CHAPTER I

WHAT IS EQUALITY IN THE LAW?

What are we talking about when we talk about equality in the law? The word and/or ideal of equality appears in most, if not all, constitutions of countries and states across the world. The guarantee of equality thus cuts across regional, cultural, and ideological differences. However, paradoxically, what exactly equality entails can also be highly dependent upon the particular regional, cultural, and ideological setting in which it is invoked and applied. At times it can even seem an “empty” ideal given its uneven and varied interpretations and applications.

Consider the most often-cited phrase in the founding document of the United States—the 1776 Declaration of Independence—which states, “We hold these truths to be self-evident, that all men are created equal.” Its French equivalent, the 1789 Declaration of the Rights of Man, states in its first article that “Men are born and remain free and equal in rights.” Yet Thomas Jefferson, the principal author of the American declaration, and an important contributor to the French declaration, was himself a slave owner, and took as his mistress one of his slaves when she was a teenager. This alone should alert us that the principle of equality may be divorced from the application. At the least, equality potentially contains varied and shifting meanings and even contradictions and tensions across time, geography, and context.

Ideas and applications of equality span a conceptual range that is impossible to capture completely here. In the materials and problems presented in chapters II–X, we will see a variety of concepts or models of equality discussed and applied. We will see equality described in terms of equal opportunity, equal outcomes, individual equality, group equality, measuring differences, refusing to measure differences, subordination, diversity, unity, respect, dignity, tolerance, social structures, institutions, individual decisions, individual rights, group rights, human rights, civil rights, color-blindness, racism-blindness, color-consciousness, reparations, obligations, damages, accommodation, discrimination, reverse discrimination, positive discrimination, affirmative action, prejudice, ignorance, bigotry, and cognitive bias. No doubt this list is incomplete.

Yet even within (and certainly between) these different ideas of legal equality there exists a tension between formal and substantive notions of equality. This tension is highlighted in this chapter before we begin confronting the problems and applications of equality in the following chapters. By formal equality, we mean the application of equality rules and norms that are agnostic about, or indifferent towards, the status of groups differently situated in society or the social structure. By substantive equality we mean the creation and application of equality rules and norms explicitly designed to identify and address the social status of groups.
differently situated in a society. We view formal and substantive equality not as polar extremes but rather as a spectrum, along which articulations and applications of equality fall. The difference between the two is a useful heuristic device, or framework, for our discussion throughout the book.

This chapter asks us to consider a number of different concepts of equality and the ways in which the tension between formal and substantive equality plays out between and within them. The excerpts that follow—most quite brief, though a few somewhat longer—are statements by a variety of jurists, artists, politicians, professors and activists that describe different conceptions of equality. Their divergent views are offered to introduce you to a few of the many ways in which equality is framed and debated, both within the law and within our broader societies. This is not a comprehensive list but rather an illustrative one designed to get us thinking about equality and some of the themes that will run throughout the rest of the book.

As you read these materials, you may find it helpful to consider a variety of problems in which we are required to apply these concepts of equality. Consider the following:

- An African–American job applicant is denied a job for which he has applied and for which he is well qualified. The employer offers as a defense that there were better applicants, but cannot produce applications or other objective evidence on which it relied. Who should bear the burden of proving the employer’s reason for its decision?

- In a State where same-sex marriage is authorized by law, a county clerk refuses to issue a marriage license to a same-sex couple because it violates his religious views. Should the clerk be required to issue the license (or disciplined for his refusal)? Whose equality rights are affected by the decision?

- A school district routinely assigns students from a minority group to “special education” classes, in which there is less academic instruction. The assignments are made based on intelligence tests administered to all incoming students. Is the district engaged in segregation? Is the assignment policy a violation of the minority children’s rights? Does the decision affect the majority group children? Do they have rights that must be respected?

- An employer provides no medical leaves of any kind to its employees, reasoning that the inconvenience to customers and other employees makes the cost of such leaves prohibitive. The policy has its greatest impact on women employees in their twenties and thirties, who cannot take leave, and are thus terminated, if they choose to have children. Does the employer’s policy violate the principle of equality?

- A medical school reserves a percentage of its seats for students from a disadvantaged minority group. Does the policy violate the rights (or reasonable expectations) of the majority group applicants? Does it violate the principle of equality?

- A national legislature passes a law making it a crime for a woman to go abroad to have an abortion. Does the law violate the principle of...
equality? What if the nation has legally adopted a state religion and that religion prohibits abortion?

- A national legislature passes a law authorizing clergy from certain religions to perform marriage ceremonies that will be legally recognized by the state. Members of other religions must marry in a civil ceremony for their marriage to be recognized. Does the law violate the principle of equality?

- A national constitution guarantees freedom of religion in private places, while prohibiting any public display of religious conviction, including the growing of beards for religious reasons. Does the law violate the principle of equality? May the state refuse citizenship to a man who is otherwise eligible but has grown a beard for religious reasons?

- A national legislature passes a law providing that hateful speech based on political views is protected by the liberty interest in free speech, but that hateful speech based on gender, race, ethnicity or religion is not. Does the law violate the principle of equality?

- A judge orders an employer to pay for a full-time interpreter to support the work of a deaf or hearing-impaired employee, who is well qualified to perform her work if an interpreter is provided. Competing businesses do not incur this expense. Is there a violation of the principle of equality?

Each of these problems is drawn from the chapters that follow, and in each case the application of the principle of equality has been applied (or probably would be applied) differently in the U.S. system as compared with other national legal systems. If we keep these examples in mind as we consider this chapter’s readings on equality, it may help us better understand the comparisons that follow.

A. Equality as Equal Citizenship

On a very basic level, the concept of equality under the law simply requires that the government treat every individual with equal concern and respect, including giving each individual the rights necessary to fully participate in society. Doing so not only upholds the dignity of the individual in a democratic society but also helps to remove the social, economic, and political barriers that some individuals face on account of socially disadvantaging differences. Historically, however, courts and commentators have disagreed over whether equality requires not just the extension of basic political and civil rights but also being attentive to the social status of individuals whom the law and society have regarded as inferior. Consider the excerpts below in light of this conflict.

The Red Lily

(1894)

ANATOLE FRANCE (JACQUES ANATOLE FRANÇOIS THIBAULT)

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.
Plessy v. Ferguson
163 U.S. 537 (1896)

JUSTICE BROWN delivered the opinion of the Court.

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other. * * * We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

The Social Contract
(1762)

JEAN–JACQUES ROUSSEAU

[E]ach man, in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has. If we then discard from the social compact what is not of its essence, we shall find that it reduces itself to the following terms: “Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.” At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains votes, and receiving from this act its unity, its common identity, its life and its will.”

Speech Announcing Submission of the Voting Rights Act
(March 15, 1965)

LYNDON B. JOHNSON

There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem.
And we are met here tonight as Americans—not as Democrats or Republicans; we’re met here as Americans to solve that problem. This was the first nation in the history of the world to be founded with a purpose.

The great phrases of that purpose still sound in every American heart, North and South: “All men are created equal.” “Government by consent of the governed.” “Give me liberty or give me death.” And those are not just clever words, and those are not just empty theories. In their name Americans have fought and died for two centuries and tonight around the world they stand there as guardians of our liberty risking their lives. Those words are promised to every citizen that he shall share in the dignity of man. This dignity cannot be found in a man’s possessions. It cannot be found in his power or in his position. It really rests on his right to be treated as a man equal in opportunity to all others. It says that he shall share in freedom. He shall choose his leaders, educate his children, provide for his family according to his ability and his merits as a human being.

To apply any other test, to deny a man his hopes because of his color or race or his religion or the place of his birth is not only to do injustice, it is to deny Americans and to dishonor the dead who gave their lives for American freedom. Our fathers believed that if this noble view of the rights of man was to flourish it must be rooted in democracy. This most basic right of all was the right to choose your own leaders. The history of this country in large measure is the history of expansion of the right to all of our people.

Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument: every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to insure that right. Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes. * * *

What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too. Because it’s not just Negroes, but really it’s all of us, who must overcome the crippling legacy of bigotry and injustice.

And we shall overcome.

Speech on Religious Minorities
(December 23, 1789)

■ COUNT STANISLAS-MARIE-ADÉLAIDE DE CLERMONT-TONNERRE

Sirs, in the declaration that you believed you should put at the head of the French constitution you have established, consecrated, the rights of man and citizen. In the constitutional work that you have decreed relative
to the organization of the municipalities, a work accepted by the King, you have fixed the conditions of eligibility that can be required of citizens. It would seem, Sirs, that there is nothing else left to do and that prejudices should be silent in the face of the language of the law; but an honorable member has explained to us that the non-Catholics of some provinces still experience harassment based on former laws, and seeing them excluded from the elections and public posts, another honorable member has protested against the effect of prejudice that persecutes some professions. This prejudice, these laws, force you to make your position clear. I have the honor to present you with the draft of a decree, and it is this draft that I defend here. I establish in it the principle that professions and religious creed can never become reasons for ineligibility.

There is no middle way possible: either you admit a national religion, subject all your laws to it, arm it with temporal power, exclude from your society the men who profess another creed and then, erase the article in your declaration of rights [freedom of religion]; or you permit everyone to have his own religious opinion, and do not exclude from public office those who make use of this permission.

But, they say to me, the Jews have their own judges and laws. I respond that is your fault and you should not allow it. We must refuse everything to the Jews as a nation and accord everything to Jews as individuals. We must withdraw recognition from their judges; they should only have our judges. We must refuse legal protection to the maintenance of the so-called laws of their Judaic organization; they should not be allowed to form in the state either a political body or an order. They must be citizens individually. But, some will say to me, they do not want to be citizens. Well then! If they do not want to be citizens, they should say so, and then, we should banish them. It is repugnant to have in the state an association of non-citizens, and a nation within the nation. In short, Sirs, the presumed status of every man resident in a country is to be a citizen. (Edited and translated by Lynn Hunt.)

———

Conceptions of Equality and Slavery in Islamic Law: Tribalism, Piety, and Pluralism

(2007)

Bernard K. Freamon

Muslims assert that the idea of universal human equality is a core precept in the Islamic belief system and a central tenet of the Shari’a. Islamic egalitarianism, in place since the time of the Prophet Muhammad, greatly facilitated Islam’s spectacular growth in the first century after the death of the Prophet and it has continued to be a powerful catalyst for the expansion of the religion over the past fourteen hundred years. The ritual of the Hajj—the pilgrimage to Mecca—is perhaps the best demonstration of the importance of the egalitarian ethos in Islamic religious belief and practice. Every year several million Muslims—men and women, youngsters and octogenarians, princes and paupers, scholars and illiterates, black,
white, brown, and yellow—travel to Mecca as hajjis or religious pilgrims in a once-in-a-lifetime sacrifice of time, money, and the routine comfort of daily life. Upon arrival at Mecca’s precinct gates, each hajji discards his or her worldly possessions and concerns, humbly donning the pilgrim’s simple garb and entering into the Islamic status of Ihram. Every hajji then performs the sacred ritual in as near a state of perfect physical equality with every other pilgrim as conditions will allow. The Qur’an, at verse 22:25, explicitly mandates this equality, providing that “...we have made [the Sacred Mosque] (open) to (all) men—equal is the dweller there and the visitor from the country...”

Participation in this ritual gives each Muslim pilgrim a profound understanding of the basic sameness of all human kind. The Hajj celebrates this basic equality in a way that is not replicated in any other human event on earth. Some have described it as a “dress rehearsal” for Judgment Day, when all human beings will stand as equals before God and all will be fairly and justly called to account for their deeds. The Hajj thus cogently demonstrates that Islam’s uncompromising conception of the oneness of God fosters a similarly uncompromising conception of the oneness of humanity.

Theological assertions of universal human equality are certainly not unique to the Islamic religion. Judaism and Christianity also make the same claim. Yet, Islam is exceptional in that, early in its existence, the Prophet Muhammad and several of his successors effectively translated the religion’s theological egalitarianism into tangible assertions of political, social, and legal equality that were quite progressive for their time. These assertions made the religion very attractive to outsiders, particularly those who had been victims of harsh and depredatory treatment in their own communities.

NOTES

1. Anatole France uses irony to express very simply the idea of equality under the law. The law should not tolerate inequality between two classes of people, or two individuals regardless of their social class. But (in)equality of what exactly? The idea of equal citizenship might suggest that, at the least, every individual in a society be guaranteed the same rights and social goods as any other. But, even then, we must decide what social goods are important, and whether goods need be tangible or whether equality also guarantees certain intangible goods, like “dignity.” Thus, one might see the formal-substantive tension expressed in these excerpts as citizenship as legal equality versus citizenship as “belonging.” The latter evokes more clearly Professor Kenneth Karst’s idea of equality in social “status,” measured in part by the reduction of inequalities that impose stigma or caste, as discussed further in note 6.

2. Rousseau’s argument is described by Enlightenment historian Gary Kates as follows: “Rousseau defines the relationship of liberty and equality in such a way that liberty is possible only when individuals relate to each other on the basis of strict equality.” Consider how Rousseau’s view
conflicts with the arguments over student speech codes, taken up in the discussion of hate speech in Chapter IX, which articulate that equality and liberty are necessarily in conflict.

