foundation of the Anti-Discrimination Principle

Although the *Lochner* Era conception of government neutrality and the anti-discrimination principle are applied in fundamentally different areas of constitutional law, the inner logic of both principles are entirely congruous. Redistribution of economic resources was considered partisanship because it altered a status quo that was assumed to be just. Likewise, the anti-discrimination principle prohibits discrimination on racial grounds, regardless of the intent or the target of the classification. This doctrine evolved after *Brown v. Board of Education* (1954)[34] and some of the subsequent desegregation cases and rests on the premise that the destruction of legal barriers was the necessary (and only permissible) condition for promoting equal opportunity. Just as the adherents to government neutrality in the *Lochner* Era had faith that the market would produce just outcomes without state interference, the believers of the anti-discrimination principle have a similar faith in desegregation. We can see evidence of this line of reasoning in the Court's jurisprudence on affirmative action as well as legal commentary on the issue. For the sake of brevity, I will limit the discussion of affirmative action to race-based remedies.

One of the early affirmative action cases to reach the Supreme Court, *Regents of the University of California v. Bakke* (1978),[35] involved a challenge to a quota system employed by the University of California at Davis. The admissions policy reserved 16 of 100 places in each year's class to certain minority races. The Court, in a fairly convoluted decision, ruled that a quota system violated the 14th Amendment Equal Protection Clause and Title VI of the Civil Rights Act of 1964. However, the Court left the door open to admissions policies that used race as one of many factors to promote a diverse educational environment, justified on free speech grounds. Invoking "educational diversity" as a form of academic freedom

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protected by the 1st Amendment seems a bizarre way to decide a question that more plainly fits under the umbrella of equal protection. Since educational diversity cannot be applied to other race-based affirmative action programs, such as workplace remedies, the Court's position on affirmative action remained somewhat ambiguous for another decade.

Justice Lewis Powell, writing the opinion of the Court, construed the Equal Protection Clause in a manner consistent with the anti-discrimination principle. He declared, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[36] Powell built his contention from previous racial discrimination cases. In its brief,[37] UC Davis had argued that the Court should only concern itself with discrimination targeted at racial minorities, as declared in *United States v. Carolene Products Co.* (1938).[38] Powell, citing *Skinner v. Oklahoma* (1942),[39] responded that the Equal Protection Clause prohibits any "invidious" classification, regardless of who is targeted.[40] Second, Powell noted that in the case *McDonald v. Santa Fe* (1976),[41] the Court ruled that the Civil Rights Act of 1866 protected whites against discrimination.[42] Finally, Powell applied the principle articulated in *Loving v. Virginia* (1967) that racial distinctions are "odious to a free people whose institutions are founded upon the doctrine of equality."[43]

Eleven years after *Bakke*, the Court expanded on this anti-discrimination logic in *Richmond v. Croson* (1989), a challenge to a Richmond city government plan to increase the number of contracts issued to minority-owned businesses.[44] In that case Justice Sandra Day O'Connor, writing for the Court's majority, stated that all racial classifications inherently pose a risk of stigmatic harm, thus all classifications must meet the standard of strict scrutiny. Consequently, the Court ruled that affirmative action programs in the workplace should be reserved for remedying specific instances of previous racial discrimination.[45] Justice O'Connor also reiterated the principle articulated in *Shelley v. Kraemer* (1948)[46] that the rights protected by the Fourteenth Amendment are "personal rights," not group rights.[47]

In *Shelley*, the Court held that racially restrictive housing covenants are not judicially enforceable because they violate the Equal Protection Clause in the context of a personal right to property. Even though *Shelley* took place after the Revolution of 1937, I have argued previously that the case relies strongly on *Lochner* Era conceptions of property rights.[48] Justice O'Connor's citation of this case is an indirect appeal to the traditional conception of the neutrality principle defended strongly during the *Lochner* Era. There is more than a little irony for Justice O'Connor to invoke *Shelley* and Justice Powell to cite *Loving* in *Bakke*. Both *Shelley* and *Loving* were victories for African Americans, but the legal logic of both decisions left the door open to protecting the civil rights of whites as well. Ironically, while the Court has often criticized the notion of group rights through the Equal Protection Clause as a means to achieve racial justice, the academic diversity rationale reaffirmed in *Grutter* can be seen as a group right. I do not mean that the academic diversity is a proxy for a quota, but rather that it grants universities power to be greater than the sum of its parts. Admissions offices have the power, though narrowly tailored, to recruit a student body which will best contribute to the marketplace of ideas. The Court's preference towards "personal" rights would seem to imply a preference towards admissions decisions being strictly meritocratic rewards for academic potential.

