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THE ANATOMY OF AMERICAN CASTE

BRYAN K. FAIR*

Soon the United States will commemorate the quadricentennial of the first permanent English settlement in America, the same place where twenty Africans were sold as indentured servants in 1619.¹ As with previous hallowed occasions celebrating The Declaration of Independence,² the United States Constitution,³ and the Bill of Rights,⁴ Jamestown's anniversary will undoubtedly include metanarratives revering American equality.⁵ Indeed, one need only recall the latest American presidential campaign to note the robust faith with which some candidates appeal to equality of opportunity as a core American value.

Notwithstanding such rhetoric, some Americans eschew invitations to honor its meretricious traditions. Indeed, many aptly view claims of constitutional equality speciously, noting the five century contradiction

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1. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (7th ed. 1994):

The twenty Africans who were put ashore at Jamestown in 1619 by the captain of a Dutch frigate were not slaves in a legal sense. And at the time Virginians seemed not to appreciate the far-reaching significance of the introduction of Africans into the fledgling colony. These newcomers, who happened to be black, were simply more indentured servants. They were listed as servants in the census counts of 1623 and 1624, and as late as 1651 some blacks whose period of service had expired were being assigned land in much the same way that it was being assigned to whites who had completed their indenture. During its first half-century of existence Virginia had many black indentured servants, and the records reveal an increasing number of free blacks.

Id. at 56. See also A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

2. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

3. U.S. CONST.

4. U.S. CONST. Bill of Rights amends. I-X (1791).

5. See, e.g., DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995); STEPHAN & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

between the American creed and American practices.⁶ For them, America's Janus-faced laws and folkways have impeded its nationhood and diminished its reasons for boast. For them, there is no American democracy, no American liberty, and no American equality.

After the Civil War, the United States had an opportunity to begin anew, and, to some, it appeared the end of slavery, the extension of citizenship and the grant of voting rights to black men, and the assurance that state laws would apply equally to black and white was such a beginning. Yet, as with earlier constitutional compromises, too many other Americans remained unequally protected, second-class citizens.⁷ The Negro's hour for many was an elaborate sellout: to white men who opposed the improved status of black men; to all women who had labored alongside abolitionists but who now found themselves omitted from the new constitutional protections; to other nonwhites living in slavlike conditions across America; and to those black men who believed America would be reconstructed to accept them.

At the center of the ongoing American constitutional abyss is the Fourteenth Amendment's equality guarantee that historically has done more to

6. Perhaps no work presents this contradiction between American ideals and practice more fully than GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY* (1944).

7. Frederick Douglass clearly understood his outsider position when he stated in an 1852 Fourth of July oration:

What to the American slave is your Fourth of July? I answer, a day that reveals to him, more than all other days of the year, the gross injustice and cruelty to which he is the constant victim. To him your celebration is a sham; your boasted liberty an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass-fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are to him mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages.

Frederick Douglass, *What to the Slave is the Fourth of July*, cited in *MASTERPIECES OF NEGRO ELOQUENCE* 46-48 (Alice Moore Dunbar ed., 1914). For contemporary treatments of the thoughts of Douglass, see WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* (1984); WILLIAM S. MCFEELY, *FREDERICK DOUGLASS* (1991).

In a similar spirit, former Associate Justice Thurgood Marshall, on the occasion of the bicentennial of the Constitution, wrote about his reluctance in joining the celebrations:

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, *the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.*

Thurgood Marshall, *Reflections on the Bicentennial of the U.S. Constitution*, 101 *HARV. L. REV.* 1, 2, 5 (1987).

support discrimination and caste than it has yet done to eliminate either. "No State shall . . . deny any person within its jurisdiction the equal protection of the laws."⁸ The hollowness of that simple clause is evident from continuing discrimination against so many Americans because of their race, gender, sexual orientation, age, disability, poverty, and/or religion, to identify some of the most intractable axes of American caste. Today, it seems beyond doubt that Reconstruction did not go far towards ending American caste; equality remains elusive for millions of persons forced into America's subordinate castes.

The purpose of this essay is to explain why modern equality theory in the United States is empty⁹ and what must be done to restore its full, generative power, the same interpretive vision that guided Earl Warren, William Brennan, and Thurgood Marshall during the halcyon days of the United States Supreme Court. In brief, equality jurisprudence is barren and ineffectual because its potent, anticaste moorings have been deftly ignored and artfully dodged by activist judges and commentators who wish to maintain the extant privileges preserved for a few under the jurisprudential status quo.

In Part One, I reclaim The Declaration of Independence as a protest document for this century, restyling it as The Declaration Against Caste.¹⁰ In

8. U.S. CONST. amend XIV, § 1 (1868).

9. Cf. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542-43 (1982) (arguing that statements of equality logically and necessarily collapse into simpler statements of rights so that the additional step of transforming simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound confusion); Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 247-48 (1983) (arguing that the equal citizenship principle that is the core of the Fourteenth Amendment does have substantive content; that is, to be treated by organized society as a respectable, responsible, and participating member who belongs to our national community). Karst says the principle is violated when the organized society treats someone as an inferior, as part of a dependent caste, or as a nonparticipant. Professor Karst has expanded his discussion of equality in his recent book, *KENNETH KARST BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989). See also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 576 (1983) (arguing that the concept of equality is morally necessary because it compels us to care about how people are treated in relation to one another, is analytically necessary because it creates a presumption that people should be treated alike and puts the burden of proof on those who wish to discriminate, and finally is rhetorically necessary because it is a powerful symbol that helps to persuade people to safeguard rights that otherwise would go unprotected); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1168-69 (1983) (arguing that rather than banish the concept of equality from moral and legal argument it is more promising to explicate a fuller understanding of the significance of existing concepts of equality). Professor Westen has replied to some commentators' critiques of his seminal article. See Peter Westen, *On 'Confusing Ideas': Reply*, 91 YALE L.J. 1153 (1982); Peter Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604 (1983); Peter Westen, *To Lure the Tarantula From Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983).

10. Others have offered rewrites, including the famous Seneca Falls Declaration of Sentiments. See JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S.*

Part Two, I illustrate that one could read the Fourteenth Amendment equality principle through the same lens¹¹ as some of its Nineteenth century proponents, locating an unmistakable anticaste meaning, elegantly and eloquently championed most notably by the complex, radical egalitarian, Senator Charles Sumner, who challenged black caste unequivocally.¹² In Part Three, I deconstruct modern American caste, laying bare its familiar components of stereotypes presented as policy sanctioned by the court. Next, I critique recent opinions by disingenuous judges who too frequently read the equality guarantee in its most restricted sense, a manner consistent with the views of Fourteenth Amendment opponents.¹³ In Part Four, I remedy such analytic missteps by re(caste)ing modern equality jurisprudence in three ways: broadening the underinclusive goals of Reconstruction, re-centering the anticaste meaning of the Equal Protection Clause, and framing a coherent equality theory that applies consistently to different forms of caste. Then, I illustrate applications of the anticaste equality theory to three recent decisions where a court employing this theory would have reached different results. The essay concludes with a simple enduring principle: since no person or group has a constitutional right to maintain another person's or group's caste, government action seeking to dismantle caste cannot run afoul of the Constitution.