3. Count Tonnerre’s speech to the French National assembly on religious equality and citizenship previews a theme we will consider more fully in chapter VIII—how should the state provide equality rights to religious minorities? Tonnerre’s answer was that their religious practices must be largely abandoned in exchange for citizenship. This remains the prevailing answer in France today. Is this an equal bargain for religious minorities?

4. The *Plessy* court’s interpretation of the guarantee of equal protection in the United States Constitution is highly formalistic in its distinction between “political” and “social” equality. As Reva Siegel has argued, this type of formalism was employed as a way to give newly freed slaves legal equality without disturbing the social segregation that was the norm in the country.

“Distinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision. But it was generally understood that civil rights were those rights exercised by economic man, such as the capacity to hold property and enter into contracts, and to bring suit to defend those rights in the legal system. Voting was the core political right. Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the “amalgamation” of the races.

White Americans reasoning about the fate of the emancipated slaves drew such distinctions precisely because their commitment to abolish slavery was not a commitment to recognize African–Americans as equals in all spheres of social life; in the years before and after the Civil War, white Americans of widely varying political views reiterated their conviction that emancipating African–Americans entailed granting the freedmen some form of legal equality, but assuredly did not require granting them ‘social equality.’”


5. You might see President Johnson’s speech in support of giving African Americans the right to vote as an example of the formalism embedded in the civil/political/social rights distinction. Consider, however, that the right to vote was guaranteed to the newly freed slaves by the 15th Amendment to the United States Constitution, which was ratified in 1870. Passage of the Voting Rights Act of 1965 was deemed necessary to address the intransigence of southern states in resisting allowing African Americans to vote freely. The Voting Rights Act specifically sought to address, and outlaw, the various mechanisms—poll taxes, literacy requirements, violence, etc.—that Southern states employed as a way of intimidating African Americans from exercising their right to vote.

6. Regarding stigma and equality, Professor Kenneth Karst argues that “[c]itizenship, in its narrowest sense, is a legal status. In relation to
B. EQUALITY AS NEUTRALITY

Even if we agree that equal citizenship guarantees some degree of "belonging," there may be different means of guaranteeing that belonging. One ongoing question addressed by equality law is whether the demand of equality mandates that the law should, in effect, be blind to group differences such as race and ethnicity. An emerging norm would require that the law treat whites and blacks, for example, on the same terms as a way of guaranteeing them equality before the law and undoing stereotypical assumptions about racial differences. Such "colorblindness" would forbid (or presumptively restrain) the government from classifying individuals by race, except for compelling purposes.

On the other hand, others question whether equality can be achieved without legal recognition, or being explicitly conscious, of race where differences in the social status of groups exist or persist due to historical discrimination. Does equality require that the law tolerate differential treatment of social groups to provide for, or equalize, opportunity among groups where their group membership has been a cause of disadvantage? Or does taking account of group differences serve only to entrench those
differences (and their social stigma) in the law and in society? The excerpts below provide some contours of the debate around whether the law should be neutral (or “colorblind”) in light of differential social status and advantages between racial and ethnic groups.

Plessy v. Ferguson
163 U.S. 537 (1896)

JUSTICE HARLAN, dissenting

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in the 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. 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. The humblest is the peer of the most powerful.

McDonald v. Santa Fe Trail Transportation
427 U.S. 273 (1976)

JUSTICE MARSHALL delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits the discharge of “any individual” because of “such individual’s race,” . . . Its terms are not limited to discrimination against members of any particular race. Thus although we were not there confronted with racial discrimination against whites, we described the Act in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), as prohibiting “(d)iscriminatory preference for Any (racial) group, Minority or Majority.” Similarly the EEOC [the Equal Employment Opportunity Commission], whose interpretations are entitled to great deference, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would constitute a derogation of the Commission’s Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group.”

Regents of the University of California v. Bakke
438 U.S. 265 (1978)

JUSTICE BRENNAN, dissenting

Our Nation was founded on the principle that “all Men are created equal.” Yet candor requires acknowledgment that the Framers of our
Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our “American Dilemma.” Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the “last resort of constitutional arguments.” Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a “separate but equal” status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in Brown v. Board of Education and its progeny, which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with “all deliberate speed.” In 1968 and again in 1971, for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be “color-blind” or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we 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 citizens.

---

**Regents of the University of California v. Bakke**

438 U.S. 265 (1978)

**JUSTICE BLACKMUN, dissenting**

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it be successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.
The difficulty of overcoming the effects of past discrimination is nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that “[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” A. Bickel, THE MORALITY OF CONSENT 13 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, can justify an exception to the principle embodied in the Fourteenth Amendment that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens,” (citing Plessy v. Ferguson, HARLAN, J., dissenting). * * *

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to “even the score” display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still. The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, created equal, who were discriminated against. And the relevant resolve is that that should never happen again. Racial preferences appear to even the score (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.

———

Commencement Speech at Howard University
(1965)

LYNDON B. JOHNSON

But freedom is not enough. 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. You do not take a person who, for
years, has been hobbled by chains and liberate him, bring him up to the
starting line of a race and then say, “You are free to compete with all the
others,” and still justly believe that you have been completely fair. Thus it
is not enough just to open the gates of opportunity. All our citizens must
have the ability to walk through those gates. This is the next and the more
profound stage of the battle for civil rights. We seek not just freedom but
opportunity. 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. For the task is to give 20 million Negroes the same chance as every
other American to learn and grow, to work and share in society, to develop
their abilities—physical, mental and spiritual, and to pursue their individu-
al happiness. To this end equal opportunity is essential, but not enough,
not enough.

Should the French State Collect Racial Population
Data?

[EDITORS’ NOTE: In France, the census is prohibited from collecting
information on race or ethnicity, because the idea of racial identity is
regarded as offensive to the French Republican commitment to equality,
which recognizes the only legitimate French identity as French citizenship.
(A second reason sometimes offered is the trauma of the Holocaust, when
French collaboration in the expulsion and murder of French Jews was
facilitated by the existence of government records disclosing religion.) The
following questions and answers, advocating the collection of racial data by
the French state, are from the English language section of the web site of
the Conseil Representatif des Associations Noires (CRAN, the Representa-
tive Council of Black Associations), an NGO founded at the time of the
2005 Paris riots to represent the interests of over 100 black organizations
in France.]

Q. When one says that “in France Black people are invisible,” what does
it mean?

In principle to have dark skin in metropolitan France is not the best
way to go unnoticed. The paradox is that as individuals, Black people in
France are visible and yet as a social group remain invisible. As a social
group it seems as if they were not supposed to exist: the French Republic
doesn’t officially recognize minorities, and doesn’t record them as such.
One could be satisfied with invisible populations, or at least see no problem
with it, as long as social and specific difficulties concerning them be
recorded, identified, recognized. However it is not the case. And instead of
remaining a quiet and normal status, invisibility is wrong.

Q. Isn’t to talk about “Black people” a misuse of language?

To the question “Who is Black?” we respond neither with nature
arguments (which could refer to a “biologizing” race concept), nor with
culture arguments (which could refer to an infinite variety of cultural differences among human individuals). Our response uses socio-political arguments. In societies where Blacks are part of the minority, a Black person is said to be as such, while a Black population made of men and women sharing a common social experience is that of discriminations because of the skin colour. Black people have in common to live in societies that consider them to be as such. Most of the time, they have no choice but to be the way they are perceived by others. To paraphrase Sartre, a Black person is an individual that others consider as Black.

Q. Is there a “black issue” in France?

No, there isn’t, but France has an issue with its black populations. This issue has complex historical roots, linked to slavery and colonisation. Our goal is to alert volunteers in order to improve the tough situation of these populations, and fight against race discrimination.

Q. What is “race discrimination”?

Discrimination refers to an unfavourable treatment applied to a person because of his or her real or supposedly social belonging. Race discrimination is an unfavourable treatment based on race (for example the colour of the skin or any other type of phenotype distinction). Thus race discrimination can affect black persons, no matter their origin or nationality. Let’s take the example of a black woman who is declined a job because of the fact that “customers wouldn’t appreciate her skin colour.” Here, this woman is the victim of race discrimination, not because of her origin, but because of her skin colour. Unlike racism which is an ideology, discrimination is a concrete act.

Q. How to fight against race discriminations?

First of all to fight against race discriminations requires studying these acts targeting individuals who don’t look “right.” This fight aims at being effective in order to put an end to moral damages. It is more concrete and pragmatic than fighting against racism. Its difficulty stands first of all in the recognition of race discriminations in order to find an efficient answer to them. And there is the rub in France, in that we lack statistical tools allowing us to measure discriminations and assess the efficiency of anti-discriminatory policies. To base one’s assessment on testimonies is not enough, no matter how numerous and how much they match. These testimonies do not allow us to measure and compare discriminations from one year to the other.

Two major types of anti-discriminatory policies are possible and desirable. First, a sanction policy against discriminatory behaviour. The penal code acknowledges and curbs race discriminations, but one must admit that the justice of our country remains little active in the application of anti-discriminatory laws. Not enough lawsuits succeed. Judges are not well trained and often seem too little motivated with investigations and decisions concerning discrimination cases. Secondly, a policy which intends to actively promote diversity. This policy is called “affirmative action” in the USA and “positive discrimination” in France. No matter what terminology, it is about coming up with devices that help putting an end to the lack of diversity within too many political, economical and social authorities. The
nature of these devices must become the core subject of a great national debate.

Q. Isn't an ethno-racial statistics dangerous?

Ethno-racial statistics is used in many countries. Its goal isn't to put people in biological and irreducible categories but to measure discriminations in order to better act against them. Demographers don't give their opinion concerning the nature of “race” or “ethnicity” and don't give any ontological verdict concerning their substance either. They only stand as a referent that helps characterizing and intervening on specific wrongdoings. These statistics are anonymous: they help measuring discriminations, but not identifying individuals.

Q. Who will decide on whether one is black or not?

Ethno-racial statistics is based on self-declaration: in the USA or in Great Britain, only concerned parties respond to those questions. Nobody decides for their group and responses are only optional.

NOTES

1. Justice Scalia’s dictate in a recent opinion on the constitutionality of race-conscious affirmative action programs—that “In the eyes of government, we are just one race here. It is American”—mirrors the French universalism (or formalism?) embedded in its refusal to classify citizens by race or to collect racial statistics. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (Scalia, concurring). Yet the question remains, as other commentators note, what position the law should take vis-à-vis the glaring social inequalities that track race and ethnicity in most modern societies. As Justice Blackmun argues, can societies and governments get beyond racism only by taking race into explicit account in addressing racial and ethnic inequalities? Or does focusing on race, particularly racial remedies (like affirmative action) do more harm than good to their targeted beneficiaries? See, for example, Ward Connerly, *One Nation Indivisible* (2001) http://www.hoover.org/publications/digest/4510836.html.

2. France is not the only country which refuses to collect racial data for the Census or for purposes of measuring racial and ethnic discrimina-
tion. As Tanya Hernandez notes, many Latin American nations refuse to collect census data according to racial identity, or otherwise collect systematic information on the status of its racial and ethnic populations. She explains that part of the reason is that any focus on race is believed to be adverse to maintaining a racially harmonious environment. However, she argues that without census data aggregated by race it is difficult to illustrate how significant the problem of racism by skin color is in these countries. In addition, the absence of census racial data effectively precludes the use of statistical evidence to prove a discrimination claim in court. Tanya Kateri Hernández, *Multiracial Matrix: The Role Of Race Ideology In The Enforcement Of Antidiscrimination Laws, A United States–Latin America Comparison*, 87 CORNELL L. REV. 1093, 1130–1131 (2002).
3. The refusal to collect racial data, either for the Census or to identify the existence of racial and ethnic discrimination, arguably has both positive and negative effects on a diverse society. Consider David Oppenheimer’s observations as an American who has spent time in France observing and discussing this issue with French residents:

From my limited time spent in France my own impression is that there is more racial and ethnic integration than in the United States. In particular, inter-racial friendships and intimate relationships appear to be more common in France than in the United States, and appear to be less controversial. Nonetheless, even a visitor sees enormous differences in the social status of non-whites in France. Nor do the French disagree; in my interviews, most of the French Muslims and French citizens of African descent (including North African and sub-Saharan African) with whom I spoke regard discrimination as a serious problem, as did many “non-minority” French citizens. Polling data confirms that these responses are representative. For example, according to a 2007 poll conducted by TNS–Sofres, over half of black French respondents stated that they had experienced racial discrimination. According to a 2006 poll, conducted by the European Union (the “Euro-barometer”), 80 percent of French respondents believe that ethnic origin discrimination is widespread in France, and over half believe that it had become worse in the prior five years. According to a 2003 poll by TNS–Sofres, 71 percent of French respondents believe that a person from North Africa or Africa faces increased discrimination.