The Court clarified its stance on affirmative action in higher education in the recent University of Michigan cases, *Gratz v. Bollinger*[49] and *Grutter v. Bollinger* (2003).[50] In *Gratz*, the Court struck down an undergraduate admissions policy that automatically awarded bonus points to minority applicants. In *Grutter*, however, the Court sustained a law school admissions policy that used race as a factor through a more individualized review of applications. Chief Justice William Rehnquist, who authored the Court's opinion in *Gratz*, rearticulated two basic suppositions in accordance with the anti-discrimination principle. First, he cited *Adarand Constructors v. Pena* (1995),[51] when the Court held that any person, regardless of race had the right to challenge a discriminatory government action. Second, Rehnquist expanded on the *Bakke* logic – the admissions policy did not sufficiently meet the standards for meritocracy required by the anti-discrimination principle. Automatically awarding bonus points, he reasoned, granted preference based on race, rather than an individualized ability for a student to contribute to educational diversity.[52]

In his dissent in *Grutter*, Justice Clarence Thomas put even more emphasis on the anti-discrimination principle. He began by quoting Frederick Douglass, who said: "What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice.* The American people have always been anxious to know what they shall do with us… I have had but one answer from the beginning. Do nothing with us!"[53] This attitude of picking oneself up by one's bootstraps corresponds strongly to Justice Peckham's observation in *Lochner* that bakers are intelligent enough to bargain for employment terms.[54] Thomas also declared that supposedly benign classifications are offensive "because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[55] Justice Thomas goes as far as to say that the Court's majority sows the seed for the rebirth of racial segregation.[56]

Even before the Court issued its opinion in *Bakke*, legal scholars began to develop the anti-discrimination principle. In 1975, Alexander Bickel wrote, "[W]e are told that [affirmative action] is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others." Affirmative action, according to Bickel, is similar to segregation because it perpetuates racial divisions. Bickel criticized affirmative action programs based on quotas because they constitute zero-sum games. For every person who benefits from a quota, someone else becomes a victim of the system. Similarly, the *Lochner* Era Court viewed the progressive economic legislation as taking benefits that belonged to one person and giving them to another. Instead, Bickel implored using positive-sum game affirmative action programs, such as increased minority recruiting and training.[57] These strategies would create equality of opportunity without partisanship.

Justice Antonin Scalia, before ascending to the Bench, labeled affirmative action "the disease as cure."[58] Among his

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various criticisms, Scalia pointed out the arbitrariness of selecting groups to benefit from affirmative action. Many white subgroups, such as Italians, Jews, and the Irish, were victims of past discrimination, yet are now being called upon to make sacrifices to other minority groups. He wrote, "I owe no man anything, nor he me, because of the blood that flows in our veins." Furthermore, he claimed affirmative action often does not accomplish its purpose, which he calls "restorative justice," because many African American students who benefit from the program are already well educated and not in need of government help.[59] Scalia also contended that affirmative action would create a public perception of black students as undeserving. It seems obvious that Scalia was attempting to build off Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896), when he argued that segregation caused blacks to be viewed as an "inferior class of beings."[60]

Finally, economist Thomas Sowell advocated for the anti-discrimination principle by challenging the economic presuppositions of support for affirmative action programs. Sowell declared, "Group discrimination…can be inferred from differences in group 'representation' only insofar as the relevant characteristics…do not differ substantially from one group to another. *This is not even approximately true*."[61] For example, Sowell observed that the median age of African Americans and Hispanics (in 1980) was much below the national average. Statistics showing minorities earning smaller incomes are therefore skewed because most minorities have not been working as long. Sowell noted that income differences among different age groups were much higher than those based on race.[62] The government's definition of affirmative action beneficiaries is also unfair, according to Sowell, because it includes groups that earn average incomes both above and below the national average.[63] Underlying this argument is the notion that if government is going to grant certain groups special treatment, government must be able to empirically justify its decision. In the absence of a true need for special assistance, such preferential treatment is constitutionally illegitimate. This line of argument may explain the growing support for socio-economic affirmative action as a replacement for race-based affirmative action.