PART ONE

The Declaration Against Caste

When in the course of human events, it becomes necessary for one people, for example, Americans with darker skin, to dissolve the caste which has

WOMEN (1991). See also LAURA A. OTTEN, *WOMEN'S RIGHTS AND THE LAW* (1993). My version broadens such earlier critiques by insisting that all morally irrelevant, socially constructed castes violate the spirit of the Declaration of Independence and the equality guarantee of the Constitution.

11. Here, I am grateful for the significant work of Jonathan Stubbs who first discussed with me the relevance of prisms and lenses. See Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism: The Good News About a Bad Situation*, 45 *MERCER L. REV.* 773 (1994). "The prism model contends that because we have varying perceptions, we tend to see the world differently; and therefore those differences are reflected not only in human decision making generally, but also in judicial decision making." *Id.* at 776.

12. See 30 *MOORFIELD STOREY, CHARLES SUMNER* (John T. Morse, Jr. ed., AMS Press 1972) (1900); DAVID DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* (1970). See also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 225-35 (1988) (calling Sumner, Thaddeus Stevens, and other advocates of the Fourteenth Amendment radical egalitarians).

13. For example, some opponents argued to reject the Fourteenth Amendment because it did not go far enough to assure the elimination of Black caste. Others opposed the amendment fearing it would. For a summary of the views of opponents, see FONER, *supra* note 12, at 256-71.

connected them to another, and to assume among the powers of the earth, the equal station to which unbiased laws entitle them, a decent respect for the opinions of others requires that they declare the causes which impel them to demand substantive equal opportunity through anticaste legislation.

We hold these truths to be self-evident, that all forms of prejudicial caste are politicized, social constructions created as tools of domination; that all humans deserve equality of opportunity and dignity; that they are endowed with certain unalienable rights, that among these are equal opportunities at life, liberty, education, employment, political participation, and the pursuit of happiness; that to secure these rights, governments are instituted among humans, deriving their just powers from the consent of the whole governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government.

Prudence, indeed, will dictate that governments long established should not be changed for light or transient causes. But when a long train of abuses and usurpations evinces a design to reduce some Americans under absolute domination and caste, it is their right, it is their duty, to throw off such government, and to provide new safeguards for their future security.

The history of the United States of America is one of repeated abuses and usurpations, all having in direct object the establishment of an absolute tyranny favoring selected Americans. To prove this, let the facts be submitted to a candid world.¹⁴

The United States was created to serve the political and economic interests of a small sub-group of white men, relegating most other Americans to varying levels of slavery or slave-like caste. That small sub-group established itself as a despotic ruler over this country, reserving to itself all authority over the means of accumulating wealth and power—land, commerce, politics, education, and occupations. To ensure its domination, that small group created a spoils system, seating itself and those most like it at the head of the government privilege line. What emerged was a pernicious political,

14. *See generally* THOMAS R. BERGER, *A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS 1492-1992* (1991); W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1969); DERRICK BELL, *AND WE ARE NOT SAVED* (1987); VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969); BRYAN K. FAIR, *NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION* (1997); DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (1970); FRANKLIN & MOSS, *supra* note 1; HIGGINBOTHAM, *supra* note 1; A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996); HOFF, *supra* note 10; IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); *IMMIGRANTS OUT! A NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan F. Perea ed., 1997); DONALD G. NIEMAN, *PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* (1991); OTTEN, *supra* note 9; STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

economic, and social caste system, with a few Protestant, white men directing the extension of American caste and their own unfair privilege up to the present. Consequently, most Americans, for most of its history, have experienced what A. Leon Higginbotham, Jr., would have described as shades of freedom.¹⁵

That racial and religious elite called indigenous American Indians heathen savages, declaring war against them, driving them from their sacred lands, forcing them to submit to unnatural, squalid conditions on and off reservations, and manipulating federal authority to betray treaties and drive Native Indians to extinction. American Indian policy was a clarion call endorsing America as a white man's country and Manifest Destiny was a declaration of white supremacy, legitimating the murder and pillage of any tribe that dared to stand in the path of any white person.¹⁶ "The only good Indian was a dead Indian."¹⁷ Those few Native Americans who have survived, live in America's shadows, significantly unseen, unheard, and uncounted.

That small white male elite made women, of whatever hue, domestic slaves and sexual objects, denying them control over their lives, their property, and their bodies through laws enacted most often without female representation or consent. Government was men's work. Business was men's work. Control of the family estate was men's work. Men determined what rights, if any, women would hold, segregating women in areas abandoned by men, and devaluing women and their labor.¹⁸

By declaring that "the paramount destiny of a woman was to be wife and mother,"¹⁹ that group placed some white women in a caste cage while claiming to place them on a protective pedestal. Nonwhite women were relegated to a subcaste beneath white women, receiving even fewer beneficial opportunities within the women's sphere. Male supremacy was presumed based on theories of religious and biological determinism.²⁰ Habit did the rest.

That elite forced gay men and lesbians to closet themselves, denying them the most basic human right to choose a consensual life partner, delimiting their rights and opportunities based on their partner's gender.²¹ Current don't ask,

15. HIGGINBOTHAM, *supra* note 14. Higginbotham identifies the precepts of American slavery law, including the enduring precept of black inferiority. *Id.* at 7-17, 195-206.

16. See BERGER, *supra* note 14, at 39-53, 66-84; BROWN, *supra* note 14, at 1-119; DELORIA, *supra* note 14, at 28-77.

17. BROWN, *supra* note 14, at 149, 170-72. The statement is attributed to General Philip Sheridan, though revised into an American aphorism.

18. HOFF, *supra* note 10; OTTEN, *supra* note 10; WILDMAN, *supra* note 14.

19. See HOFF, *supra* note 10, at 117-275; OTTEN, *supra* note 10, at 35-171; WILDMAN, *supra* note 14, at 1-24, 139-60.

20. GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986).

21. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). *But see Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding that class animus towards gays and lesbians is unconstitutional).

don't tell policies and other homophobic legislation continue the estrangement, isolation, violence, and other discriminations against Americans who choose same sex partners.²²

That elite made African Americans, through slavery, segregation, and other affirmative acts of subordination, a despised caste, asserting such persons had no rights which a white person was bound to respect.²³ A century later, even as laws changed declaring an end to American apartheid, white resistance to African American equality hardened, producing myriad devices and legal interpretations that maintained the outsider status of black people.²⁴ One still hears trumpets for white power, for America's legacy as a white man's country where blacks do not belong. Even more, one can see that whites rule America.²⁵

That elite made Mexicans and Asian Pacific Islanders its transient, replacement laborers, admissible in and excludable from this country whenever either policy served the interests of that group, whether building a railroad or harvesting myriad crops.²⁶ By closing off federal naturalization procedures to whites only until 1870, and then to whites and persons of African ancestry until the 1950s, Mexicans and Asians were not greeted by an immigrant welcome mat, but rather by rejection or restriction.²⁷

22. LESBIANS, GAY MEN, AND THE LAW 334-75 (William B. Rubenstein ed., 1993). See also ALBA CONTE, *SEXUAL ORIENTATION AND LEGAL RIGHTS* 495-566 (1997).