Whether we describe them as “minorities” or “visible minorities” or “immigrants” (a term sometimes extended to non-immigrant French citizens who are descended from non-European ancestors), or “blacks and Arabs” or “Africans” or “North and sub-Saharan Africans” or some other term of outsider identity, there are a substantial number of French citizens who are distinguished from French citizens of European descent by their skin color and ancestral origins. These French citizens are widely believed, and by some data revealed, to be less likely to have high-paying and/or high-status jobs, less likely to attend top schools and universities, and less likely to live in high-quality housing, as compared with lighter-skinned French citizens. Although the dark-skinned population of France is believed to be substantial, there are only a handful of dark-skinned French citizens elected to the National Assembly from the constituencies within continental Europe. (There are a few more elected from the overseas Departments in the Caribbean, the Indian Ocean, the South Pacific, and South America.) In the first poll ever taken of self-identified French blacks, they overwhelmingly responded that they were discriminated against because of their color.

Housing segregation is sufficiently entrenched that an affirmative action admissions program that provides preferences to students who live in economically disadvantaged neighborhoods (“banlieues”) can substitute for a race-based program in recruiting students perceived as not being “native French” to an elite (and largely white) school. The
riots that began in the suburbs of Paris in the fall of 2005 and spread to many minority neighborhoods were widely understood around the globe and within France to be race riots, and a wake-up call for France.

In the wake of the riots and the growing evidence of intolerable inequality, why not begin collecting racial identity data, and thus measuring discrimination and inequality?


4. In order to permit affirmative action policies (known as “positive action” in Europe), the European Union has adopted three provisions excepting affirmative action from the prohibition of discrimination, one in their constitutive treaty, two by legislation. The Treaty on the Functioning of the European Union provides at Article 157:4 “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” Note that the treaty provision applies to gender, but not race, ethnicity or color. Similar language is found in Article 5 of European Union directive 2000/43/EC, which prohibits race and ethnic origin discrimination in employment and other sectors, and in Article 7 of Directive 2000/78/EC, which prohibits discrimination in employment (but not other sectors) based on religion or belief, age, disability and sexual orientation.

---

**A Constitution Without Race: Proposal for an Amendment of Article 3**


Hendrik Cremer

1. Changing the formulation of the ban on discrimination in the Constitution

The German Institute of Human Rights recommends an amendment of the ban on discrimination in Article 3, Section 3, Clause 1 of the Constitution: the term “race” should be removed, without altering the protective scope of the clause. Art. 3, Sec. 3, Cl. 3 currently provides: “No one shall be favored or discriminated against on account of . . . his race.”

This provision aims to combat racism and eliminate discrimination. At the same time, the wording of the provision conjures up a vision of humankind that is based on the notion of different “races.” Yet only racist theories are based on the assumption that there are different human “races.”

The formulation of Art. 3 Sec. 3 thus leads to an irresolvable contradiction. Parties who suffer racial discrimination must claim that they were discrimi-
inated against on account of their race; they have to assign themselves to a particular race and are therefore forced to use racist terminology.

The point of the discussion about the term “race” is not an intellectual mind game, but a change of perspective: racism cannot be credibly fought when the term “race” is retained. This is more so because use of the term makes the concept of human races appear acceptable, and can help feed racist thinking.

Some EU states have already decided to refrain from using the term in their legislation. In Germany, too, there is wide awareness of the problems of the term. An amendment of the Constitution, which is the foundation of the legal system of Germany, would be a signal to finally break the habit of using the term, and end the apparent acceptance of race concepts.

The German Institute of Human Rights recommends the striking of the term “race” from Art. 3 Sec. 3 Cl.1, and that the provision should be formulated in the following way:

“No one shall be favored or discriminated against in a racist manner, or on account of his sex, descent, language, home country and origin, beliefs, and religious or political views.”

3. Conclusion

The use of the term “race” in the ban on discrimination in the Constitution can promote racist thinking, because it suggests that there are different human “races.” As long as the term is used in relation to people, it will trigger irritation and lack of understanding, culminating in personal injury. Moreover, its use is by no means necessary. The European Parliament has already recommended that the term should no longer be used in EU documents and human rights texts. Countries like Finland, Sweden and Austria have already distanced themselves from the term in their national legislation.

In the end, the term “race” cannot be interpreted in a sensible way. Every theory that is based on the existence of different human races is in itself racist. It is therefore time for a departure from the concept through amending Art. 3, Sec. 3, Cl. 1, so that the Constitution can instead prohibit racist discrimination or favoring. This would help the protection against racist discrimination and the fight against racism to have greater effect.

(Translation by Fanxi Wang)

NOTES

1. For more detail on the German debate on the nature of the term “race,” see Hendrik Cremer, “. . . and To Which Race Do You Belong?” The Problem of the Term “Race” in Legislation, German Institute of Human Rights Policy Paper No. 10 (2d ed. 2009).

2. The European Union Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin provides, “The European Union rejects theories which attempt to determine the
existence of separate human races. The use of the term “racial origin” in this Directive does not imply an acceptance of such theories.” (EC Directive 2000/43/EC of 29 June 2000, Preamble, Part (6).) Does the language of the preamble satisfactorily answer the Cremer critique?

C. EQUALITY AS ANTISUBORDINATION

In 1976, Professor Owen Fiss of the Yale Law School published an essay that gave rise to a new theory of equality law, which he called the “group-disadvantaging principle” and is now known as antisubordination theory. Fiss asserted that courts were improperly interpreting the Equal Protection Clause of the Constitution as a requirement that the government not discriminate against an individual based on his/her classification (such as a racial classification). This is described as the non-discrimination principle. Today others would describe it as the “anticlassification” principle (embedded in the equality as neutrality notion discussed above). Fiss argued that the purpose of the Fourteenth Amendment’s Equal Protection Clause was to protect subordinated groups (principally African Americans) from governmental acts that contributed to their subordination. The difference in the theories of what “equality” means can be described on two axes. One—does the constitution protect groups, or individuals? Two—does the Equal Protection Clause require strict scrutiny of government action when the government acts against a suspect class, or, alternatively, when it makes a suspect classification? What follows is a small portion of Fiss’s own words on the subject and contemporary perspectives on the role of antisubordination analysis in equality jurisprudence.

Groups and the Equal Protection Clause

5 J. Phil. & Pub. Affairs. 107 (1976)

OWEN M. FISS

This is an essay about the structure and limitations of the antidiscrimination principle, the principle that controls the interpretation of the Equal Protection Clause . . .

The words—no state shall “deny to any person within its jurisdiction the equal protection of the laws”—do not state an intelligible rule of decision. In that sense the text has no meaning. The Clause contains the word “equal” and thereby gives constitutional status to the ideal of equality, but that ideal is capable of a wide range of meanings. This ambiguity has created the need for a mediating principle, and the one chosen by courts and commentators is the antidiscrimination principle. When asked what the Equal Protection Clause means, an informed lawyer—even one committed to Justice Black’s textual approach to the First Amendment—does not repeat the words of the Clause—a denial of equal protection. Instead, he is likely to respond that the Clause prohibits discrimination.
One purpose of this essay is simply to underscore the fact that the antidiscrimination principle is not the Equal Protection Clause, that it is nothing more than a mediating principle. I want to bring to an end the identification of the Clause with the antidiscrimination principle. But I also have larger ambitions. I want to suggest that the antidiscrimination principle embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means. I also want to outline another mediating principle—the group-disadvantaging principle—one that has as good, if not better, claim to represent the ideal of equality, one that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in Equal Protection cases.

* * *

The antidiscrimination principle has structural limitations that prevent it from adequately resolving or even addressing certain central claims of equality now being advanced. For these claims the antidiscrimination principle either provides no framework of analysis or, even worse, provides the wrong one.

The Permissibility of Preferential Treatment

One shortcoming of the antidiscrimination principle relates to the problem of preferential treatment for blacks. This is a difficult issue, but the antidiscrimination principle makes it more difficult than it is: the permissibility of preferential treatment is tied to the permissibility of hostile treatment against blacks. The antidiscrimination principle does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group. It only knows criteria or classifications; and the color black is as much a racial criterion as the color white. The regime it introduces is a symmetrical one of “color blindness,” making the criterion of color, any color, presumptively impermissible. Reverse discrimination, so the argument is made, is a form of discrimination and is equally arbitrary since it is based on race. * * *

In my judgment ... preferential and exclusionary policies should be viewed quite differently under the Equal Protection Clause. Indeed, it would be one of the strangest and cruelest ironies to interpret that Clause in such a way that linked in some tight, inextricable fashion the judgments about the preferential and exclusionary policies. This dilemma can only be avoided if the applicable mediating principle of the Clause is clearly and explicitly asymmetrical, one that talks about substantive ends, and not fit, and one that recognizes the existence and importance of groups, not just individuals. Only then will it be possible to believe that when we reject the claim against preferential treatment for blacks we are not at the same time undermining the constitutional basis for protecting them. Of course, even if the antidiscrimination principle were not the predominant interpretation of the Clause, it might still be possible to formulate a claim against preferential treatment. The element of individual unfairness to the rejected applicants inherent in preferential treatment could be considered a cost in evaluating the state action in the same way as a loss of liberty or dignitary harm might be. The failure of the state to include other disadvantaged groups, such as the Chicanos, might also become significant. But the
In attempting to formulate another theory of equal protection, I have viewed the Clause primarily, but not exclusively, as a protection for blacks. In part, this perspective stems from the original intent—the fact that the Clause was viewed as a means of safeguarding blacks from hostile state action. The Equal Protection Clause (following the circumlocution of the slave-clauses in the antebellum Constitution) uses the word “person,” rather than “blacks.” The generality of the word chosen to describe those protected enables other groups to invoke its protection; and I am willing to admit that was also probably intended. But this generality of coverage does not preclude a theory of primary reference—that blacks were the intended primary beneficiaries, that it was a concern for their welfare that prompted the Clause.

It is not only original intent that explains my starting point. It is also the way the courts have used the Clause. The most intense degree of protection has in fact been given to blacks; they have received a degree of protection that no other group has received. They are the wards of the Equal Protection Clause, and any new theory formulated should reflect this practice. I am also willing to speculate that, as a matter of psychological fact, race provides the paradigm for judicial decision. I suspect that in those cases in which a claim of strict scrutiny has been or reasonably could have been made, it is commonplace for a judge to reason about an equal protection case by thinking about the meaning of the Clause in the racial context and by comparing the case before him to a comparable one in the racial area. Moreover, the limitations or inadequacies of the antidiscrimination principle surface most sharply when it is used to evaluate state practices affecting blacks.

Starting from this perspective, a distinctively racial one, it strikes me as odd to build a general interpretation of the Equal Protection Clause ... on the rejection of the idea that there are natural classes, that is, groups that have an identity and existence wholly apart from the challenged state statute or practice. There are natural classes, or social groups, in American society and blacks are such a group. Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives.

I use the term “group” to refer to a social group, and for me, a social group is more than a collection of individuals, all of whom, to use a popular example, happen to arrive at the same street corner at the same moment. A social group, as I use the term, has two other characteristics. (1) It is an entity (though not one that has a physical body). This means that the group has a distinct existence apart from its members, and also that it has an identity. It makes sense to talk about the group (at various points of time) and know that you are talking about the same group. You can talk about the group without reference to the particular individuals who happen to be its members at any one moment. (2) There is also a condition of interdependence. The identity and well-being of the members of the group
and the identity and well-being of the group are linked. Members of the
group identify themselves—explain who they are—by reference to their
membership in the group; and their well-being or status is in part deter-
mined by the well-being or status of the group. * * *

I would therefore argue that blacks should be viewed as having three
characteristics that are relevant in the formulation of equal protection
theory: (a) they are a social group; (b) the group has been in a position of
perpetual subordination; and (c) the political power of the group is severely
circumscribed. Blacks are what might be called a specially disadvantaged
group, and I would view the Equal Protection Clause as a protection for
such groups. Blacks are the prototype of the protected group, but they are
not the only group entitled to protection. There are other social groups,
even as I have used the term, and if these groups have the same character-
istics as blacks—perpetual subordination and circumscribed political pow-
er—they should be considered specially disadvantaged and receive the same
degree of protection. What the Equal Protection Clause protects is specially
disadvantaged groups, not just blacks. A concern for equal treatment and
the word “person” appearing in the Clause permit and probably require
this generality of coverage.

Some of these specially disadvantaged groups can be defined in terms
of characteristics that do not have biological roots and that are not
immutable; the Clause might protect certain language groups and aliens.
Moreover, in passing upon a claim to be considered a specially disadvan-
taged group, the court may treat one of the characteristics entitling blacks
to that status as a sufficient but not a necessary condition; indeed the court
may even develop variable standards of protection—it may tolerate disad-
vantaging practices that would not be tolerated if the group was a “pure”
specially disadvantaged group. Jews or women might be entitled to less
protection than American Indians, though nonetheless entitled to some
protection. Finally, these judicial judgments may be time-bound. Through
the process of assimilation the group may cease to exist, or even if the
group continues to retain its identity, its socioeconomic and political
positions may so improve so as to bring to an end its status as specially
disadvantaged.

———

The American Civil Rights Tradition: Anticlassification
or Antisubordination?