III. Government Neutrality and the Anti-Caste Principle

A. The New Deal Conception of Government Neutrality

The debate over the *Lochner* decision seems like a clash between a libertarian faith in individualism and free markets against paternalistic state interference. One would think that the philosophy of John Stuart Mill would be the foundation of the Court's decision in *Lochner*. For example, Mill wrote, "With respect to his own feelings and circumstances, the most ordinary man or woman has the means of knowledge immeasurably surpassing those that can be possessed by any one else."[64] In other words, Mill had faith in the rationality of the individual to be the best judge of his or her welfare. For society to use coercion to compel individuals to go against what they view as in their welfare is to insult and destroy individual autonomy. Applied to *Lochner*, if bakers are willing to work long hours in a bakery, the government should not stop them.

However, Mill's argument assumes that individuals possess the power to act upon the judgments of their feelings and circumstances.[65] The law at issue in *Lochner* should fall under a category of legislation Mills described as "required not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment." This principle allows government intervention because the citizens were "unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law."[66] In other words, individuals ought to be free to pursue their interests and welfare, but in some cases, strong obstacles stand in their way of actualizing their interests. In these cases, individuals are justified in appealing to governmental coercion because the force of law is stronger than their individual ability to pursue their goals. Thus, certain laws may seem paternalistic, but in truth they may really be the only way for individuals to set the conditions necessary for the exercise of their autonomy. To use a concrete example: there is a moral difference between a collective bargaining agreement between labor and management and purely monopolistic coercion.

One of the first legal scholars to adopt a position similar to this with regard to industrialization was Seymour Thompson. In an address in 1892, Thompson decried the growing power of corporations. Particularly, Thompson feared that the goal of corporations was to take care of its stockholders rather than its workers. The bifurcation of management and labor that began to occur in the Industrial Revolution changed the bargaining power between management and labor because of this new business focus. He wrote that since a corporation had only legal obligations, it therefore "destroys all sense of moral responsibility on the part of the managers."[67] Additionally, he argued technological innovations altered the labor market such that workers became expendable.[68] Consequently, corporations have both the ability and the willingness to exploit their relative bargaining power when making employment contracts with workers. Thompson observed, "What mockery to talk about the freedom of contract where only *one* of the contracting parties is free!"[69]

In his famous critique of the *Lochner* decision, Learned Hand also stressed the need for equality of bargaining power as a precondition for the traditional interpretation of government neutrality. He cited *Knoxville Iron Co. v. Harbison*,[70] a 1901 case in which the Supreme Court upheld a Tennessee law that required companies to pay workers in cash instead of scrip or coupons. Of that wage law, the Court said, "Its tendency, though slight it may be, is to place the employer and employe [sic] upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation."[71] Judge Hand then asked why the work-hours law in *Lochner* would not be sustained under a similar justification. Hand concluded:

> For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, one of whom is under the pressure of absolute want, while the other is not, is as proper a legislative function as it should neutralize the relative advantages arising from…superior physical force.[72]

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Historian William Willoughby proposed a new social ideal building off that of Mill, which he called "modern liberalism." Willoughby predicated the theory on the notion that "[f]reedom means a real liberty to chose."[73] Recognizing the massive socioeconomic changes occurring at the time, Willoughby characterized the plight of many workers as economic slavery. He took issue with the traditional interpretation of government neutrality, that non-interference in the market best protects individual freedom of contract. "On the contrary," Willoughby wrote, "it may mean the sanctioning by law of conditions which will in effect destroy any real freedom."[74]

In a statement similar to that of Mill, Willoughby contended, "Our philosophy…holds that liberty and law are correlative terms: that the first can truly exist only through, and by virtue of, the second." Without government intervention, economic forces would only perpetuate the unjust socioeconomic landscape.[75] Perhaps the most intriguing part of Willoughby's argument is that he rejects the idea his philosophy is a form of socialism. On the contrary, modern liberalism would give individuals only the opportunity by which to actualize their conception of the good life. Willoughby labels this argument "affirmative action,"[76] possibly making him the first person to use the term. The goal of modern liberalism is "the equalizing of opportunities,"[77] making it a very different approach to achieving the traditional goals of government neutrality. Franklin Delano Roosevelt used the term "affirmative action" to describe the New Deal. He said, "The word 'Deal' implied that the Government itself was going to use affirmative action to bring about its avowed objectives rather than stand by and hope that general economic laws would attain them."[78]

Eventually, the Court abandoned *Lochner* in favor of a New Deal conception of economic rights in the so-called Revolution of 1937. In the case *West Coast Hotel v. Parrish* (1937),[79] the Court upheld a minimum wage law for women. Chief Justice Charles Evans Hughes, writing for the majority, began his opinion by noting "the economic conditions which have supervened"[80] that demanded a review of the Court's past rejection of minimum wage legislation in *Adkins v. Children's Hospital*.[81] In that 1923 case, the Court struck down a minimum wage statute on Lochnerian grounds. The updated economic conditions of the country largely served as the basis for Hughes' argument; he refers to inequality in bargaining power between workers and employers on seven occasions.[82]