23. See BELL, *supra* note 14, at 26-50; DUBOIS, *supra* note 14, at 43-45; HIGGINBOTHAM, *supra* note 1, at 3-16, 19-60; NIEMAN, *supra* note 14, at 3-29.

24. FRANKLIN, *supra* note 1, at 532-72; BELL, *supra* note 14, at 50 *et seq.*

25. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992). See also CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II 3-25 (John Higham ed., 1997). For an alternate critique, see THERNSTROM & THERNSTROM, *supra* note 5.

26. See T. Alexander Aleinikoff, *The Tightening Circle of Membership*, in IMMIGRANTS OUT!, *supra* note 14, at 324-32; Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in IMMIGRANTS OUT!, *supra* note 14, at 190-204; Robert S. Chang, *A Meditation on Borders*, in IMMIGRANTS OUT!, *supra* note 14, at 244-53; Richard Delgado, *Citizenship*, in IMMIGRANTS OUT!, *supra* note 14, at 318-23; Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT!, *supra* note 14, at 13-43; Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!, *supra* note 14, at 165-89; Juan F. Perea, *The Statue of Liberty: Notes from Behind the Gilded Door*, in IMMIGRANTS OUT!, *supra* note 14, at 44-58; Dorothy E. Roberts, *Who May Give Birth to Citizens? Reproduction, Eugenics, and Immigration*, in IMMIGRANTS OUT!, *supra* note 14, at 205-19; Raymond Tatalovich, *Official English as Nativist Backlash*, in IMMIGRANTS OUT!, *supra* note 14, at 78-102; Patricia Zavella, *The Tables Are Turned: Immigration, Poverty, and Social Conflict in California Communities*, in IMMIGRANTS OUT!, *supra* note 14, at 136-61. See also LÓPEZ, *supra* note 14, at 1-47.

27. See the Naturalization Act of 1790, 1 Stat. 103, and the Naturalization Act of 1870, 16 Stat. 254. For a comprehensive listing of immigration and naturalization statutes, see the current website of the U.S. Immigration and Naturalization Service, at <http://www.ins.usdoj.gov>.

That elite's theory of racial supremacy also seduced many working class whites, despite their desperate poverty, illiteracy, and restricted political influence. For whites mired in economic caste, their whiteness and/or maleness assured them a slightly higher life status than many others constrained by multiple layers of exclusionary laws. Poor white men could aspire to become like their elite brothers by shedding language, religion, or other attributes that might serve as proxies for their exclusion. By becoming white, they were assured fewer obstacles to their acceptance and belonging to America, in ways that Americans with darker skin are presumed not to belong.²⁸

That small, despotic elite has sustained a tyranny of a minority, crushing all opposition to its unfair privilege, by rendering its privileges invisible and unassailable by its laws. Although expressed in terms of freedom and equality, the new government's organic laws extended voice to white male property-holders or merchants, leaving most other Americans under their hand or heel. Indeed, whiteness, maleness, and property became species of currency, with persons possessing all three claiming as their birthright dominion over all others.²⁹

In every stage of these oppressions many persons have petitioned for redress, but those petitions have gone significantly unheeded and have been met with new injuries. A small elite, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Unlike Jefferson, I reject theories of supremacy. No person has the right to subjugate others and no government can maintain a person's subjection. Under American constitutional law, there is no caste.

28. Ken Karst has elegantly set out an equal citizenship principle, requiring that the society treat all members as if they belong, politically and socially. See KARST, *supra* note 9. This principle has been honored in the breach.

29. The leading authority on records of the Constitutional Convention is Max Farrand. MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 4 vols. (1937); a list of the delegates attending the Convention is in vol. 3, app. B, 555. See also JAMES H. HUTSON, *SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1987); ARTHUR TAYLOR PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* (1968), especially 22-36, his lively, contemporaneous sketches of the delegates; JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (1966). For contemporary assessments of the constitutional denial of equality, see BELL, *supra* note 14, at 26-51; FAIR, *supra* note 14, at 67-113.

PART TWO

The Anticaste Origins of the Fourteenth Amendment

When the Supreme Court, through Justice Samuel Miller, first interpreted the Civil War Amendments, there was little ambiguity within the Court about the pervading congressional purpose for the amendments:

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this [equal protection] clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.³⁰

Within a decade the Court would recognize its interpretive error, extending the scope of the Equal Protection Clause, at least technically, to all persons.³¹ Yet, before the Court announced its view of the amendments, numerous others in Congress filled its journal, explaining their goals and motives for the Fourteenth Amendment and related legislation. As the most articulate champion for ending black caste in America, Sumner's words are indispensable to understanding what ardent proponents sought to accomplish by the new equality guarantee. Sumner and others used the term caste repeatedly when they explained the critical need for the Fourteenth Amendment:

Religion and reason condemn Caste as impious and unchristian, making republican institutions and equal laws impossible; but here is Caste not unlike that which separates the Sudra from the Brahmin. . . .

In arraigning this attempt at separation as a Caste, I say nothing new. For years I have denounced it as such, and here I followed good authorities, as well as reason. Alexander Von Humboldt, speaking of the negroes in Mexico when Slavery prevailed, called them a Caste. A recent political and juridical writer of France uses the same term to denote not only the discrimination in India, but

30. *Hearings on Civil Rights Bill*, 43rd Cong. 358 (May 20, 21, 1874) (statement of Sen. Morton). For the full text of the case, see *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 394, 410 (1872).

31. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

that in our own country, especially referring to the exclusion of colored children from the common schools as among “the humiliating and brutal distinctions” by which their Caste is characterized. (Charles Comte, *Traité de Legislation*, Tome IV., pp. 129, 455.) The principle of separation on the ground of hereditary inferiority is the distinctive essence of Caste; but this is the outrage which lifts itself in our country, crying out, “I am better than thou, because I am white. Get away!”³²

Remarkably, if one examines modern American caselaw and commentary, one finds scant use of the term caste in the American context. This is especially surprising since proponents of the Fourteenth Amendment used the term often. Consider Sumner’s use of one of the hundreds of letters he received from blacks regarding school desegregation and the need for equality legislation. He anticipated the devastating consequences of caste:

I call the especial attention of the Senator from Georgia to this declaration from an humble colored person. The letter proceeds [written by a colored person from Greencastle, Franklin County, Pennsylvania, Nov. 25, 1871]:

“Now, sir, allow me to ask you if the law has not the same power over a public house or a public institution of learning that it has over a railroad company? And if such be the case, allow me to ask you to bring the weight of your voice and pen”—

Unhappily it is very little; I wish it were more—

“in favor of such a needed reform. In our public schools is the place to commence to break down caste.”