■ JACK M. BALKIN and REVA B. SIEGEL

A fairly standard story about the development of antidiscrimination
jurisprudence since the 1970s argues that the views of Fiss and other
antisubordination theorists were rejected by the U.S. Supreme Court,
which adopted a contrary and inconsistent theory of equality. This
approach is sometimes called the anticlassification or antidifferentiation prin-
ciple. Roughly speaking, this principle holds that the government may not
classify people either overtly or surreptitiously on the basis of a forbidden
category: for example, their race. We add the word “surreptitiously” because a law that does not explicitly classify by race may nevertheless be motivated by an invidious purpose to differentiate on the basis of race, and most people think that this also counts as a violation of the anticlassification or antidifferentiation principle.

When Fiss talks about the anticlassification approach in his 1976 article, he calls it the “antidiscrimination” principle. In hindsight, this choice of words was quite unfortunate, because there is no particular reason to think that antidiscrimination law or the principle of antidiscrimination is primarily concerned with classification or differentiation as opposed to subordination and the denial of equal citizenship. Both antisubordination and anticlassification might be understood as possible ways of fleshing out the meaning of the antidiscrimination principle, and thus as candidates for the “true” principle underlying antidiscrimination law.

We challenge the common assumption that, during the Second Reconstruction, the anticlassification principle triumphed over the antisubordination principle. We argue instead that the scope of the two principles overlap, that their application shifts over time in response to social contestation and social struggle, and that antisubordination values have shaped the historical development of anticlassification understandings. Analyzed from this historical vantage point, American civil rights jurisprudence vindicates both anticlassification and antisubordination commitments, even as the antisubordination principle sits in perpetual judgment of American civil rights law, condemning its formalism, compromises, and worldly limitations, and summoning it to more socially transformative ends. * * *

The idea of distinguishing between anticlassification and antisubordination principles arose at a critical juncture in American race history. Fiss authored his path-breaking article proposing the “group disadvantaging principle” in 1976, two decades after Brown, when American law had discredited prominent and overtly discriminatory practices enforcing racial segregation. At this juncture in the struggle over disestablishing Jim Crow, the Court faced important questions about the constitutionality of two kinds of practices: practices that employed racial criteria to integrate formerly segregated institutions and practices that preserved the racial segregation of institutions through formally neutral rules that made no overt reference to race. The stakes were high. Depending on how the Court dealt with the legality of affirmative action and the legitimacy of facially neutral practices with a disparate impact on racial minorities, the Constitution would either rationalize or destabilize the practices that sustained the racial stratification of American society now that the most overt forms of segregation were abolished.

The questions facing the Court put at issue the very meaning of Brown and the civil rights movement. If the Court read Brown as invalidating segregation on the ground that it violated an anticlassification principle, then facially neutral practices with disparate impact on racial minorities would be presumptively constitutional, while affirmative action would not. On the other hand, if the Court read Brown as invalidating segregation on the ground that it violated an antisubordination principle, then affirmative
action would be presumptively constitutional, while facially neutral practices with a disparate impact on minorities would not.

In point of fact, segregation under Jim Crow violated both the anticlassification and antisubordination principles. Cases like *Brown* and *Loving* contained language condemning the practice of classifying citizens by race as well as language condemning practices that enforced subordination or inflicted status harm. For example, *Brown* argued that “[t]o separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Loving* argued that “[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” Depending on whether one emphasized the anticlassification or antisubordination discourse in *Brown* and *Loving*, the cases seemed to resolve the disputes facing the Court quite differently.

Fiss advanced the group-disadvantaging principle as a framework for understanding *Brown*, so that *Brown* could be doctrinally elaborated in ways that would continue the work of disestablishing racial segregation. By developing the antisubordination values of cases like *Brown* and *Loving* into an independently justified “group-disadvantaging principle” and differentiating that principle from an anticlassification principle, Fiss sought to guide the Court in resolving the central questions of racial equality it faced in the mid–1970s. Fiss and the audience of *Groups and the Equal Protection Clause* understood the anticlassification and antisubordination principles to have divergent practical implications for the key issues of the moment: The anticlassification principle impugned affirmative action, while legitimating facially neutral practices with a racially disparate impact, while the antisubordination principle impugned facially neutral practices with a racially disparate impact, while legitimating affirmative action. Given the way Fiss and his audience understood the practical entailments of the two principles, it seems plausible to say that, during the 1970s and 1980s, the Court decided to vindicate anticlassification rather than antisubordination commitments. If one defines the anticlassification and antisubordination principles solely with reference to these doctrinal debates, one might well conclude that the Court has never embraced the antisubordination principle in its Fourteenth Amendment case law. Yet if we step back from this particular group of cases, we will discover that this view fundamentally mischaracterizes the development of American antidiscrimination law. In fact … antisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice.

Sometimes … courts have implemented the anticlassification principle in a fashion that preserves status relations. But often, and particularly as the civil rights agenda expands, the judiciary has applied the anticlassification principle in ways that dismantle status relations. … As social protest delegitimates certain practices, courts are often moved, consciously or unconsciously, by perceptions of status harm to find violations of the anticlassification principle where they saw none before. Considered from
this historical vantage point, American civil rights jurisprudence vindicates both anticlassification and antisubordination commitments.

Groups, Politics, and the Equal Protection Clause
Issues In Legal Scholarship (2003), Abstract
http://www.bepress.com/ils/iss2/art19

Samuel Issacharoff and Pamela S. Karlan

In some ways, what’s remarkable is how much of the current debate follows the tracks Owen [Fiss] laid down over a quarter-century ago. Groups and the Equal Protection Clause identified two mediating principles that might “stand between the courts and the Constitution to give meaning and content to an ideal embodied in the text.” One, which Owen called the “antidiscrimination principle,” saw the clause as primarily a limitation on the government’s power to classify individuals (that is, to make discriminations among them). The other, the “group-disadvantaging principle” that Owen championed, saw the clause as essentially a prohibition on the creation or perpetuation of subordinate classes. Much of the contemporary debate over affirmative action, for example, plays out along precisely these lines. Opponents of affirmative action emphasize its use of a “suspect classification” (race) to deprive individuals of the right to be judged on their own merits. Supporters stress the continuing disadvantaged condition of blacks and Hispanics and argue that race-conscious action is necessary to bring members of traditionally excluded groups into the educational and economic mainstream.

Affirmative Action and the Group–Disadvantaging Principle
Issues In Legal Scholarship (2003)
http://www.bepress.com/ils/iss2/art14

Daniel Sabbagh

[A]ffirmative action inevitably relies on a historical, sociological and political judgment as to which reference groups ought not to be overrepresented at the bottom of the economic and occupational hierarchy in order to avoid the self-perpetuation of morally unacceptable, structural inequalities. For all “groups” are not of a similar kind. Some of them are only statistical aggregates in which case the distinctive feature of their “members” is defined on a quasi-random basis, and will be considered arbitrary by insiders and outsiders alike (think of the group of people with blond hair and brown eyes). Others are associations set up to promote the interests or ideas shared by their members, who typically affiliate themselves with some organizational structure specifically designed to that end (political parties, unions, etc.). Only a few of them are ascriptive, status groups whose existence, far from being the product of a foundation of any kind, remains largely independent from the will of their individual members and
whose impact on their social experience and subjective identity is still particularly powerful. In Fiss’ characteristically eloquent prose,

“There are natural classes, or social groups, in American society and blacks are such a group. Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives.”

Naturally, one may well disagree over exactly which groups would qualify for a description of this kind. Yet, the margin of disagreement is not infinite.

“black men and women (. . .) are not free to choose for themselves in what roles—or as members of which social groups—others will characterize them. They are black, and no other feature of personality or allegiance or ambition will so thoroughly influence how they will be perceived and treated by others, and the range and character of the lives that will be open to them.”

Thus, Fiss’ restrictive conception of social groups does provide an answer to the slippery-slope argument: the only groups that should benefit from affirmative action policies under the anti-caste principle enclosed in the Fourteenth Amendment are those whose membership of which stands as a crucial feature of the individual’s identity insofar as it shapes others’ expectations toward her.

NOTES

1. The difference between “anticlassification” (or antidiscrimination), on the one hand, and “antisubordination,” on the other hand, is a classic illustration of the formal/substantive equality divide. It is tempting to draw a stark line in the sand when reading a court’s interpretation of the meaning of equality as either an illustration of formal equality or of substantive equality. However, Balkin and Siegel urge us to look deeper to see how formalism—e.g. application of the anticlassification rule—might, in some cases, contain strands of a concern for a more substantive equality. One example of this is the Loving v. Virginia case, 388 U.S. 1 (1967), discussed by Balkin and Siegel, excerpted in chapter V, and in which the United States Supreme Court invalidated laws prohibiting interracial marriages not just as a violation of the rule against racial classifications but also as wrongfully perpetuating an ideology that was at the heart of the subordination of Blacks in American society. In doing so, the Court rejected the State of Virginia’s formal equality argument used to defend the antimiscegenation statute. The State argued that the statute treated blacks and whites equally by applying the same penalty to them for violating the ban on interracial marriage. The Court’s rejection of that argument is accomplished by application of the anticlassification rule, which triggered a searching inquiry (“strict scrutiny”) into the true purpose and effect of the statute, white supremacy. Brown v. Board of Education is another example,
as Balkin and Siegel point out, of how the Court imported antisubordination analysis into anticlassification analysis to invalidate “separate but equal” in part because of its impact on the “hearts and minds” of Black children in society.

2. Another area where the relationship between anticlassification/antidiscrimination and antisubordination has historically played out is affirmative action admissions policies, and in an earlier era, race-conscious student assignment policies to counteract segregated schools. A close look at the Court’s jurisprudence similarly reveals a shifting terrain of the tension between formalist and more substantive visions of whether the anticlassification rule prohibits using race-conscious policies to ameliorate racial segregation and subordination:

“[D]uring the very period when the Supreme Court was adopting the strict scrutiny framework set forth in *McLaughlin* and *Loving*, federal courts were routinely upholding the right of state and local governments to implement race-conscious policies intended to lessen de facto public school segregation. Courts, in other words, understood equal protection as a race-asymmetric constraint on governmental action; they understood that the purpose of equal protection doctrine was to prevent the state from inflicting certain forms of status harm on minorities.

But this understanding of the presumption against racial classification began to shift by the end of the 1960s, in response to escalating national conflicts over race and the rise of a new generation of desegregation initiatives aimed at post-secondary and professional education. Constitutional challenges to voluntary desegregation initiatives, which appeared as soon as those initiatives began, suddenly had legal traction. Until the 1970s, race-conscious assignment policies were either understood as licit forms of racial classification, or not counted as “invidious classifications” at all. Amidst a national conversation about what harms and whose harms the Equal Protection Clause would redress, judges began to analyze university admissions practices as racial classifications subject to the presumption of unconstitutionality.”


3. The concept that Fourteenth Amendment scrutiny should be elevated in cases involving “statutes directed at particular religious . . . national . . . or racial minorities” [demonstrating] “prejudice against discrete and insular minorities” was first articulated by the Supreme Court in footnote four of Justice Harlan Stone’s majority opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Justice Stone reasoned that discrete and insular minority groups lacked the political power to protect themselves through the democratic process. This same concept is behind Dr. King’s explanation of why civil rights advocates were obligated to obey just laws, but not unjust laws. As he explained in the *Letter From Birmingham Jail*, “An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make
binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal.”

4. Does the decision to define certain categories as protected by anti-discrimination law reveal whether the intent is to protect against classification or subordination? Consider the Charter of Fundamental Rights of the European Union, which provides in Article 21:1.

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

D. Equality as Equal Treatment

The question of gender equality raises slightly different arguments and tensions that revolve around the question of how to treat biological, physiological, and social differences between men and women. Should the law be “blind” to those differences and treat men and women the same? Or does equality law require that members of certain groups be treated differently in order to be treated the same? Treating men and women the same, despite differences, might in fact undermine stereotypes traditionally associated with some differences between men and women and which have hindered their opportunities in society. On the other hand, failing to recognize and explicitly account for those differences and the ways in which they have curtailed equal opportunities for men and/or women may perpetuate existing inequalities. Consider the questions raised by equality as sameness through the excerpts below.

———

Equality and Difference: The Case of Pregnancy

1 Berkeley Women’s Law Journal 1, 26 (1985)

HERMA HILL KAY

Philosophers recognize that, just as the concept of equality requires that equals be treated equally, so it requires that unequals be treated differently. To treat persons who are different alike is to treat them unequally. The concept of formal equality, however, contains no independent justification for making unequals equal. A different concept, that of equality of opportunity, offers a theoretical basis for making unequals equal in the limited sense of removing barriers which prevent individuals from performing according to their abilities. The notion is that the perceived inequality does not stem from an innate difference in ability, but rather from a condition or circumstance that prevents certain uses or developments of that ability. As applied to reproductive behavior, the suggestion would be that women in general are not different from men in innate
ability. During the temporary episode of a woman’s pregnancy, however, she may become unable to utilize her abilities in the same way she had done prior to her reproductive conduct. Since a man’s abilities are not similarly impaired as a result of his reproductive behavior, equality of opportunity implies that the woman should not be disadvantaged as a result of that sex-specific variation.