Hughes did not believe that the Court needed to discard government neutrality in order to sustain a minimum wage law. He did not focus on the liberty of contract aspect of neutrality, but on the deeper objective of promoting equal opportunity and the public interest. Government neutrality, according to this view, is designed to prevent arbitrary exercises of state power to the detriment of the public good.[83] Hughes wrote, "The legislature was entitled to adopt measures to reduce…the exploit[ation] of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition."[84] In light of the mistreatment of workers, Hughes concluded, "Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide."[85]

Cass Sunstein argued that the fundamental change that took place between *Lochner* and *West Coast Hotel* is a shift in baselines to which government neutrality is applied. In the traditional conception of government neutrality, the status quo distribution of assets was the appropriate baseline largely because it was assumed the free market produced just outcomes.[86] Sunstein writes, "Status quo neutrality disregards the fact that existing rights…are in an important sense a product of law."[87] Thus, if the status quo is the product of unjust past decision, status quo neutrality is indefensible.[88] The Court's recognition of unjust economic practices forced it to question the continued usage of status quo neutrality.

In *Lochner* (and *Adkins*), the Court viewed progressive economic legislation as robbing an employer to give to workers. By 1937, the Court viewed the actions of unjust corporations as stealing from the public interest for their own profit. The Court's new conception of equality viewed workers as entitled to a decent standard of living, a right that was often denied. Sunstein writes, "The Court's claim is that the failure to impose a minimum wage is not nonintervention at all but simply another form of action – a decision to rely on traditional market mechanisms, within the common law framework, as the basis for regulation."[89] In other words, perpetuating an unjust status quo through inaction was itself constitutionally equivalent to direct partisan government action creating an unjust situation.

B. Government Neutrality as the Foundation of the Anti-Caste Principle

As with the anti-discrimination principle, we can see the influence of government neutrality on the development of the anti-caste principle. The New Deal conception of the neutrality principle permitted government interference to promote economic opportunity in light of huge inequalities in bargaining power. The anti-caste principle holds the same logic with regard to racial groups. We can witness these similarities in both case law and scholarly literature.

In their dissents in *Bakke*, Justices William Brennan and Thurgood Marshall both contended that affirmative action is the latest development in the struggle to affirm the Founding Father's promise of equality in spite of the past history with slavery.[90] After enduring centuries of constitutional subjugation, Justice Marshall proclaimed, "[W]hen a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."[91] Just as progressive legal scholars employed social science evidence to bolster their case for economic legislation,[92] Justice Marshall cited statistics demonstrating the extent to which the lack of educational opportunities impacted African Americans.[93] Justice Brennan observed, "[T]he conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation…or the equally debilitating pervasive private discrimination…, and yet come to the starting line with an education equal to whites."[94]

As a result of social, economic, and political position of African Americans, Justice Brennan implored, "[W]e cannot…let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow

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citizens."[95] On the contrary, Justice Brennan outlined a number of Court precedents to demonstrate that race-conscious remedies should be the means to end the effects of segregation. He cited *North Carolina Board of Education v. Swann* (1971),[96] where the Court ruled that colorblind remedies to school segregation would "render illusory the promise of *Brown*."[97] Justice Brennan, relying on *Green v. County School Board* (1968),[98] declared that a public body that once discriminated "cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance."[99] Furthermore, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971),[100] the Court ruled race-conscious school assignment plans permissible as a means of remedying a history of segregation. But even in the absence of past discrimination, such plans were allowable to creating racial pluralism within student bodies.[101]

Justice Brennan construed the Equal Protection Clause as prohibiting only stigmatic classifications, not all racial classifications (even some invidious racial classifications are sanctioned, as in the case of *Korematsu v. United States,* 1944).[102] Invoking *Brown*, Justice Brennan noted that Allan Bakke's rejection from UC-Davis in no way approached the level of harm felt by black children due to segregation. Instead, affirmative action is the price that must be paid to compensate African Americans for "educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination."[103] Justice Marshall also cited *United Jewish Organizations v. Carey* (1977),[104] in which the Court upheld a redistricting plan that increased the voting power of racial minorities at the expense of a Jewish majority.[105] Such a plan is certainly inline with the New Deal commitment to equality of opportunity, whereas the Court in *Lochner* rejected such a zero-sum game solution as partisan.