“Caste!” I understand the Senator from Georgia to vindicate caste. He proposes to maintain it at hotels and in cars. “Caste!” an unchristian,

32. *Hearings on Amnesty Bill (Civil Rights Amendment)*, 42nd Cong. 383 (Jan. 15, 1872) (statement of Sen. Sumner). On the construction of whiteness, Sumner wrote:

Observe, if you please, how little the word “white” is authorized to play the great part it performs, and how much of an intruder it is in all its appearances. In those two title-deeds, the Declaration of Independence and the Constitution, there are no words of color, whether white, yellow, red, or black; but here is the fountain out of which all is derived. The Declaration speaks of “all men” and not of “all *white* men;” and the Constitution says, “We the people,” and not “We the *white* people.” Where, then, is the authority for any such discrimination, whether by the nation or any component part? . . .

There is also the original common law, antedating and interpreting the Constitution, which knew no distinction of color. One of the greatest judges that ever sat in Westminster Hall, Lord Chief Justice Holt, declared in sententious judgment, worthy of perpetual memory, “The common law takes no notice of negroes being different from other men.” (*Smith v. Gould*, 2 Lord Raym. (1274)).

Id. at 385. For a comprehensive collection covering congressional debates on the Civil War Amendments and related bills, see ALFRED AVINS ED., *THE RECONSTRUCTION AMENDMENTS’ DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS* (Virginia Comm’n on Constitutional Gov’t 1967).

irreligious discrimination, not to be vindicated by any logic, by any reason, and least of all is it to have the foundation of law!³³

Sumner understood the stigma of caste on colored persons, however, he also noted the harm to the whole community. He knew the surest protection of all children was common schools open to all:

What must be the feelings of a colored father or mother daily witnessing this sacrifice to the demon of Caste?

This is an illustration merely, but it shows precisely how impossible it is for a separate school to be the equivalent of the common school. And yet it only touches the evil without exhibiting its proportions. The indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong.³⁴

It is not enough that all should be taught alike; they must all be taught together. They are not only to receive equal quantities of knowledge, but all are to receive it in the same way. But they cannot be taught alike unless all are taught together; nor can they receive equal quantities of knowledge in the same way, except at the common school.³⁵

33. *Hearings on Amnesty Bill (Civil Rights Amendment)*, 42nd Cong. 244 (Dec. 20, 1871) (statement of Sen. Sumner). On interpreting the Constitution after the Civil War, Sumner continued:

Before the war, when slavery prevailed, the rule was otherwise, naturally, but as I have already said, the grandest victory of the war was the establishment of the new rule by which the Declaration became supreme as interpreter of the Constitution. Take, therefore, any phrase in the Constitution, take any power, and you are to bring it all in subordination to those lofty primal truths. Every power is but the agent by which they are to be maintained; and when you come to those several specific powers abolishing slavery, defining citizenship, securing citizens in their privileges and immunities, guarding them against any denial of the equal protection of the laws, and then again securing them in the right to vote, every one of those safeguards must be interpreted so as best to maintain equal rights. Such I assert to be constitutional law.

Sir, I cannot see it otherwise. I cannot see this mighty Magna Charta degraded to the level of a casual letter or an item of history. Why, sir, it is the baptismal vow of this Republic; it is the pledge which our fathers took upon their lips when they asked the fellowship of mankind as a free and independent nation. It is loftier than the Constitution, which is a convenience only, while this is a guide. . . .

Id. at 825.

34. *Hearings on Amnesty Bill to Remove Political Disabilities Imposed on Former Confederates by 14th Amendment (Civil Rights Amendment)*, 42nd Cong. 384 (Jan. 15, 1872) (statement of Sen. Sumner).

35. Sumner continued:

The common school is important to all; but to the colored child it is a necessity. Excluded from the common school, he finds himself too frequently without any substitute. Often there is no school. But even where a separate school is planted it is inferior in character. No matter what the temporary disposition, the separate school will not flourish as the

Citing Rousseau, Sumner explained the need for instructive equality legislation:

In the absence of the law people please too often by inhumanity, but with the law teaching the lesson of duty, they will please by opposite conduct. Thus will the law be an instrument of improvement, necessary in proportion to existing prejudice. Because people still please by inhumanity, therefore must there be a counteracting force. This precise exigency was foreseen by Rousseau, remarkable as writer and thinker, in a work which startled the world, when he said:

“It is precisely because the force of things tends always to destroy equality that the force of legislation should always tend to maintain it.”—*Contrat Social*, Liv. II, chap. 11.³⁶

For Sumner all caste was odious. Thus, while he hammered away at racial inequality and segregation, there is some evidence suggesting his support for a broader application, similar to the one I champion herein:

common school. . . . White parents will take care not only that the common school is not neglected, but that its teachers and means of instruction are the best possible, and the colored child will have the benefit of this watchfulness. This decisive consideration completes the irresistible argument for the common school as the equal parent of all without distinction of color.

Id.

36. *Hearings on Amnesty Bill (Civil Rights Amendment)*, 42nd Cong. 383 (Jan. 15, 1872) (statement of Sen. Sumner). Sumner implored his colleagues to listen to advocates for equality, including colored citizens like J.F. Quarles:

Some ancient writer has said that the first part of equity is equality. Thus we may infer that if there is inequality of rights, there can be no equity. If this be true what shall we say of equality in the South? For, in whatever direction we go, whether it be in public places of amusement, in the street cars, upon the railroad, in the hotel, or in the wayside inn, we encounter the invidious distinction of caste and oligarchy. We cannot think of these things without impatience; we cannot speak of them without denouncing them as unworthy of an intelligent and humane people. Nay, we would be less than men if we did not everywhere, and under all circumstances, utter our earnest and solemn protest against this inhuman outrage upon our manhood.

Id. at 429. Likewise, consider Sumner’s use of [a letter from Professor John M. Langston, of Howard University, to the WASHINGTON CHRONICLE, dated Dec. 26, 1871]:

Indeed, the colored man cannot be educated in any proper sense, however numerous may be the school-houses to which he is invited, however bountiful the school endowment put within his reach, however admirable the school system in accordance with the methods of which it is proposed to educate him, if he is not made to feel in the common school, the academy, the college, and the professional school, that his manhood, his civil and social rights, are recognized and respected. This certainly is true of an American whether white or black. *To attempt the education of a person in the midst of a tolerated and justified system of caste, is sure to dwarf rather than draw out and make useful his powers.*

Id. at 433.

Caste is the stronghold of that principle of pride which makes a man think of himself more highly than he ought to think. Caste infuses itself into and forms the very essence of pride itself.

In caste government is nurturing a tremendous evil, a noxious plant by the side of which the graces cannot flourish; part and parcel of idolatry, a system which, more than anything else the devil has yet invented, tends to destroy the feelings of general benevolence. Such is caste—odious, impious, accursed, wherever it shows itself.³⁷

Sumner's views were shared by others seeking to end black caste. Consider, for example, the reflections of another Massachusetts senator:

In Massachusetts we had a struggle of ten years before we could destroy caste in our common schools. It was only in the year 1855, by the Legislature that sent me into this body, that the victory was won and the question settled, and settled beyond all reversal. It was then decided that colored children should go into all the public schools, and not be excluded from any.