Bradwell v. Illinois
83 U.S. 130, 140–142 (1872)

Mr. Justice Bradley, concurring in the result

[EDITORS’ NOTE: Myra Bradwell’s application for membership in the Illinois bar was rejected because of her sex. In this opinion, Justice Bradley concurs with the Supreme Court’s 8–1 decision rejecting her challenge to the bar’s decision.] [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.

In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.
Muller v. State of Oregon
208 U.S. 412 (1908)

Mr. Justice Brewer, delivered the opinion of the Court

[EDITORS’ NOTE: Muller was convicted of employing women employees at his laundry for over ten hours in one day, in violation of a state “protective” law. Relying on a lengthy brief filed by future Justice Louis Brandeis, collecting social science data on working conditions for women, the Court upheld the Oregon law, and Muller’s conviction.]

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one’s eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her
benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

———

**Sail'er Inn, Inc. v. Kirby**  
5 Cal.3d 1 (1971) California Supreme Court

PETERS, J., expressing the unanimous view of the Court.

Laws which disable women from full participation in the political, business and economic arenas are often characterized as “protective” and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.

———

**United States v. Virginia**  

JUSTICE GINSBURG delivered the opinion of the Court.

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women for particular economic “disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

———

**Nguyen v. Immigration and Naturalization Service**  
533 U.S. 53, 72 (2001)

JUSTICE KENNEDY delivered the opinion of the Court.

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes
would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Nguyen v. Immigration and Naturalization Service
533 U.S. 53, 72 (2001)

JUSTICE O’CONNOR, dissenting

It is, of course, true that the failure to recognize relevant differences is out of line with the command of equal protection. But so too do we undermine the promise of equal protection when we try to make our differences carry weight they simply cannot bear.

NOTES

1. The U.S. Supreme Court is not engaging in the formalism of neutrality or “anticlassification” in its gender jurisprudence as it is in its race jurisprudence. In recognizing that there are real, or relevant, differences that the state may legitimately take into account, the Court recognizes both the biology of sexual difference and also that certain social differences on the basis of gender matter. While we might be wise to continue to reject biological determinism for race, is it safe to say that there are “real” racial differences (disparities) in American society? Why might we be able to acknowledge gender differences but not racial ones?

2. One might argue that the line between a sex-based distinction that “celebrates” gender differences and one that “denigrates” or restrains the opportunity of one sex is not always clear. One way to understand the tightrope that the United States Supreme Court is walking in its attempt to parse out the difference between an invidious and a more benign form of differential treatment is to think in terms of whether the sex difference relied upon embodies a “perfect proxy”—that is, whether the assumption underlying the difference is true of all women or no women; all men or no men. As Mary Ann Case persuasively argues, the Court has used the term “stereotype” to look for imperfect proxies, or overbroad generalizations. She has found that “[e]ven a generalization demonstrably true of an overwhelming majority of one sex or the other does not suffice to overcome the presumption of unconstitutionality the Court has attached to sex-respecting rules: virtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate. . . . [A]s well as being descriptively less than perfectly accurate, these generalizations also embody outdated normative stereotypes (i.e., ‘fixed notions concerning the roles and abilities of

3. Professor Julie Suk observes, “American antidiscrimination doctrine is skeptical of paternalistic policies that restrict the choices of individuals belonging to protected groups in the name of their protection. Mandatory maternity leave betrays the sex stereotype of women as caregivers, and such stereotypes seem to offend the identitarian conception of sex equality that aspires to undo women’s traditional identities as caregivers. At the same time, the absence of mandatory maternity leave has adverse distributive consequences for women; it makes it difficult for women to choose to take adequate maternity leaves, due to well-founded fears of being penalized in the labor market for such choices. The lack of adequate maternity leave in the United States notoriously disadvantages women workers and thereby undermines the redistributive conception of equality.” Julie C. Suk, Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe, 60 AM. J. OF COMP. LAW ___ (2012).

4. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, attempts to guarantee gender equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life—including the right to vote and to stand for election—as well as education, health and employment. Over 185 countries have joined the Convention, although notably the United States is not a signatory. Quotas of some form exist in over one hundred of CEDAW’s State signatories, including in France which amended its constitution in 2000 to require that half of all political candidates be women. For a list of countries that have adopted quotas, see http://www.quotaproject.org/. Think about the adoption of quotas by a country like France in light of its “universalist” equality mandate—i.e., its belief that all citizens are equal before the law and its anathema to identity classifications on the basis of race or ethnicity. Why doesn’t a law that attempts to enforce gender parity not violate this universalism? Or does it? An early attempt to institute a 25% quota for women in France was rejected by its Constitutional Council as violating the principle of equality under French law which does not require that “different people be treated differently.” For a nice summary of the reasoning of the Council See Darren Rosenblum, Parity/Disparity: Electoral Gender Inequality On The Tightrope Of Liberal Constitutional Traditions, 39 UNIVERSITY OF CALIFORNIA DAVIS L. REV. 1119, 1159–1160 (2006). However, as Professor Rosenblum explains, “the flourishing of feminist theory in France fed reconsideration of the relationship between gender and universalism.” He explains that:

The practical establishment of Parity as an element of French universalism arose as feminists shifted from a quota requirement of one-fifth or one-quarter of candidates to the fifty percent Parity proposal. In so doing, their efforts reflected respect of the universalism underlying French constitutional theory. Parity, unlike quotas, was not to establish some minority representation, but rather to give represen-
In feminist theory terms, Parity re-conceptualized representation in terms of society’s composition of men and women, instead of centering on the uniquely feminine identity in each woman. Although Parity seems to convey an essentialist structure of gender, culture and law, its advocates’ vision of a dual universal may move toward de-essentializing essentialism in the context of political representation as well.

Critics of this redefined universalism alleged that it was nothing more than communitarianism, American style. French constitutional theory centers on the civic creed of universalism in contrast to the communitarianism prevalent in the United States, where society finds itself broken up into groups based on ethnicity, race, or sexual orientation. Feminists countered that women are not a group, but rather women cut across all interest groups and would not be a unified element in the legislature. In the end, advocates succeeded with this argument—that women are half of the universal, and do not constitute a group that would conflict with French universalist traditions. Rosenblum, supra, at 1163–1165.

E. Equality as Accommodation

Equality might be framed as a demand to affirmatively accommodate certain differences so that these differences become essentially cost-free in society and in the market of equal opportunity. To reduce the opportunity costs of certain differences, accommodation would require taking explicit account of a particular difference as a way of reducing barriers in certain settings arising from that difference. A stronger version of accommodation would force fundamental restructuring of a workplace or other setting to allow those with certain differences to participate on an equal footing with others. Accommodation has its costs, however, as some of the commentators below point out. These excerpts illustrate some of the contours of the debate over whether and how the law might accommodate differences of religion, race, ethnicity, disability and gender where those differences restrict an individual’s opportunities in society.

———

Religion, Private Schools and the Duty of Reasonable Accommodation: Looking Beyond the Trees to the Forest
Published in Le Devoir (June 15, 2005)

PIERRE MAROIS
(President, Commission des droits de la personne et des droits de la jeunesse)

It is appropriate to emphasize that reasonable accommodation is a legal duty that arises from the right to equality. It is one of the tools used
in Quebec to manage, in a civilized way, the conflicts that inevitably occur given the growing diversity within society.

Reasonable accommodation is based on a simple observation: although all human beings are equal, they are not identical. This observation has repercussions in daily life. For example, the courts have ruled that pregnant female employees must be accommodated to allow them to continue working without being penalized; if they have to miss a few hours of work for a medical examination, the employer must accommodate them if this can be done without unduly affecting the operation of the enterprise. The same applies to people with disabilities, who may have to be accommodated by changes to their job tasks or to the workplace.

Religious particularities are also taken into account to encourage everyone to play an active role in society, just as the needs linked to pregnancy or disability are now recognized. A refusal to take religious particularities into account could have the opposite effect, namely that of placing some people on the margins of society, and this must be avoided. In its 1995 opinion, the Commission took into account the risks that, if students were forbidden to wear an Islamic veil at school, they could be excluded from the right to public education.

Obviously, we must still look at the question of how far accommodation can extend. The duty of accommodation does not mean that all particularities must be accepted unconditionally. As the Commission pointed out in 1995, “In the case of religion, rights and freedoms can soon be transformed into sacred absolutes placing constraints on society as a whole.” The duty of reasonable accommodation has a limit, defined by the notion of undue hardship.

The Paradoxes of Reasonable Accommodation

Many calls for accommodation come from the proponents of muddled political correctness—the friends of multiculturalism, diversity and communitarianism. For them, the existence of permanent ethnic and religious groups and of collective rights attached to them is a public good. Reasonable accommodation is one of the ways of maintaining differences and the negotiation of the degree of accommodation is, in the nature of things, the domain of the lobbies. This model of Canada is what Joe Clark meant when he said that Canada is a “community of communities.” The opponents of accommodation, especially in Quebec, are often inspired by French republicanism, by notions of secularism, of equality and of integration of newcomers as equals into our society. They abhor the idea that civil society should become a permanent negotiating session between powerful lobbies.

It is the thesis of this essay that reasonable accommodation is desirable for two reasons—individual freedom and effective integration of immigrants.
In a democratic society, individual freedom is surely one of the fundamental values. Telling a person what to wear, how to decorate their homes, what to eat and when to celebrate holidays is an unnecessary interference with personal liberty.

The second reason for accommodation is equally important—the integration of immigrants. Accommodating kirpas, kirpans, kerchiefs, turbans, religious holidays and so on allows the individuals in question easy access to public institutions and public employment. This, in turn, integrates them in the mainstream and, in the next generation, most of their children do not require accommodation.

This process is assisted by the fact that accommodation prevents the development of a sense of alienation or, in extreme cases, perception of persecution, which is sometimes evident in isolated minorities, and that the availability of many types of employment promotes economic equality, which is the most important condition for successful integration.

All of this, of course, points to certain limits as to the type of accommodation that merits the adjective “reasonable.” Most will agree that demands for accommodation should not be too onerous. For instance, individuals should be able to claim a few days for religious observance; society could not cope with a request for 50 days a year. Similarly, one could not permit truly dangerous objects in the name of religion (e.g., a sharpened sword instead of a kirpan).

What has less often been pointed out is that accommodation that ghettoizes groups—for instance by the creation of separate schools, hospitals, courts—is undesirable. Indeed, a burka or a veil that covers the face, as opposed to a kerchief, is very problematic, because it constitutes a barrier to social integration. It is very surprising that, in their opposition to accommodation, Quebec republicans fixated on the rather innocuous kirpan, and not on the expensive and morally questionable subsidies to private schools.

It is becoming increasingly clear that multiculturalism is not only a chimera, but also a dangerous one. No society has ever been successful in the long run unless it integrated its citizens and eliminated barriers to marriage between them.

The word “assimilation,” which is odious when force is used, should be rehabilitated as a description of what happens to citizens of varied origins in an open society. When the Anglo Saxons, the Scandinavians, the Celts and the Normans fused to form the English nation, and when the Romans, Celts and Germanic Franks became the French, both attained a cultural and social cohesion that no multicultural society can imitate. Of course, assimilation is not a one-way street. The immigrants adopt the language and culture of the majority, but the majority is also modified, and indeed permeated, by the contribution of the immigrants. It is obvious that the waves of immigration of the 20th century have left an indelible mark on Canada and on the descendants of the two majority groups of the early 1900s. That is perhaps another reason, a pedagogical one, to permit...
manifestations of new cultures in our schools and other institutions, since much of what they bring will become part of us.

---

**Trans World Airline v. Hardison**

432 U.S. 63 (1977)

**Justice Marshall, dissenting**

The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious function; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules. What all these cases have in common is an employee who could comply with the rule only by violating what the employee views as a religious commandment. In each instance, the question is whether the employee is to be exempt from the rule’s demands. To do so will always result in a privilege being allocated according to religious beliefs, unless the employer gratuitously decides to repeal the rule in toto. What the statute says, in plain words, is that such allocations are required unless undue hardship would result.

---

**The Equality Crisis: Some Reflections on Culture, Courts and Feminism**


**Wendy W. Williams**

Feminists split over the validity of the Montana statute [requiring employers to provide pregnant employees with leaves of absence]. Some of us felt that the statute was, indeed, incompatible with the philosophy of the PDA [“Pregnancy Discrimination Act”]. Others of us argued that the PDA was passed to help pregnant women, which was also the objective of the Montana statute. Underneath are very different views of what women’s equality means; the dispute is therefore one of great significance for feminists.

The Montana statute was meant to help pregnant women. It was passed with the best of intentions. The philosophy underlying it is that pregnancy is central to a woman’s family role and that the law should take special account of pregnancy to protect that role for the working wife. And those who supported the statute can assert with great plausibility that pregnancy is a problem that men don’t have, an extra source of workplace disability, and that women workers cannot adequately be protected if pregnancy is not taken into account in special ways. They might also add that procreation plays a special role in human life, is viewed as a fundamental right by our society, and therefore is appropriately singled out on social policy grounds. The instinct to treat pregnancy as a special case is
deemed deeply imbedded in our culture, indeed in every culture. It seems natural, and right, to treat it that way.