Justice Marshall wrote a similarly strong dissent in *Croson*[106] In accordance with the New Deal conception of government neutrality, Marshall argues that current economic conditions of African Americans in Richmond is due in large part to the legacy of discrimination. While the city was almost majority black, only .67% of public construction contracts were being granted to minority-owned businesses at the time. Marshall concludes, "To the extent this enormous disparity did not itself demonstrate that discrimination had occurred, the descriptive testimony of Richmond's elected and appointed leaders drew the necessary link between the pitifully small presence of minorities in construction contracting and past exclusionary practices."[107] Nonetheless, Marshall's argument did not meet the standard set by the Court's majority of remedying specific instances of past discrimination.

Turning to the scholarly community, Cass Sunstein argues that a post-New Deal conception of government neutrality provides constitutional legitimacy to affirmative action. Sunstein argues that, similar to economic disparities at beginning of the 20th century, disparities in opportunities between blacks and whites are often unjust products of legal decisions. Under these conditions government action, like in *West Coast Hotel*, is not illegitimate favoritism, but rather a commitment to the principle of neutrality. And like Justice Marshall and Learned Hand, Sunstein believes, "Efforts to eliminate the second-class citizenship of blacks should hardly be regarded in the same way as efforts to perpetuate it."[108]

Kenneth Karst believes that the anti-caste principle (which he labels the equal citizenship principle) flows logically from the country's historical struggle with equality. According to this view, the true legacy of Jacksonianism is an aversion to the unjust accumulation of special privileges by the powerful, and it implies an affirmative duty to remedy the effects of segregation.[109] The Court in *Brown* reaffirmed this "old tradition"[110] by making black school children full members of the community. Karst zeroed in on Chief Justice Warren's claim that segregation "generates a feeling of inferiority as to their status in the community."[111] Although *Brown* dealt with educational segregation, Karst believes the Court extended this principle in several per curiam decisions striking down segregation in other areas of public life.[112]

Furthermore, Karst attempted to debunk the anti-discrimination principle: "If we allow major substantive inequalities to persist…equality of opportunity will serve mainly as a comfort to the comfortable, a slogan assuring them that they have earned their favored positions."[113] As a result of these inequalities, public perception of African Americans as inferior will only continue. The individualized system of justice embodied in the anti-discrimination principle ignores the fact that individuals often suffer harms because of their group membership.[114] In the area of affirmative action, the anti-discrimination principle makes no sense because all classifications be they merit, experience, race, gender, etc. divide people into groups. When a white student challenges an affirmative action policy, he is not claiming to suffer discrimination as an individual, but as a member of a disfavored group.[115] Thus, Karst claimed, courts should weigh the harms suffered by white students against the perpetuation of stigmatic harms to blacks.

Owen Fiss likewise took aim at the anti-discrimination principle to illustrate its deficiencies. He wrote, "The antidiscrimination principle is not compelled or even suggested by the language of the [Equal Protection] Clause."[116] Although a colorblind conception of justice may sound appealing, Fiss called it "the strangest and cruelest ironies" that the Equal Protection Clause would view preferential and exclusionary classifications in a similar manner.[117] As a result of the discriminatory intent standard mandated by the anti-discrimination principle, government can offer innocent justifications for its actions that disguise their true motive,[118] a critique distinctly similar to Justice Harlan's in *Plessy*.[119] The search for objective classifications, according to Fiss obscures the true purpose of the Equal Protection Clause: "[W]hat is ultimately at issue is the welfare of certain disadvantaged groups, not just the use of a criterion…"[120]

In order to promote social welfare, Fiss proposed a version of the anti-caste principle, which he calls the group-disadvantaging principle.[121] Fiss argued that the focus on arbitrary discrimination misses the point because it "is the species, not the genus"[122] of a deeper conception of racial injustice. A system of group rights is well founded because racial groups (but not artificial classes, such as the poor)[123] have distinct existences apart from the individual members, and those members are also interdependent. Fiss emphasized that this logic explains why the *Dred Scott* Court declared that freed blacks were not really free.[124] Since African Americans lack national political power to advocate for their interests,

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Fiss believes that the judiciary has the duty to protect their rights,[125] reasoning that sounds much like Mill's. Nonetheless, Fiss did endorse limits to the group-disadvantaging principle. For example, levying sales taxes and ensuring minimum qualifications for employees and students are permissible, even though both policies may disadvantage many African Americans.[126]