. . . There may be practical difficulties in carrying out this system of equality; *I expect some difficulties; but, sir, it is the mode and manner of educating the people against caste.* In the contest of a year or two, perhaps of a few months, the people will be educated to the high plane of republican and Christian principle, so that they will look down on no class of their fellow-men because of race or color.³⁸

Another representative insisted that opening schools would help dismantle caste:

But the fact that southern-born whites and blacks, in nearly equal proportion and in large numbers, have, for the past six years, recited together and in

37. *Hearings on Amnesty Bill (Civil Rights Amendment)*, 42nd Cong. 824 (Feb. 5, 1872) (statement of Sen. Sumner). Sumner further explained:

The original bill contains both, and I now ask the Senate most solemnly to consider whether, while decreeing equal rights for all in this land, they will say that those equal rights shall not prevail in the common schools and in the jury box. Such, sir, I understand to have been the vote of the Senate. What will ensure should it be confirmed by the other House? The *spirit of caste* will receive new sanction in the education of children; justice will find a new impediment in the jury-box. Sir, I plead for the colored race, who unhappily have no representative on this floor.

I ask the Senate to set its face against that *spirit of caste* now prevailing in the common schools, against that injustice which is now installed in the jury-box. I insist that the Senate shall not lose this great opportunity. You recognize the commanding principle of the bill. Why not, then, apply it throughout, so that hereafter there shall be no question; for, sir, be well assured there is but one way of settling this great cause, and that is by conceding these equal rights. . . .

Hearings on Civil Rights (Amnesty), 42nd Cong. 3738 (May 21, 1872) (statement of Sen. Sumner).

38. *Hearings on Public Schools in the District of Columbia; National Education Fund*, 41st Cong. 1061 (Feb. 8, 14, 1871) (statement of Sen. Wilson).

perfect harmony, makes this institution [Berea College] typical of what may be accomplished throughout the nation, and makes it of more than local importance. It requires no argument to show how much the colored people will be benefited by such an education. There is nothing like just such a school as this to teach mutual respect and forbearance, to dignify labor, to enforce a regard for the persona and property of all classes, and to take away some of the arrogant superciliousness of *caste and race*.³⁹

An unmistakable urgency for full equality for black men was the goal of ardent proponents:

Inasmuch as these four million colored people are made by the Constitution citizens of the country, as they and their posterity through all time are to have a lot and part with us as citizens, I say now, not waiting for an uncertain future, but now when this subject is under consideration in the Senate of the United States, and under consideration by circumstances which make us amenable to posterity, let us do that thing which is right in the eye of the Constitution; and nothing is right but absolute equality of rights.⁴⁰

Even opponents of the Fourteenth Amendment recognized its anticaste moorings. Some opponents prophetically argued that the stains of the master/slave relationship would extend black caste and that in response to new legislation white intolerance towards blacks would expand:

It matters not how wealthy, how intelligent, or how morally meritorious the negro may become, so long as he remains among us the recollection of the former relation of master and slave will be perpetuated by the changeless color of the Ethiop's skin, and that color will alike be perpetuated by the degrading tradition of his former bondage. Without this equality of political and social privileges, and without the hope of a home and government of their own, the emancipation of the slaves of the south will be but adding a new burden to their wretchedness by compelling them to provide for themselves and families, without setting before them scarcely a single incentive to exertion, or, if such incentive should exist, it would only be in the desperate desire that by some bloody revolution they might possibly conquer for themselves that equality which their liberators had denied them. The result of such a revolution would doubtless be their utter annihilation or re-enslavement. To appreciate and understand this difficulty, it is only necessary for one to observe that, *in proportion as the legal barriers established by slavery have been removed by*

39. *Hearings on Civil Rights Bill*, 43rd Cong. 1314 (Jan. 27, Feb. 7, 1874) (statement of Rep. Ransier) (arguing in favor of non-proscriptive schools, reading from a notice for Berea College appearing in *THE AMERICAN MISSIONARY* 243-44 (Nov. 1873)).

40. *Hearings on Civil Rights Bill*, 43rd Cong. 4168 (May 22, 1874) (statement of Sen. Boutwell).

*emancipation, the prejudice of caste becomes stronger, and public opinion more intolerant to the negro race.*⁴¹

To the same effect, consider the remarks of a Missouri representative about the universality of black caste, even in the free states:

There are no States in the Union which give to this class of people the rights of citizens, and the man who insists upon emancipating slaves, and retaining them in a country where every right except that of personal freedom is refused them, that man, in my opinion, is not in favor of emancipation in its large and liberal sense. It is "keeping the word of promise to the ear, and breaking it to the hope." It is simply the gift of personal freedom, unaccompanied by any other rights which make freedom valuable. *It is to retain them here as a degraded caste, as they now are in all of the free States. They are not admitted, in any free State, to a full equality with its citizens.*⁴²

Reconstruction was a chance for a new beginning. Black slavery was abolished, citizenship became a birthright, race discrimination against former slaves was proscribed, and black men were assured that any state that excluded them from voting would suffer a diminution of its federal political representation. The Radical Republicans intended to abolish black caste. Yet, the Supreme Court did not share Congress' enthusiasm for revision, and the Court ruled that Congress lacked the power to enact most of the civil rights legislation that it passed between 1865 to 1875. But rather than reduce the

41. *Emancipation and Colonization: Hearings on H. R. 576, Report No. 148*, 37th Cong. 16 (July 16, 1862) (statement of Rep. Albert S. White, Select Committee on Emancipation). White continued:

... Experience, painful and sad, had convinced them that here they would forever remain an inferior caste, denied every right which distinguishes or gives value to personal freedom, while the conviction that the torrid zone, their natural organization fitting them to endure its climate, where fervid heat enervates and emasculates all other races, gave the best guarantee against the degradations with which they had been afflicted.

Id. at 28.

42. *Hearings on Confiscation; Prohibition of Slavery; Colonization*, 37th Cong. 173 (May 23, 26, June 2, 1862) (statement of Rep. Blair). But see at least one statement denying that eliminating caste was the question to determine:

Let the colored people have their separate societies, let them have their separate schools, let them have their churches. We are not now considering any question of *caste*, but of race.

Let them have their social and other societies; let them have their faudangoes and their places of public amusement; let them have their hotels; let them have their own graveyards; let them have their own churches; let them have their common schools. Why, sir, in my State there is a normal school for the instruction of colored people, so that they may be enabled to go among their own people, and educate them. We do not want colored teachers to teach white children; nor do you gentlemen of the North; nor will the colored people when they have their own competent teachers want white teachers to teach their own children. *Hearings on Civil Rights Bill*, 43rd Cong. 368 (May 22, 1874) (statement of Sen. Hamilton).

scope of the new laws, Congress and the Court should have read them more broadly, insisting that the laws prohibited all caste.

Reconstruction's potential glory has been dashed significantly through its singlemindedness. We needed more than the Negro's hour. We needed to recognize Sumner's wisdom: all caste is odious and undermines equality whether resting on race, gender, sexual orientation, age, religion, disability, or poverty. Equality theory must remain empty until an anticaste theory finds broad acceptance across these bases of caste.

A close examination of Reconstruction debates illuminates a potent, anticaste aspect of the equality guarantee. Proponents sought to dismantle black caste, while opponents resisted legal efforts to establish political or social equality between whites and blacks. By recalling the use of caste during Reconstruction, I seek only to re-center the anticaste moorings of the Fourteenth Amendment proponents that have been lost in the pages of congressional proceedings.