Yet, at a deeper level, the Supreme Court in cases like Gilbert, and the feminists who seek special recognition for pregnancy, are starting from the same basic assumption, namely, that women have a special place in the scheme of human existence when it comes to maternity. Of course, one’s view of how that basic assumption cuts is shaped by one’s perspective. What businessmen, Supreme Court Justices, and feminists make of it is predictably quite different. But the same doctrinal approach that permits pregnancy to be treated worse than other disabilities is the same one that will allow the state constitutional freedom to create special benefits for pregnant women. The equality approach to pregnancy (such as that embodied in the PDA) necessarily creates not only the desired floor under the pregnant woman’s rights but also the ceiling which the [Montana . . .] case threw into relief. If we can’t have it both ways, we need to think carefully about which way we want to have it.

—–

Nevada Department of Human Resources v. Hibbs

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

—–

Tennessee v. Lane

JUSTICE GINSBURG, concurring.

Including individuals with disabilities among people who count in composing “We the People,” Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.

—–

Disabilities, Discrimination, and Reasonable Accommodation

PAMELA S. KARLAN & GEORGE RUTHERGLEN

[H]ow the law defines discrimination makes a big difference in the kinds of remedies it provides. The Americans With Disabilities Act (ADA),
the newest comprehensive federal antidiscrimination statute, offers a funda-
damentally different approach to—and a fundamentally different remedy for—vindicatory discrimination than prior legal regimes. The older statutes generally prohibit discrimination in employment on other grounds: Title VII of the Civil Rights Act of 1964 (Title VII) on the basis of race, national origin, sex and religion; the Age Discrimination in Employment Act of 1967 (ADEA) on the basis of age. In language that tracks the earlier language of Title VII and the ADEA, the ADA forbids employers from taking an individual’s disability into account by “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.” But unlike Title VII, the ADA also requires employers to take some disabilities into account by providing “reasonable accommodations” to disabled workers who request them; it defines discrimina-
tion to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual....” And the potential sweep of reasonable accommodations is quite broad: beyond “making existing facilities . . . readily accessible to and usable by individuals with disabilities” accommodations may include “job restructuring, part-time or modified work schedules, . . . [or] the provision of qualified readers or interpreters....” Put somewhat differently, under the civil rights statutes that protect women, blacks, or older workers, plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor; disabled individuals often can.

Two examples clarify this point. Suppose that one “essential function” of the job of sack handler is to carry fifty-pound sacks from the company loading dock to a store room. If a male worker is physically disabled by a back ailment, and thus unable to carry the sacks the full distance, the company can be required to make the reasonable accommodation of providing the worker with a dolly on which to transport the sacks. By contrast, if a female worker cannot lift the same heavy cartons hoisted by her male counterparts, no accommodation is required and firing her because she cannot do the job as it then stands does not constitute impermissible sex discrimination. As long as the heavy lifting requirement is job-related, an employer may impose such a qualification even if it excludes a dispropor-
tionate percentage of female applicants. But even if the requirement is job-
related, the employer may be compelled to modify it in order not to exclude a disabled applicant who could perform the job as modified.

Consider also a job that requires its occupant to read various docu-
ments and prepare reports. The employer may be required to accommodate a blind or dyslexic worker by providing her with an assistant to read documents to her. But suppose a black employee—as a direct result of having attended inferior, poorly funded public schools beset by the lingering effects of de jure segregation—lacks adequate reading comprehension and writing skills. Even if he could certainly understand the documents if they were read to him and could communicate his reports orally, because he is the victim of “environmental, economic, and cultural disadvantages” and “is unable to read [at the appropriate level] because he ... was never
taught to read,'" he is not disabled and therefore is not entitled to any accommodation of his impairments.

We point out these contrasts between the safeguards of "traditional" civil rights laws and the protections accorded by the ADA not to show that disabled individuals are somehow receiving unwarranted benefit or even an unfair advantage over other groups that have experienced exclusion from full economic participation, but rather to suggest that the emerging law of reasonable accommodation may shed light on antidiscrimination law generally. The ADA's focus on a "flexible, interactive process" of employer-employee negotiation and liberal modification of physical, logistic, and attitudinal barriers that preclude full equality of opportunity may provide a model for thinking about traditional affirmative action as well.

NOTES

1. The feminist debate in the United States over the accommodation of pregnancy in the workplace has shifted toward a more substantive debate about how to accommodate women's "caregiving" role in society. Contemporary feminist legal scholars now critique the push to accommodate pregnancy as limited because it failed to address the barriers to women's full participation in the workplace beyond the immediate, physical events of pregnancy and childbirth. As one feminist scholar points out:

The persistent attachment gap resulting from women's disproportionate caregiving responsibilities at home has had tangible negative economic and social consequences for women. The part-time, temporary, or otherwise contingent jobs to which women are often limited generally provide lower hourly wages than full-time positions, tend to be less stable, and are less likely to offer health insurance, childcare benefits, pension benefits, or opportunities for advancement. Even for women who work full-time, career interruptions for nurturing responsibilities often translate into lower seniority, wages, and salaries vis-à-vis male coworkers. Such interruptions occur not just during a woman's childbearing years, but later in life as well. Older women who reduce their work hours or exit the workforce at the height of their earning capacity to care for elderly parents experience not only short-term losses of wages, but also potentially long-term reductions in pension income.

Furthermore, women's disproportionate responsibility for caregiving at home has consequences well beyond their reduced economic well-being. The "feminization of poverty" weakens women's bargaining power within marriage, leaves women vulnerable to sexual abuse and domestic violence, and can decrease the likelihood of women gaining or keeping the custody of their children upon divorce. Moreover, because women are the primary caretakers of children in our society, the marginalization of women's wage work has resulted in the widespread poverty of children in America. Finally, the failure of our law to recognize women's work/family conflicts has, in large part, shifted the burden of caregiving from one class of women to another—
that is, from economically privileged women able to conform to the rigid expectations of the American workplace to low-paid domestic and childcare workers who disproportionately are poor women and women of color. . . . The law’s response to the labor force attachment gap and the resulting marginalized economic status of women and children has been minimal.”


2. In 1993, Congress passed the gender-neutral Family Medical and Leave Act which requires employers to provide up to twelve weeks of unpaid leave in a twelve-month period for the care of family members with serious health conditions, for an employee’s own serious health condition, or for the birth or adoption of a child. 29 U.S.C. § 2601–2654 (1994). While the Act specifically recognizes that “the primary responsibility for family caregiving often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men,” contemporary feminists question whether the gender neutrality of the Act nevertheless perpetuates the myth that women and men share caregiving equally and thus fails to address the discriminatory structure of the workplace which continues to favor non-caregivers (who are mostly men) See Kessler, *supra*, at 420–421.

3. A stronger version of accommodation, as embodied in the American With Disabilities Act and developed in Quebec for its cultural and religious minorities, does require (in some circumstances) a fundamental restructuring of institutions and societal norms to accommodate “difference.” But when does accommodation for certain differences undermine equality for others? In the context of a recent public debate on reasonable accommodation, the Quebec Council on the Status of Women, a provincial body that advises the government on issues relating to women, proposed that the Quebec charter be changed to ban public employees from wearing visible religious symbols within workspaces. Such symbols would include large Christian crosses, Sikh turbans, Jewish yarmulkes, and the common headscarf which conceals the hair and neck of Muslim women. The Council argued that abolition of these symbols was an important step toward ensuring equality between men and women in Quebec. According to the Quebec Council on the Status of Women, Islamic symbols such as the headscarf send “a message of the submission of a woman, which should not be conveyed to young children as part of a secular education, which is required to promote equality between men and women.” Conseil du statut de la Femme, *Right to Equality Between Women and Men and Freedom of Religion*, www.csf.gouv.qc.ca/fr/english/. This proposal and its debate sparked an outcry from the Muslim community who felt targeted and increasingly isolated from the broader society. A group of feminists has published a statement opposing the Council’s proposal because, among other reasons, “regulating women’s public religious expression is gender discrimination insofar as it takes away women’s freedom and inhibits their civic participation.” See The Simone de Beauvoir Institute, Concordia University, “*Reasonable Accommodation: A Feminist Response*” (November
CHAPTER I WHAT IS EQUALITY IN THE LAW?

4. As Professor Karlan and Rutherford explain, the right to accommodation is central to the prohibition of discrimination against persons with disabilities. In *Eldridge v. British Columbia*, (1997, Docket 24896), the Supreme Court of Canada held that under the Charter of Rights and Freedoms in Canada, the government was obligated to provide sign interpreters to deaf patients at medical facilities. The Charter provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Court relied on two theories, reasonable accommodation and adverse impact, which will be discussed in Chapter II. For a discussion of *Eldridge*, see Arlene B. Mayerson and Silvia Yee, *The ADA and Models of Equality*, 62 OHIO STATE L.J. 535 (2001).

5. Under the United Nations Convention on the Rights of Persons with Disabilities, discrimination is defined as follows: “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

6. The failure to provide reasonable accommodation to persons with disabilities is also required under the Equality Act of the United Kingdom (2010) at section 21(2), as are accommodations for religious requirements relating to sex, marriage and sexual orientation (schedule 9, para. 2). Are these two forms of accommodation comparable? In a case where a Registrar refused to perform same-sex marriages because it offended her religious beliefs, her claim that she was entitled to religious accommodation was rejected. *See Ladele v. London Borough of Islington*, UKEAT/0453/08/RN (EAT), [2009] EWCA Civ 1357 (CA) (discussed in Emmanuelle Bribosia and Isabelle Rorive, *In Search of a Balance Between the Right to Equality and Other Fundamental Rights*, European Network of Legal Experts in the Non–Discrimination Field (2010)).

7. What other groups might reasonably seek accommodation as a means of achieving equality? When should it be provided?

F. EQUALITY AS DIVERSITY

In the United States we have seen increasing acceptance of the idea that promoting racial and ethnic diversity is a positive social goal. But recognition of diversity requires recognition of the legitimacy of a particular identity. In France and other countries, as we have seen, there is resistance to viewing individuals as members of an identity group. Several
of these excerpts address the idea that equality should entail some degree of recognition (and even celebration) of different identities as members of specific racial, ethnic, religious, and sexual groups. However there are strong and weak versions of this diversity principle that map onto the formal/substantive tension we have seen reflected in other conceptions of equality, and as the excerpts below reveal.

———

**Lesbian and Gay Equality Project v. Minister of Home Affairs**

Constitutional Court of South Africa Case CCT 60/04 (Dec. 1, 2005)

**JUSTICE SACHS**

Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.

———

**Wygant v. Jackson Board of Education**

476 U.S. 267 (1986)

**JUSTICE STEVENS, dissenting**

[I]n our present society, race is not always irrelevant to sound governmental decisionmaking . . . In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous melting pot do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only “skin deep”; it is
far more convincing to experience that truth on a day-to-day basis during
the routine, ongoing learning process.

In this case, the collective-bargaining agreement between the Union
and the Board of Education succinctly stated a valid public purpose—
“recognition of the desirability of multi-ethnic representation on the teach-
ing faculty,” and thus “a policy of actively seeking minority group person-
el.” * * *

It is argued, nonetheless, that the purpose should be deemed invalid
because, even if the Board of Education’s judgment in this case furthered a
laudable goal, some other boards might claim that their experience demonstr-
ates that segregated classes, or segregated faculties, lead to better
academic achievement. There is, however, a critical difference between a
decision to exclude a member of a minority race because of his or her skin
color and a decision to include more members of the minority in a school
faculty for that reason.

The exclusionary decision rests on the false premise that differences in
race, or in the color of a person’s skin, reflect real differences that are
relevant to a person’s right to share in the blessings of a free society. As
noted, that premise is “utterly irrational” and repugnant to the principles
of a free and democratic society. Nevertheless, the fact that persons of
different races do, indeed, have differently colored skin, may give rise to a
belief that there is some significant difference between such persons. The
inclusion of minority teachers in the educational process inevitably tends to
dispel that illusion whereas their exclusion could only tend to foster it. The
inclusionary decision is consistent with the principle that all men are
created equal; the exclusionary decision is at war with that principle. One
decision accords with the Equal Protection Clause of the Fourteenth
Amendment; the other does not. Thus, consideration of whether the
consciousness of race is exclusionary or inclusionary plainly distinguishes
the Board’s valid purpose in this case from a race-conscious decision that
would reinforce assumptions of inequality.