IV. Conclusion

Part of the reason why the debate over affirmative action remains unresolved is that both the anti-discrimination principle and the anti-caste principle offer compelling normative justifications. Advocates of both positions argue that they are the true heir to two of the most important opinions in Supreme Court history: Justice Harlan's dissent in *Plessy* and the Court's opinion in *Brown*. On the one hand, Justice Harlan observed, "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."[127] Yet in the very next sentence he writes, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[128] Similarly, Chief Justice Earl Warren's wrote that the 14th Amendment was intended "to remove all legal distinctions"[129] between the races. But he also based his decision on the notion that segregation "generates a feeling of inferiority as to their status in the community that may affect [black children's] hearts and minds in a way unlikely ever to be undone."[130]

The controversy over affirmative action is analogous to the Court's earlier struggle with economic rights because of the legal principles involved. Both struggles involve attempts to balance hard work and skill against deeper notions of fairness as ingredients for prosperity. Do changing social conditions require a reexamination of traditional government neutrality? If so, how far can government reach before it crosses the line into impermissible favoritism? In a larger sense, the debate on affirmative action is a modern incarnation of an age-old debate on American civic virtues.[131] The anti-discrimination principle is a strongly deontological argument that invokes the Puritan work ethic and the notion of pulling yourself up by your bootstraps. The anti-caste notion of providing a baseline from which groups can compete fairly is a more teleological argument with ties to the principle of equality of opportunity.

I do not attempt to provide a legal theory to answer these American dilemmas; instead I wanted to frame the debate in such a way as to promote a greater understanding of these important constitutional issues. When constitutional historians study a particular era of the Court, far too often they describe a jurisprudence that is the unique product of the Justices sitting on a particular Court. Since each historical period of the Court is *sui genesis*, constitutional theory becomes less relevant because the actors shaping that theory come and go over time. While the period approach to constitutional history explains many aspects of constitutional change, a strong understanding of public law should also emphasize constitutional ideals that transcend the changes in historical realities.

An emerging perspective in political science argues that the policy preferences of individual justices play a larger role in Court decisions than legal factors such as precedent.[132] The behavioralist approach may be right, but it is important to understand that constitutional principles are not merely products of politics and policy preferences. They are deeper expressions of civic ideals. Government neutrality jurisprudence, throughout time and in different substantive contexts, beautifully encapsulates American conceptions of the good life, which makes our public law a worthy scholarly endeavor.

Endnotes

[1] *See*, e.g., Bruce Ackerman, *We the People: Foundations*, 58-80 (1991) and Paul R. Dimond, "The Anti-caste Principle – Toward a Constitutional Standard for Review of Race Cases," 30 *Wayne Law Review* 1, 22-23 (1983). For a thorough review of this position, see G. Edward White, *The Constitution and the New Deal*, 13-32 (2000).

[2] Hans J. Hacker and William D. Blake, *Toward an 'Integrated' Theory of Associative Right: The Role of Government Neutrality in Civil Rights Jurisprudence* (9 January 2004) (unpublished manuscript).

[3] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[4] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, 22-45 (1993).

[5] *Lochner v. New York*, 198 U.S. 45 (1905).

[6] Richard Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," 1974 *Supreme Court Review* 1, 25 (1974).

[7] John Hasnas, "Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle," 71 *Fordham Law Review* 425, 431 (2002). Hasnas provides excellent description of the literature on both the anti-discrimination and anti-caste principles.

[8] Cass R. Sunstein, *The Partial Constitution*, 78 (1993).

[9] Sunstein 1993, 3, 78.

[10] Sunstein 1993, 6-7.

[11] Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution*, 3, 5 (1989).

[12] *Calder v. Bull*, 3 U.S. 386, 388 (1798).

[13] James Madison, *The Federalist No. 10* , 45, 46 (1961, Clinton Rossiter ed.).

[14] Aristotle, *The Politics* 95 (1984, Carnes Lord, trans.). See also Gordon S. Wood, *The Radicalism of the American Revolution*, 100-109 (1991).

[15] Thomas Jefferson, *2nd Annual Message to Congress* (1802), reprinted in 3 *The Writings of Thomas Jefferson* 340 (1904, Memorial Edition, Lipscomb and Bergh, eds.).

[16] Gillman, 25-26.

[17] Joseph J. Ellis, *America Sphinx: the Character of Thomas Jefferson*, 156-58 (1998).

[18] Andrew Jackson, "Veto Message Regarding the Bank of the United States" (1832), available at <<http://www.yale.edu/lawweb/avalon/presiden/veto/ajveto01.htm>>.

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[19] Gillman, 35-37.

[20] *Lochner v. New York*, 198 U.S. 45 (1905).