More recently, a few scholars have hinted at the appositeness of anticaste analysis in the United States. For example, Gunnar Myrdal described an American caste line in the middle of the Twentieth century, a line, defining "the Negro group in contradistinction to all the non-colored minority groups in America and all other lower class groups."⁴³ Caste best captures the structural and experiential second-class status still forced on so many Americans because of their race, gender, sexual orientation, disability, age, poverty, or religion, among other bases of American caste.

Ken Karst addresses similar status issues through an equal citizenship principle.⁴⁴ Cass Sunstein has asserted an anticaste principle in the broad context that I use this term, but he insists that legislators rather than judges should apply the principle primarily.⁴⁵ Likewise, Ruth Colker has set out a

43. MYRDAL, *supra* note 6, at 58.

44. KARST, *supra* note 9, at 3.

The principle of equal citizenship, as I use the term, means this: Each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant. The principle thus centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community. . . .

Id.

45. Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311 (1999):

There is good reason to think that the best understanding of the equality principle of the United States Constitution has a great deal to do with a prohibition on second-class citizenship, or "caste." An anticaste principle can claim considerable support from the theory and the practice of those who defend the Fourteenth Amendment. Such a principle also fits well—far from perfectly, but well—with the general fabric and thrust of constitutional doctrine. As a matter of political theory, the anticaste principle also has

comparable anti-subordination principle.⁴⁶ All three contemporary commentators seem focused on the same phenomenon: the government's endorsement of policies declaring who belongs and who is an outsider. And on that score, American governments have spoken often and decisively.⁴⁷

In many ways, I agree with Sumner, Myrdal, Karst, Sunstein, and Colker. Each implies that caste laws violate constitutional equality. Yet, none of them goes far enough to set out the foundations for an anticaste equality theory that is coherent across axes of caste.

considerable appeal, connected as it is with some of the defining ideals of liberal democracy, which is designed to ensure that morally irrelevant characteristics are not turned into a systematic basis for social disadvantage. The anticaste principle seems to serve as a promising basis for both organizing and reformulating many aspects of the law of equal protection.

Id. (footnotes omitted). See also Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994):

Put too briefly, the anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so. . . .

Id. at 2411.

If opposition to caste is a basic goal, civil rights policy should concern itself first and foremost with such problems as lack of opportunities for education, training, and employment; inadequate housing, food, and health care; vulnerability to crime, both public and private; incentives to participate in crime; disproportionate subjection to environmental hazards; and teenage pregnancy and single-parent families. Policies of this kind suggest a major shift in direction from the more narrowly focused antidiscrimination policies of the past.

Id. at 2450.

46. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 n.12, 1014-16 (1986):

In this Article, I argue that courts should analyze equal protection cases from an anti-subordination perspective. Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.

Id. at 1007-08. See also RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996).

47. For a counterview on the applicability of an anticaste principle, see Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456 (1994).

PART THREE

Deconstructing Caste

If Americans are ever to realize equality of opportunity, they must deconstruct and dismantle American caste. Consider female caste. Today, women comprise nearly fifty-five percent of the voting age population in the United States.⁴⁸ Nonetheless, they constitute only a small percentage of the nation's legislators, judges, and chief executives. For example, fewer than 50 of the 435 members of Congress are women.⁴⁹ Only seven percent of the nation's federal judges are women.⁵⁰ The numbers on the state level are only slightly higher. Twenty percent of all state legislators are women; yet, among those persons elected to statewide offices, most states can boast no more than two or three women.⁵¹ Only two of the nation's fifty governors are women.⁵² The numbers for labor statistics and earnings are similarly bleak.

Why are women so disproportionately underrepresented among state and federal policymakers? Is such gender caste traceable to centuries' old past discrimination which relegated women to the domestic sphere? Indeed, does political caste explain why less than eight percent of all congressional delegates are African American, less than four percent are Hispanics, and only one percent are Asian Pacific Islanders?⁵³ Why are no United States Senators African American or Hispanic?⁵⁴

Undoubtedly, one important cause of these disparities is voter conduct. Despite their numeric majority, only sixty-seven percent of voting age women reported that they were registered in the 1996 presidential election.⁵⁵ Only fifty-five percent of eligible voting females reported voting in that election.⁵⁶ Similarly, only sixty-three percent of African Americans and thirty-five percent of the Hispanics reported they registered in the 1996 election.⁵⁷ And fewer than fifty-one percent of the former and less than twenty-seven percent

48. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, Table No. 462 (117th ed. 1997).

49. *Id.* at 281 tbl.448. *See also* INFORMATION PLEASE ALMANAC 823 (Borgna Brunner ed., 1998).

50. ABA COMM'N ON WOMEN IN THE PROFESSION, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8 (1995).

51. STATISTICAL ABSTRACT, *supra* note 48, at 285 tbl.457.

52. *Id.* at 283 tbl.453. *See also* Sunstein, *supra* note 45, at Appendices (setting out extensive labor caste statistics).

53. STATISTICAL ABSTRACT, *supra* note 48, at 281 tbl.448.

54. *Id.* at 288 tbl.462.

55. *Id.*

56. *Id.* Turnout in congressional elections is even lower, with as few as 45% of eligible women voting.

57. STATISTICAL ABSTRACT, *supra* note 48, at 288 tbl.462.

of the latter reported voting.⁵⁸ Such startling numbers confirm that voter apathy knows neither race nor gender. However, the costs of nonparticipation for these individuals are enormous, exacerbating the already uneven playing field. In this context, nonparticipation extends the marginalized status of many Americans, from generation to generation. Because many Americans once could not and today do not count at the polls, they do not count. No one mired in caste can afford going uncounted.

Yet despite partial complicity, another factor more fully explains the numerous persons and groups that live in caste in the United States. The principal cause of the huge disparities in the lives of men and women and in the lives of whites and so many racial minorities is an American tradition which has taught certain citizens that they are superior and thus more deserving of civil and political rights and economic and social opportunities than other inferior citizens.⁵⁹ This historical discourse has taught, among other realities, that politics is men's work, primarily white men, North, South, East, and West. To be sure, one of the greatest lessons of United States history is that it has been a government of some white men, by some white men, and for some white men. Nonwhiteness, nonmaleness, non-Christianness, nonheterosexualness, among other caste classifications, have caused many Americans to become strangers to its laws.

American caste is extant; it is hard to avoid. By every measure of wealth or power women are subordinate to men, people of color are subordinate to whites, homosexuals are subordinate to heterosexuals, the working poor are subordinate to the rich, and so on. Although the imagery shifts slightly from group to group, if one deconstructs caste, its anatomy is neither complex nor normative. A common paradigm in the maintenance of status inequality in the United States, a pattern which transcends the axis of caste, is the construction of discourses which reify anachronistic, stereotypic images of individuals or groups as outsiders, the implementation of policies which delimit the life opportunities of those caricatured and vilified, and, finally, the approbation of those exclusionary policies by courts.