———

Regents of the University of California v. Bakke
438 U.S. 265 (1978)

詹姆士·波韦尔大法官意见附录

哈佛学院招生计划

* * * The belief that diversity adds an essential ingredient to the
educational process has long been a tenet of Harvard College admissions.
Fifteen or twenty years ago, however, diversity meant students from
California, New York, and Massachusetts; city dwellers and farm boys;
violinists, painters and football players; biologists, historians and classic-
cists; potential stockbrokers, academics and politicians. The result was that
very few ethnic or racial minorities attended Harvard College. In recent
years Harvard College has expanded the concept of diversity to include
students from disadvantaged economic, racial and ethnic groups. Harvard
College now recruits not only Californians or Louisianans but also blacks
and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are “admissible” and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only “admissible” academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

---

**Grutter v. Bollinger**


Justice O'Connor delivered the opinion of the Court

* * * The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies
primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

The Law School’s claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”


These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” Brief for Julius W. Becton, Jr., et al. as Amici Curiae 5. The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” * * *

———

Covering

KENJI YOSHINO

Assimilation is the magic in the American Dream. Just as in our actual dreams, magic permits us to transform into better, more beautiful creatures, so too in the American Dream, assimilation permits us to become not only Americans, but the kind of Americans we seek to be. Justice Scalia recently expressed this pro-assimilation sentiment when he joined a Supreme Court majority to strike down an affirmative action program. Calling for the end of race-consciousness by public actors, Scalia said: In the eyes of government, we are just one race here. It is American. (Packed into this statement is the idea that we should set aside the racial identifications that divide us—black, white, Asian, Latino—and embrace the Americanness that unites us all.)
This vision of assimilation is profoundly seductive and is, at some level, not just American but human. Surrendering our individuality is what permits us to enter communities larger than the narrow stations of our individual lives. Especially when the traits that divide us are, like race, morally arbitrary, this surrender seems like something to be prized. Indeed, assimilation is not only often beneficial, but sometimes necessary. To speak a language, to wear clothes, to have manners—all are acts of assimilation.

This assimilationist dream has its grip on the law. The American legal antidiscrimination paradigm has been dominated by the cases of race, and, to a lesser extent, sex. The solicitude directed toward racial minorities and women has been justified in part by the fact that they are marked by “immutable” and “visible” characteristics—that is, that such groups cannot assimilate into mainstream society because they are marked as different. The law must step in because these groups are physiologically incapable of blending into the mainstream. In contrast, major strands of American antidiscrimination law direct much less concern toward groups that can assimilate. Such groups, after all, can engage in self-help by assimilating into mainstream society. In law, as in broader culture, assimilation is celebrated as the cure to many social ills. One would have to be antisocial to argue against it.

I believe gays may have theorized some dimensions of the relationship between assimilation and discrimination differently from either racial minorities or women. This is because gays are generally able to assimilate in more ways than either racial minorities or women. In fact or in the imagination of others, gays can assimilate in three ways: conversion, passing, and covering. Conversion means the underlying identity is altered. Conversion occurs when a lesbian changes her orientation to become straight. Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.

Of these three forms of assimilation, covering will probably be least familiar. The term and concept come from sociologist Erving Goffman’s groundbreaking work on stigma. Goffman observed that even persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large. Thus a lesbian might be comfortable being gay and saying she is gay, but might nonetheless modulate her identity to permit others to ignore her orientation. She might, for example, (1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code as gay; or (3) not engage in gay activism.

As Goffman realized, these modes of assimilation are not always easily distinguishable from one another. For example, Goffman recognized that the same action could be either passing or covering depending on the knowledge of the audience before whom it was performed. A woman who refrains from holding hands with her same-sex partner may thus pass with respect to those who do not know her orientation but cover with respect to those who do. This does not mean that the modalities of assimilation are
indistinguishable. Rather, it means that one must know not only the performance of the actor, but also the literacy of the audience, to make that distinction . . .

The classical model of identity is also a model of discrimination. If individuals have multiple ways of modulating their identities, discrimination against them will take multiple forms, including the demands to convert, to pass, and to cover. The form of assimilation required of an identity will often be correlated to the strength of the animus against it. When discriminatory animus against an identity is particularly strong, it may require conversion. When that animus is weaker, it may permit individuals to retain the targeted trait, but require them to pass. When the animus is weaker still, it may permit individuals to retain and disclose their trait, but require them to cover it.

The Prohibition Era (Review of Covering: The Hidden Assault on Our Civil Rights, by Kenji Yoshino)

THE NEW REPUBLIC, March 20, 2006

MARTHA C. NUSSBAUM

In 1998, a Missouri court granted custody to a lesbian mother, after finding that “the children were unaware of Mother’s sexual preference, and Mother never engaged in any sexual or affectionate behavior in the presence of the children.” Many courts have gone the other way, after determining that same-sex parents engaged not in overt sexual conduct that would be inappropriate for any parent to display before any child, but in displays of affection, such as hugging or holding hands, which clearly revealed the parent’s sexual orientation. Courts in these cases are not demanding that same-sex parents stop being gay, or even that they pretend not to be gay. Instead, they are making a demand that Kenji Yoshino (following Erving Goffman) calls a demand for “covering”: a demand not to express their identity in public and visible ways.

The repression of a minority, Yoshino argues, does not end when it is permitted to exist in society, and is no longer forced to “convert” to some other way of being and acting. Nor does it end when members of the group are not expected to “pass,” concealing their minority identity from all but chosen intimates. Even when minorities who reveal their group membership openly are tolerated, they are often required to assimilate in ways that “cover” that identity. Thus, it was all right for the lesbian mother to be known as a lesbian, but not all right for her to hold hands with her partner. It is often all right for African Americans to be prominent in the workplace, but they have to dress for success and play nice, conforming their behavior to a stereotype invented by the dominant culture.

An interesting example that came too late for inclusion in Yoshino’s account of “covering” has been the media’s treatment of the Olympic medal-winning speed skater Shani Davis. White society was all set to pat itself on the back when an African American finally medaled in the lily-white sport, and Davis would have been warmly welcomed into its bosom
had he been cheerful, docile, and grateful. Stories of how Davis overcame his “gang-infested” neighborhood (he comes from my own neighborhood, Chicago’s Hyde Park, a multiracial university community that can be criticized as boring but not as gang-infested) were trotted out to prepare the way for a warm reception. Instead of gratitude and proper “white” behavior, however, Davis was spiky, brusque, and clearly annoyed at the press’s quite ridiculous treatment of his origins. He talked to Chicago newspapers, which treated him with respect and got his story right, but he turned a cold shoulder to the others. (“Are you angry, Shani?” a network reporter asked, as if that would be the unforgivable sin, when the white community was being so very nice). A similar treatment often befalls African Americans who wear cornrows, or “talk black,” or in other ways refuse to make the majority comfortable.

Similar stories can be told about other minorities. There was once a time when Jews were forced to convert to Christianity if they wanted to escape persecution. Overlapping with this time were times when many Jews persisted in their religion but kept it secret, “passing” as Christian, while revealing their Jewish identity to intimates. By far the most significant form of discrimination suffered by Jews in Europe and North America in the modern era, however, is the form that Yoshino calls “covering”: they may be full and equal (sort of) members of Protestant society if they talk and dress like WASPs, and do not flaunt their religion before others; in short, if they are not “too Jewish.” In the mid-twentieth century, upwardly mobile Jewish parents gave their children WASP names, urged them to avoid their too-Jewish peers, and made sure they went to WASP schools where they would get the “right” social connections. I know older Jews who flinch, even today, before “out” Jews of their own generation, because the expressions and mannerisms of those Jews are exactly what their parents drilled them not to display.

Women, too, encounter a demand for “covering,” but in a more complicated, mixed-up form. At times, women are urged to adopt stereotypical male behavior. A female law student is urged to be aggressive and talkative, to wear a black suit, to mask her emotions, not to have children or to say nothing about them if she does. But at other times (and in other careers), women are penalized if their dress and manner are not “feminine” enough. How on earth any sane person could ever decode these social rules is beyond me. Our confusion is clearly revealed by Yoshino’s lists of women’s “masculine” and “feminine” characteristics, since many professional women possess most of the items on both lists: they avoid pastels and floral designs, and they are aggressive, ambitious, assertive, athletic, competitive, individualistic, and self-reliant; but they also wear earrings and makeup, are sympathetic and yielding, and perform “nurture” functions at work, “like counseling and mentoring.” So who would be surprised that women get criticized and downgraded from both directions: sometimes for being “too masculine,” sometimes for being not “masculine” enough?

The story of any minority’s progress, argues Yoshino, can be charted by examining these three stages: first, the demand for conversion; second, the demand for “passing”; third, and last, the demand for “covering.” Not all three categories apply to all groups. Women were never asked to
"convert," for obvious reasons, or even to "pass," and African Americans had no realistic option of "conversion." Most minorities in America today, according to Yoshino, no longer face demands for conversion or passing—but all, to some extent, face the demand for covering, for assimilation to majority norms. And this demand, while less oppressive than the other two, is profoundly unfair, burdening minorities in ways that majorities are not burdened.

Moreover, the demand is fraught with psychological danger. How can a person really have equality when she has to push some of her most deeply rooted commitments under the rug, treating them as something shameful and socially inappropriate? Surely the lives of gays in America have improved markedly now that they are typically not subjected to enforced conversion procedures, and may even be "out" with impunity; but being "out," as Yoshino rightly shows, is a spectrum, and the law professor whose colleagues tolerate his known gayness but who urge him not to engage in gay politics, or not to teach sexual-orientation law, or not to "flaunt" his orientation through public displays of affection, encounters a demand that is constricting. So, Yoshino concludes, we should not pat ourselves on the back because we tolerate people who are different, when we are imposing demands that deform and humiliate. Instead we must think about how we can produce a society where people are free to be themselves.

NOTES

1. Is "diversity" an empty concept? Diversity simply means difference, variety, or heterogeneity. This means that, in theory, diversity embraces all differences. For instance, in university admissions policies, race has been placed "on the same footing for consideration" as other "qualities" such as exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, rural school attendance, non-mainstream political views, ability to communicate with the poor, and other qualities deemed "different." The concept thus leaves it up to the institution to determine which differences matter most. In theory, a school might attain diversity by accepting more racial minorities or by accepting more tuba players or athletes. Some have argued that diversity needs a "mediating principle" to give it substance in addressing the historical disadvantages of groups like African Americans. See generally Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of Diversity 1993 WISCONSIN LAW REVIEW 105. In practice, however, the diversity rationale has been used as a justification for upholding race-conscious affirmative action plans.

2. If an employer or educational institution succeeds in "diversifying" itself by hiring/admitting people of varying types of "difference"—racial, ethnic, sexual, etc.—under what circumstances might some individuals still feel the need to "cover" their identities? Does diversity address the problem of "covering?"
3. Who are the intended beneficiaries of diversity? Is the purpose to give minority group members an opportunity to join a majority-dominated college or workplace, or to improve the experience of the majority? One critique of the Harvard admissions plan adopted by Justice Powell’s decision in *Bakke* is that its purpose was to improve the educational experience of Harvard’s overwhelmingly white student body by admitting some Black and Chicano students, which would help give the white students a broader view of the world. Is this unfairly cynical? This issue is discussed further in chapter IV.

4. In his dissent to the *Grutter* decision, Justice Thomas describes the University of Michigan Law School’s diversity admissions policy as an “aesthetics” policy, designed to produce a classroom racial mix that is pleasing to observe. See *Grutter v. Bollinger*, 539 U.S. 306, 354–355, n. 3 (dissenting opinion of Thomas, J.). He argues that if the Law School really cared about promoting diversity, it could achieve it through random admissions, giving up its elite status by becoming less selective, or it could stop using the LSAT, which has a discriminatory impact on Blacks and Latinos. Do you agree? Why doesn’t Michigan (and other highly selective law schools) give up using a test that produces such discriminatory results? This issue is discussed further in chapter IV.

5. In 2006, in response to the *Grutter* decision, which permitted the University of Michigan to use racial and ethnic diversity in admitting students, the voters of Michigan passed the “Michigan Civil Rights Initiative,” which banned affirmative action by the State University system. Exit polls show that the initiative had strong support from white voters, and strong opposition from Black voters. See http://www.insidehighered.com/news/2006/11/08/michigan.

6. California and Washington have also passed voter initiatives banning affirmative action in State Universities, including diversity-based affirmative action. Can a court find that the voters have violated the Equal Protection Clause by voting to end a policy that helped minorities? The Supreme Court said yes, in some circumstances (see *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457 (1982)), but in the case of the California initiative the Ninth Circuit and the California Supreme Court both ruled that the initiative did not violate the principle of equality, even where it was supported by white voters and opposed by non-white voters. See *Coalition for Écon. Equity v. Wilson*, 122 F.3d 692, 702 (1997); *Coral Constr., Inc. v. City and County of San Francisco*, 113 Cal.Rptr.3d 279 (2010). New litigation on the issue is pending, as of February 2012, in the Sixth and Ninth Circuits.

---

G. Reparative Equality

One approach to achieving equality is to attempt to repair the harm caused by inequality through reparations, as part of a restorative justice process. When societies have undergone fundamental change, the demand for reparations has at times been an important, and controversial, part of
the change process. Examples include reparations paid by the United States to Japanese Americans incarcerated during World War II, victims of the Nazi Holocaust, and the South African Truth and Reconciliation Commission. Continuing claims for reparations include claims in the United States for slavery, for race riots, for the genocide against the American Indians, and for the military conquest of Hawaii. Dr. King’s “I Have a Dream” speech, often used as a defense of “color-blindness,” can also be described as a call for reparations.