[21] Brief for Plaintiff in Error, *Lochner v. New York*, 198 U.S. 45 (1908) at 40 [hereinafter Plaintiff Brief].

[22] Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, 108 (1992)

[23] Plaintiff Brief, 7-9.

[24] See Brief for Defendant in Error, *Muller v. Oregon* 208 U.S. 412 (1908).

[25] Plaintiff Brief, 47-61.

[26] Gillman, 127.

[27] *Lochner v. New York*, 198 U.S. 45, 52-53 (1905).

[28] *Lochner v. New York* 198 U.S. 45, 56 (1905).

[29] *Lochner v. New York*, 198 U.S. 45, 57 (1905).

[30] *See* notes 67-77.

[31] Cass R. Sunstein, "Lochner's Legacy," 87 *The Columbia Law Review* 873, 882 (1987).

[32] *See* e.g., Alfred H. Kelly and Winfred A. Harbison, *The American Constitution*, 513-515, 522-523 (1948). Gillman, 3-6 (listing *Lochner* critics).

[33] Howard Gillman, 39; Ellis, 352-53.

[34] *Brown v. Board of Education* 347 U.S. 483 (1954).

[35] *Regents of Univ. of Cal. V. Bakke* 438 U.S. 265 (1978).

[36] *Regents of Univ. of Cal. V. Bakke* 438 U.S. 289-90 (1978).

[37] Brief for Petitioner, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), 68-69.

[38] *United States v. Carolene Products Co*. 304 U.S. 144, 154 n. 4 (1938) (declaring that the Court "prejudice against discrete and insular minorities" would be "subjected to more exacting judicial scrutiny.")

[39] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a criminal sterilization program that targeted only some classes of felons.)

[40] *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 290 (1978).

[41] *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 296 (1976).

[42] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 293 (1978).

[43] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11 (1967).

[44] *Richmond v. J.A. Croson Co*. 488 U.S. 469 (1989).

[45] *Richmond v. J.A. Croson Co.,*488 U.S. 494, 491-92 (1989).

[46] *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948).

[47] *Richmond v. J.A. Croson Co*. ,488 U.S. 493 (1989).

[48] Hacker and Blake.

[49] *Gratz. v. Bollinger*, 123 S. Ct. 2411 (2003).

[50] *Gratz v. Bollinger*, 123 S. Ct. 2325 (2003).

[51] *Adarand Constructors v. Pena,* 515 U.S. 200, 224 (1995).

[52] *Gratz v. Bollinger*, 123 S. Ct. 2427-30 (2003).

[53] *The Frederick Douglass Papers* 59, 68 (J. Blassingame & J. McKivigan eds. 1991) in *Grutter v. Bollinger*, 123 S. Ct. 2350 (2003).

[54] See text accompanying note *Lochner v. New York* 198 U.S. 45, 57 (1905).

[55] *Grutter v. Bollinger*, 123 S. Ct. 2352 (2003).

[56] *Grutter v. Bollinger,* 123 S. Ct. 2358 (2003).

[57] Alexander Bickel, *The Morality of Consent* (1975).

[58] Antonin Scalia, "The Disease as Cure," 147 *The Washington University Law Quarterly* 152 (1979).

[59] Scalia, 153-54.

[60] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

[61] Thomas Sowell, "Weber and Bakke and the Presuppositions of Affirmative Action," 26 *Wayne Law Review* 1309, 1314 (1980).

[62] Sowell, 1314-16.

[63] Sowell, 1319-20.

[64] John Stuart Mill, *On Liberty* 207 (1962).

[65] *See* Gerald Dworkin, "Paternalism," 56 *The Monist* 64 (1972). Dworkin, offering a unique analysis of Mill's writing, attempts to recast paternalism in a positive light. He analogizes it to a social insurance policy, a surrender of autonomy in the present in exchange for a stronger future. *See also* Roscoe Pound, "Liberty of Contract" 18 *Yale Law Journal* 454, 484 (1909). (Invoking Mill's prohibition against contracts in which one sells himself into slavery.)

[66] John Stuart Mill, *Principles of Political Economy* 442, (1900).

[67] Seymour D. Thompson, "Abuses of Corporate Privilege," 26 *American Law Review* 169, 196 (1892).

[68] Thompson, 201.

[69] Thompson, 199.

[70] *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).

[71] *Knoxville Iron Co. v. Harbison*, 183 U.S. 20 (1901).

[72] Learned Hand, "Due Process and the Eight-Hour Day," 21 *Harvard Law Review* 495, 506 (1908).