Consider the essentialist caricatures of women as weak, blacks as lazy, Indians as drunk, Hispanics as illegals, homosexuals as pedophiles, or the poor as irresponsible. Each stereotype has led to exclusionary policies, relegating millions of Americans to educational, economic, political, and social ghettos, unable to support or defend themselves or to escape their exploitation. And courts have routinely averted their eyes, pretending not to see discrimination or

58. *Id.*

59. The answer lies in how women have been denied equal opportunity, including exclusion from the legal profession, from voting, from employment, and from most of the best schools and highest paying jobs.

making it unassailable. To dismantle caste, one must make each layer visible, deconstructing its roots and branches.

Consider the black image in the white mind and one can begin to comprehend slavery, segregation, and modern racial separation.⁶⁰ Blackness was synonymous with indolent, child-like, unkempt, tainted, dirty, lascivious, and brutish.⁶¹ One drop of black blood, one known black ancestor, caused millions of persons to lose the white American's presumption of citizenship—of belonging—and all concomitant rights.⁶² White America denigrated blackness, forcing all blacks, slave or free into an heritable caste.⁶³

Declaring black inferiority was only the first stage. Next, whites enacted numerous policies and laws that rested on their demeaning images of blacks. In Louisiana, its laws as late as the 1960s were models for other parts of the nation:

Louisiana requires that all circuses, shows, and tent exhibitions to which the public is invited have one entrance for Whites and one for Negroes. No dancing, social functions, entertainment, athletic training, games, sports, contests 'and other such activities involving personal and social contacts' may be open to both races. Any public entertainment or athletic contest must provide separate seating arrangements and separate sanitary drinking water and any other facilities for the two races. Marriage between the two races is banned. Segregation by race is required in prisons. *The blind must be segregated.*⁶⁴

60. GEORGE M. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND* (1971).

61. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812*, at 8-32 (1968).

62. LÓPEZ, *supra* note 14.

63. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

64. *Garner v. Louisiana*, 368 U.S. 157, 179-81 (1960) (Douglas, J., concurring). Justice Douglas continued:

Teachers in public schools are barred from advocating desegregation of the races in the public school system. So are other state employees. Segregation on trains is required. Common carriers of passengers must provide separate waiting rooms and reception room facilities for the two races and separate toilets and separate facilities for drinking water as well. Employers must provide separate sanitary facilities for the two races. Employers must also provide eating places in separate rooms and separate eating and drinking utensils for members of the two races. Persons of one race may not establish their residence in a community of another race without approval of the majority of the other race. Court dockets must reveal the race of the parties in divorce actions. All public parks, recreation centers, playgrounds, community centers and 'other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted' must be segregated.

Id.

The meaning of such laws was clear: blacks are unfit to associate with whites. And, as Sumner stated so convincingly, that cry is the essence of white supremacy.⁶⁵

The final step was judicial enforcement of laws founded on racist stereotypes. *Plessy v. Ferguson*⁶⁶ was as important as any other case giving Americans both the separate but equal doctrine and the colorblindness doctrine, which ironically today mean the same thing. Critics of an anticaste principle should recall *in context* the words of Justice John Marshall Harlan who wrote that “[t]here is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”⁶⁷ They should explain why the Constitution, especially the Equal Protection Clause of the Fourteenth Amendment, prohibits governmental policies designed to eliminate caste. Justice Harlan believed that the Louisiana law was unconstitutional because it implied the inferiority of blacks and the supremacy of whites.⁶⁸

Even before his important dissent in *Plessy*, Justice Harlan wrote that while the language of the Fourteenth Amendment was prohibitory, it also contained:

[A] necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemptions from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.⁶⁹

65. See SUMNER, *supra* note 32 and accompanying text.

66. 163 U.S. 537 (1896).

67. *Plessy v. Ferguson*, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting).

68. For additional support of the view that Justice Harlan was concerned about racial subordination, see his dissent in *The Civil Rights Cases*, 190 U.S. 3, 35 (1883). Justice Harlan wrote:

But I hold that since slavery, as the Court has repeatedly declared, . . . was the moving or principal cause of the adoption of [the Thirteenth Amendment], and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same State, and such legislation may be of a direct and primary character . . .

69. *Plessy*, 163 U.S. at 556 (Harlan, J., dissenting). The quoted language provides an interesting context for interpreting Justice Harlan’s assertion that our Constitution is color-blind. Justice Harlan was concerned about racial subordination and laws which implied inferiority of Blacks. Similar language is quoted in *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880).

Judicial Activism in Defense of Caste

By largely ignoring or discounting the stated goals of Fourteenth Amendment supporters, the current Supreme Court has embraced a jaundiced equality theory that fails to distinguish between legislative policies that produce American caste and ones designed to eliminate it.⁷⁰ Consequently, the Court has announced a series of decisions in voting, education, and employment cases that have produced results that are inimical to Reconstruction goals, that is, to dismantling caste, especially black caste. The retrenchment decisions from the Rehnquist Court over the past decade, cases like *City of Richmond v. Croson*,⁷¹ *Shaw v. Reno*,⁷² *Miller v. Johnson*,⁷³ *Freeman v. Pitts*,⁷⁴ *Missouri v. Jenkins*,⁷⁵ and their progeny, collectively reverse many of the momentous civil rights gains achieved in the 1960s. Some members of the current Court show such contempt for precedent, they write opinions that reverse significant, hard-won civil rights, while barely citing relevant historical context or precedent.⁷⁶

In its winter, the Rehnquist Court has abandoned the initiatives started just over thirty years ago, dismantling those legal victories of the 1960s and 1970s in the same way that its predecessor gutted the Civil War Amendments and federal civil rights statutes during the late Nineteenth century.⁷⁷ Indeed, the parallels to the post-Reconstruction Court portend the emasculation of the 1964 Civil Rights Act⁷⁸ and the 1965 Voting Rights Act.⁷⁹

Using rhetoric of federalism, equal opportunity, and color-blindness, the current Court majority has turned its interpretive power against citizens who have only in the last generation begun to live on the margins of the "American Dream." This Court writes too often as if discrimination never happened in the U.S. or that it occurred so long ago that nothing can or should be done about it.

70. Perhaps the clearest example is *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (a 5-to-4 decision on remedial affirmative action policies). For a full critique, see FAIR, *supra* note 14, at 144-50.

71. 488 U.S. 469 (1989).

72. 509 U.S. 630 (1993).

73. 115 S. Ct. 2475 (1995).

74. 503 U.S. 467 (1992).

75. 515 U.S. 70 (1995).

76. Two significant recent examples of this sidestepping of precedent are found in the Court's opinions in *Adarand* which failed to reconcile the earlier decision in *Fullilove*, as well as *Shaw* which was written as if the Court had not faced a similar claim in *United Jewish Organizations*.

77. The parallels between 1872-1896 and 1973-1997 are remarkable. The current Court is rereading modern civil rights statutes and reinterpreting constitutional provisions against the very persons the revised laws were designed to protect, just as the post-Reconstruction Court did a century ago in its repudiation of the Civil War Amendments and related federal civil rights laws.

78. 78 Stat. 241, 42 U.S.C.A. §§ 1971, 1975a to 1975d, 2000a to 2000h-6.

79. 79 Stat. 437, 42 U.S.C.A. §§ 1971, 1973, 1973a to 1973p.