———

Repairing the Past: New Efforts in the Reparations Debate in America


CHARLES J. OGLETREE, JR.

Reparations for African Americans are controversial and highly divisive, not just among whites but also among African Americans. For example, since its introduction in 1989, H.R. 40, Representative John Conyers’s reparations bill, has failed to generate broad support or approval each year that he has filed it in Congress. At the state and local level, the reparations movement has been dramatically different. The movement has gained public moment in recent years, as evidenced by the growing number of legislative initiatives and remains a compelling argument for social justice.

At its most basic level, reparations seek something more than token acknowledgement of the centuries of suffering of African Americans at the hands of the state and federal governments, corporations, and individuals during the three centuries of chattel slavery and Jim Crow. As Randall Robinson notes in his book The Debt: What America Owes to Blacks, many of our greatest public monuments, including the White House, the Capitol, and the Jefferson Memorial, were built by slaves. Sadly and remarkably, the nation’s Capital offers no tribute to these who constructed our nation’s most venerable monuments. The sacrifices of the African American community for the American nation during slavery, Reconstruction, and Jim Crow are too often forgotten.

This is not a casual oversight. Randall Robinson argues persuasively that it is more insidious. The national consciousness of the terrible history of slavery and Jim Crow has been deliberately repressed into a national subconscious as an ugly part of our national history that we choose to ignore.

The failure to acknowledge this history greatly influences the national debate about race. If we refuse to consciously confront the nation’s complicity in enslaving millions of its subjects and brutalizing millions of its citizens during Jim Crow, then we cannot engage in a conscientious discussion or race. To invoke our nation’s responsibility for discrimination is not to play the “victim” card but to demand the same treatment that other races and ethnicities receive. Accordingly, the first goal of reparations is to remember and celebrate these forgotten African Americans and insist...
that our nation fully acknowledge their many contributions to our country’s economic and political well-being.

But reparations can—and must—go further than educating the public and erecting monuments to the nation’s slave forefathers and foremothers. Reverend Martin Luther King Jr. lamented our failure to recognize these historic contributions when he pleaded that for genuine social reconciliation to occur, American must engage in a process of acknowledging its past and repairing the enduring injustices it has created at home.

---

I Have a Dream
Speech delivered on August 28, 1963

Rev. Dr. Martin Luther King, Jr.

In a sense we have come to our nation’s capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check which has come back marked “insufficient funds.” But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now.

[EDITORS’ NOTE: Justice Scalia’s indirect reply to Dr. King and Professor Ogletree is that there is no creditor or debtor race in American law. Consider the following excerpts in light of the continuing debate over reparations for slavery.]

Adarand Constructors, Inc. v. Pena

Justice Scalia, concurring in part and concurring in judgment

In my view, government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a
debtor race. That concept is alien to the Constitution’s focus upon the individual.

Looking Beyond the Bottom: Critical Legal Studies and Reparations

MARI MATSUDA

Reparations is a “critical legalism,” a legal concept that has transformative power and that avoids the traps of individualism, neutrality and indeterminancy that plague many mainstream concepts of rights or legal principles. Reparations avoid standard liberal pitfalls because, first, it is a concept directed at remedying wrongs committed against the powerless. Unlike “free speech” or “due process,” payment for past injustice is a one-way value. Those on the bottom—minority group members, political outsiders, the exploited—will receive reparations.

Second, reparations doctrine supports group rights rather than individual rights and thus escapes some of the ideological traps of traditional rights thinking.

Finally, reparations is at its heart transformative. It recognizes the crimes of the powerful against the powerless. It condemns exploitation and adopts a vision of a more just world. The reparations concept has the aspirational, affirming, idealistic attraction of rights rhetoric, without the weak backbone. While rights rhetoric turns to dust time and again, reparations theory, should we accept and internalize it, may prove more dependable.

This progressive tilt of reparations, however, can mask lurking dangers. Some detect a certain commodifying vulgarity in throwing money at injured people. . . . Reparations, one could argue, promotes the idea that everyone has a price, that every wound is salved by cash, that success merely means more money.

The practical shortage of resources in the injured communities weighs against the commodification risk. Monetary grants will not compensate for the terrible losses sustained. No sum can make up for loss of freedom or sovereignty. The award serves a largely symbolic function, much as the passing of a pig in a Pacific-island apology ceremony. The judgment states, “Something terrible has happened for which we are responsible. While no amount can compensate for your loss, we offer here a symbol of our deep regret and our continuing obligation.”

Resistance to commodification is important. If reparations are viewed as an equivalent exchange for past wrongs, continuing claims are terminated. Any obligation to victim-groups would end since their injury is transformed into a commodity and the price paid. A reparations claim would become a dangerous gamble for victims, and a welcome res judicata opportunity for perpetrators. One generation could sell away their claim at bargain-basement prices, to the detriment of future generations, in an
effort to cash in at the earliest opportunity. Commodification must be resisted if reparations are to be more than a coercive quit-claim mechanism.

A related and indeed troubling objection to reparations comes from looking to the bottom. Some thoughtful victim group members are inclined to reject reparations because of the political reality that any reparations award will come only when those in power decide it is appropriate. Hayden Burgess, a native Hawaiian nationalist lawyer, suggests that any award of cash reparations is inadequate, for it ignores the Hawaiian’s primary need: restoration of the Hawaiian government and removal of the United States presence in Hawaii. Rather than a top-down model of reparations granted by the United States, Burgess prefers negotiations between the Hawaiians and the United States as equals, perhaps mediated by a neutral third party in an international forum, to determine an appropriate remedy for the overthrow of the Hawaiian government. Burgess suggests that self-determination for the Hawaiian people is guaranteed by international law, and that self-determination includes the right to negotiate with the United States for the return of the Hawaiian Islands. Reparations would merely enforce the role of the United States as lawgiver and patron.

Reparations awards, in this view, portray the government as benign and contrite. Reparations buys off protest, assuages white guilt, and throws responsibility for continued racism upon the victims. “We paid you, why are you still having problems? It must be in your genes.”

To avoid this corruption, victims must define the remedies, and the obligation of reparations must continue until all vestiges of past injustice are dead and buried. Reparations is not, then, equivalent to a standard legal judgment. It is the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to victims for guidance.

Finally, there is the difficult problem of the effect of reparations to one group upon other victim groups that remain uncompensated. Just as affirmative action in employment and college admission—a form of reparations—may impact negatively on the white underclass, monetary reparations to one victim group may result in a new group slipping to the bottom.

Reparations will result in a new form of disadvantage only if they are made outside of a broader consciousness that always looks to the needs of the bottom. A critical theory of reparations recognizes economic as well as racial injustice. It looks to human experience to guide compensation to those in need. Such an approach would view each reparations award to a successful claimant group as a step forward in the long journey toward substantive equality. Thus, progressive Hawaiians view awards already made to Native Americans on the mainland United States not as a chunk taken out of a limited fund, leaving less for Hawaiians, but as a symbol of the possibility of reparations for Hawaiians as well. The arguments that victims will have to make and perpetrators will have to accept before any reparations are awarded will raise consciousnesses about the obligation and need to correct past wrongs. Each separate commitment to the concept of reparations thus internalizes new norms and moves us closer to the end of all forms of victimization.
A theory of reparations formulated in consideration of both a victim’s consciousness and the insights of critical legal theorists provides a critical legalism, moving us away from repression and toward community.

---

**Postamble to the Constitution of the Republic of South Africa Act No. 200 of 1993**

(Interim Constitution)

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu [translated by Desmond Tutu as “open and available” and “the essence of being human’’] but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

[EDITORS’ NOTE: These provisions were preserved in Schedule 6, section 22 of the Constitution of the Republic of South Africa Act No. 108 of 1996 (the Constitution), which provided that: Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading “National Unity and Reconciliation” are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.]
NOTES

1. Are there different theories, or versions, of reparations reflected in these passages? If so, can you articulate them? Can you place them along the scale of formal and substantive notions of equality?

2. In 1942, pursuant to an order by President Franklin Roosevelt (Executive Order 9066), the United States imprisoned (or detained or interred) over 100,000 American citizens of Japanese ancestry and Japanese residents living on the Pacific coast, sending them to prison camps (or detention or interment or war relocation camps). The Supreme Court upheld the constitutionality of the order, in Korematsu v. United States, 323 U.S. 214 (1944). In 1988 Congress passed the Civil Liberties Act of 1988, which provided reparations payments of $20,000 to each surviving detainee. Approximately 60,000 victims lived to receive reparations payments. Why were the reparations payments limited to survivors? Is there a principle of equality that explains this limitation?

3. The Korematsu case was a prosecution by the United States of Fred Korematsu, an American citizen of Japanese ancestry who was prosecuted for failing to appear for “resettlement” in the camps. His conviction was affirmed by the United States Supreme Court, based on evidence submitted by the United States that U.S. citizens of Japanese descent could not be trusted to be loyal to the United States in the war with Japan. In the 1980’s UCSD Professor Peter Irons uncovered evidence that the government “deliberately omitted relevant information and provided misleading information” to the Court. In 1983 the U.S. District Court for the Northern District of California overturned the original conviction. The holding of the Supreme Court decision, however, is undisturbed. For legitimate military purposes, the government may single out an ethnic, national or racial group for group imprisonment without trial.

4. In 1921 the Greenwood section of Tulsa Oklahoma, then known as the “Black Wall Street,” was pillaged and burned by white police, troops, and rioters. Uncounted numbers of Black residents were killed, and hundreds if not thousands were injured. The survivors were imprisoned in internment camps. In 1997 a “Tulsa Race Riot Commission” was formed. It recommended reparations payments to the surviving victims and the descendants of victims, and a scholarship fund for descendants and others affected by the riots. In response, the Oklahoma Legislature passed the “1921 Tulsa Race Riot Reconciliation Act,” which provided for 300 scholarships, but no direct reparations payments. A lawsuit was filed in the United States District Court seeking reparations as recommended by the Commission; it was dismissed as untimely. For more on the Greenwood reparations claims, see http://www.okhistory.org/trrc/freport.htm; Alfred L. Brophy and Randall Kennedy, Reconstructing the Dreamland: The Tulsa Race Riot of 1921, Race Reparations, and Reconciliation (2002).

5. The largest reparations payments for racist acts by a state were the payments made by Germany to the survivors and descendants of the victims of the Holocaust. Since an initial settlement in 1952, Germany has paid an estimated $60 billion to the victims of Nazi persecution. See website of the Conference on Jewish Material Claims Against Germany at
http://www.claimscon.org/index.asp?url=about_us. Long after the original agreement, additional payments were demanded and paid, with some paid by the German state, others by German companies to their Holocaust era slave laborers, Swiss banks and Italian insurance companies to the descendants of their murdered depositors or policy holders, and museums all over Europe to the original owners (or their descendants) of artworks confiscated (stolen) by the German state. New claims continue to be negotiated over fifty years after the original agreement, as historical records surface that bring new evidence to light. Does the continuing viability of these claims help answer some of the concerns raised by Professor Matsuda that initial payments will be inadequate and will serve as res judicata as to further claims?

6. Among the still unresolved Holocaust reparations claims is a claim against the French National Railroad, which transported over 70,000 Jews from France to German death camps in 1942 through 1944. The victims were transported in cattle cars, but were charged the price of passenger tickets. A class action brought in the United States is pending. An earlier case was brought against the railroad in France, where a lower court decision in favor of the victims was reversed by the highest administrative court (Conseil d’Etat). http://cacambo.over-blog.net/article-7318368.html. In January 2011 the railroad publicly apologized to French Holocaust victims for its role. The apology is expected to improve its bid to build bullet trains in the United States. See http://www.nytimes.com/2011/01/26/world/europe/26france.html.

———

I Will Give You A Talisman
Mahatma Gandhi, Last Phase, Vol. II (1958), P. 65

Mahatma Gandhi

I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to a control over his own life and destiny? In other words, will it lead to swaraj (freedom) for the hungry and spiritually starving millions? Then you will find your doubts and your self melt away.

———

Faces at the Bottom of the Well
(1992), p. 12

Derrick Bell

We must see this country’s history of slavery, not as an insuperable racial barrier to blacks, but as a legacy of enlightenment from our enslaved forebears reminding us that if they survived the ultimate form of racism,
we and those whites who stand with us can at least view racial oppression in its many contemporary forms without underestimating its critical importance and likely permanent status in this country.

To initiate the reconsideration, I want to set forth this proposition, which will be easier to reject than refute: Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance.

NOTES

1. This chapter begins and ends with statements about equality based on wealth or poverty. Anatole France’s ironic statement about equality law prohibiting the rich from stealing bread is bookended with Gandhi’s talisman that we ask how our actions will affect the poor. What is the relationship between income equality and the various forms of identity equality discussed in the preceding pages?

2. Both Gandhi and Bell suggest a political ethic that, in coming to terms with the immensity of the problem of oppression, racism and inequality, provides us with a source for resistance, public service, and social change. How might the imperative to find inspiration from the “faces at the bottom of the well” or to “recall the face of the poorest and the weakest man” shift our understanding of legal equality? Or social equality? How does it reframe our understanding of legal advocacy for equality?