[73] William Willoughby, "The Philosophy of Labor Legislation," 8 *American Political Science Review* 14, 17 (1914).

[74] Willoughby, 17-18.

[75] Willoughby, 19.

[76] Willoughby, 21.

[77] Willoughby, 20.

[78] The Public Papers and Addresses of Franklin D. Roosevelt 5 (1938) in Sunstein 1993, 57. The Wagner Act of 1935 used the term affirmative action in the context of a duty on employers to rectify past intimidation of union members. Sowell, 1310. President John F. Kennedy first used affirmative action in its current racial context in an executive order forbidding government contractors from discriminating in employment. See Exec. Order No. 10,925, 3 C.F.R. 448 (1961).

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[79] *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937).

[80] *West Coast Hotel Co. v. Parrish*, 300 U.S.390 (1937).

[81] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[82] *West Coast Hotel*, 300 U.S. 393, 394, 395, 398, 399 (1937).

[83] Sunstein 1993, 2.

[84] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-399 (1937).

[85] *West Coast Hotel Co. v. Parrish,* 300 U.S. 399 (1937).

[86] Sunstein 1993, 40.

[87] Sunstein 1993, 4.

[88] Sunstein 1993, 6.

[89] Sunstein 1987, 880-881.

[90] *Regents of the University of California v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., dissenting); *Regents of the University of California v. Bakke*, 438 U.S. 387-91 (Marshall, J., dissenting).

[91] *Regents of the University of California v. Bakke,* 438 U.S. 387 (1978).

[92] *See, e.g.*, Pound and Gillman for a summary of the movement toward sociological jurisprudence.

[93] *Regents of the University of California v. Bakke*, 438 U.S. 395-96 (1978).

[94] *Regents of the University of California v. Bakke*, 438 U.S 372 (1978).

[95] *Regents of the University of California v. Bakke*, 438 U.S 327 (1978).

[96] *North Carolina State Board of Education v. Swann,* 402 U.S. 43 (1971).

[97] *Swann v. Charlotte-Mecklenburg Board Of Education* 402 U.S. 45-46 (1971) in *Regents of the University of California v. Bakke*, 438 U.S. 265, 356.

[98] *Green County School Board*, 391 U.S. 430 (1968).

[99] *Regents of the University of California v. Bakke*, 438 U.S.362 (1978).

[100] *Swann v. Charlotte-Mecklenburg Board Of Education* 402 U.S. 1 (1971).

[101] *Swann v. Charlotte-Mecklenburg Board Of Education* 402 U.S. 16 (1971).

[102] *Korematsu v. United States*, 323 U.S. 214 (1944); *Regents of the University of California v. Bakke*, 438 U.S. 356 (1978).

[103] *Regents of the University of California v. Bakke*, 438 U.S. 375-76 (1978).

[104] *United Jewish Organization Inc. v. Carey*, 430 U.S. 144 (1977).

[105] *Regents of the University of California v. Bakke*, 438 U.S. 399 (1978).

[106] *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 528 (1989).

[107] *Richmond v. J.A. Croson Co.,* 488 U.S. 540 (1989).

[108] Sunstein 1993, 150.

[109] Karst, 38.

[110] Karst, 32.

[111] *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

[112] *See New Orleans City Park Improvement Ass'n v. Deteige*, 358 U.S. 913 (1958) (involving public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (involving public transportation); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (involving public golf courses); and *Baltimore v. Dawson*, 350 U.S. 877 (1955) (involving public beaches). I believe that the Court did not issue opinions in these cases (in part) because the jurisprudential difficulty in extending the fundamental rights logic of *Brown* to other spheres. Hacker and Blake.

[113] Karst, 39.

[114] Karst, 148-49.

[115] Karst, 161.

[116] Owen Fiss, "Groups and the Equal Protection Clause," 5 *Philosophy and Public Affairs* 107, 118 (1976).

[117] Fiss, 136.

[118] Fiss, 140.

[119] *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting). ("Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.")

[120] Fiss, 146.

[121] Fiss, 147.

[122] Fiss, 158.

[123] Fiss, 156.

[124] Fiss, 148-49.

[125] Fiss, 151-53.

[126] Fiss, 157, 165.

[127] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

[128] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

[129] *Brown v. Board of Education*, 347 U.S. 489, 489 (1954).

[130] *Brown v. Board of Education*, 347 U.S. 494 (1954).

[131] For an interesting discussion of civic virtues, *see* Jim Cullen, *The America Dream: A Short Narrative of an Idea that Shaped a Nation* (2002).

[132] *See* Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002).

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