Thus, Justice Thomas tells us government cannot make the races equal; it can only recognize, respect, and protect us as equal before the law.⁸⁰ Similarly, when Justice Scalia writes that in this country there is only one race—American,⁸¹ one must wonder if he inhabits the same country as most Americans, a country that routinely has been decidedly antiblack, anti-Indian, anti-Asian, anti-Mexican, but never anti-white.

For the current Court majority, the Constitution cannot do for equality what it has done for inequality.⁸² Under such thinking, this Court has abandoned the schoolchildren whom it promised to protect in *Brown*.⁸³ The same five justices have decided that in most situations it is illegal to create majority-minority voting districts, where race is the predominant factor used to create the district.⁸⁴ A third area of retrenchment is in modern affirmative action. There, Justice O'Connor has displayed a shocking insensitivity to race-based remedial policies, contending that there is no constitutional difference between policies designed to eliminate racial caste and those which promote white supremacy.⁸⁵

Consider the Court's education cases. The Court has all but abandoned its mandate to desegregate schools or to promote educational diversity. Today the Court has abandoned the meaning of *Brown* and *Swann v. Charlotte-Mecklenburg Board of Education*.⁸⁶ *Brown* was a command to eliminate dual educational systems, a superior one for whites and an inferior one for minorities, entirely.⁸⁷ It held that segregated schools placed black children in a caste, stigmatizing them in ways likely to ever be undone.⁸⁸ Such publicly sponsored caste was inherently unequal, violating the Equal Protection Clause.⁸⁹ Regrettably, the Court did not state directly the connection between white supremacy and segregation, but *Brown's* implicit meaning is unmistakable: *Brown* meant that policies promoting racial supremacy were unconstitutional.⁹⁰

Swann was a belated order to recalcitrant school officials, who for almost twenty years thumbed their noses at the Constitution, to adopt desegregation

80. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

81. *Id.* (Scalia, J., concurring).

82. Indeed, this Court has an apparent mission to shift the balance of power between the federal government and the States in favor of state authority despite longstanding precedent to the contrary. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (redefining the scope of federal commerce power, despite nearly 50 years of contrary precedent).

83. See *Missouri v. Jenkins*, 515 U.S. 70, 98-101 (1995).

84. See *Miller v. Johnson*, 515 U.S. 900, 916-19 (1995).

85. See *Adarand*, 515 U.S. at 223-37.

86. 402 U.S. 1 (1971).

87. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

88. *Id.* at 494.

89. See *id.* at 493-95.

90. The Court would later make this point explicit in *Loving v. Virginia*, 388 U.S. 1 (1967).

plans that would likely work immediately.⁹¹ Now, twenty-five years later, America still has many color-coded schools and unequal educational opportunity throughout the nation. Nonetheless, in *Oklahoma City v. Dowell*,⁹² Rehnquist set out a new test for ending district court supervision: whether the school board had complied in good faith with the court order since it was entered and whether the vestiges of past discrimination had been eliminated *to the extent practicable*.⁹³ Reminiscent of the “all deliberate speed” proviso in *Brown II*,⁹⁴ *Dowell* reveals that the Court will no longer force school officials to prove much at all.

Moreover, in *Freeman v. Pitts*,⁹⁵ the Court held that a district court is permitted to withdraw judicial supervision with respect to discreet categories in which a school district has achieved compliance with a court-ordered desegregation plan. Justice Kennedy’s opinion clarified *Dowell* by listing specific factors to examine before relinquishing supervision.⁹⁶ These standards are important because once federal authority is dismissed, plaintiffs must initiate costly new lawsuits, rather than simply petition the court for a hearing. They must also presumably meet the difficult burden of showing invidious, purposeful discrimination.

Finally, in *Missouri v. Jenkins*,⁹⁷ the Court held that the remedial power of the federal court does not extend to orders to fund salary increases or remedial education programs, where student achievement levels remained below national norms at many grade levels. Unlike *Swann*, *Jenkins* cabins federal court remedial power narrowly, to eliminating the identifiable vestiges of the de jure segregation, to the extent practicable. Thus, these new cases release school districts from the evidentiary burdens established in *Brown*.

The Court’s mandate today is not desegregation, but restoring local control, quickly. Therefore, no matter what schools look like, as long as no one can prove resegregation is the result of invidious discriminatory intent, local school officials can do whatever they want, leaving *Brown* as essentially meaningless. And left in the Court’s retrenchment wake are the children already disabled by historic undereducation and poverty. Much as Chief Justice Taney’s legacy has been captured by his opinion in *Dred Scott*,⁹⁸ Chief

91. *Swann*, 402 U.S. at 13.

92. 498 U.S. 237, 249-50 (1991).

93. *Id.*

94. *Brown*, 349 U.S. at 301.

95. 503 U.S. 467, 491-92 (1992).

96. *Id.*

97. 515 U.S. at 98-101.

98. 60 U.S. (19 How.) at 393.

Justice Rehnquist's will likely be the evisceration of *Brown* and the resurrection of *Plessy*.⁹⁹

This Court's record in recent voting cases is no less retrogressive, reflecting the same ahistoric, revisionism found in recent education cases. Historically, the Court had identified two types of voting rights claims—deprivation or dilution. Either a plaintiff was prevented from voting entirely—through a device such as a grandfather clause, poll tax, literacy test, or white primary—or districts were drawn to dilute the weight of a person's vote—by creating districts with unequal populations or employing single member or at large districts to minimize black voting strength. For example, in *Smith v. Allright*¹⁰⁰ and *Terry v. Adams*,¹⁰¹ blacks could not vote in the primary, the only election that mattered. The primary was opened to members of the Jaybird Democratic Organization, which only whites could join.¹⁰² Also, in *Gomillion*,¹⁰³ all but a half dozen of the 400 black residents of Tuskegee were gerrymandered out of the municipality and *excluded* from voting.

In other voting cases, minority plaintiffs challenged legislative districting, alleging that districts were shaped and sized to minimize the impact of minority voting. For example, in *Reynolds v. Sims*,¹⁰⁴ the Court reminded us that the right to vote can be denied by a debasement or dilution of the weight of a citizen's vote as effectively as by wholly prohibiting its free exercise. The Court held the right to vote can neither be denied outright, nor can it be destroyed by alteration of ballots, nor diluted by ballot-box-stuffing.¹⁰⁵ *Reynolds* guaranteed one person one vote.¹⁰⁶ After the decision, the Alabama Legislature could no longer apportion one Senate seat for 15,000 persons and another for 600,000.¹⁰⁷ Districts had to be roughly the same size numerically.

In *Shaw v. Reno*,¹⁰⁸ the Court created a novel voting rights claim, requiring no proof of invidious discriminatory injury. None of the plaintiffs in *Shaw* claimed either an abridgement or a dilution of their voting rights. Instead, they claimed that their rights had been violated essentially because they were placed

99. For students of history who recall Rehnquist's statements during his confirmation hearings regarding a controversial memo that he authored when he was a law clerk to Associate Justice Robert Jackson, there is chilling irony that *Brown* has been undone on his watch. For a concise, detailed assessment of Rehnquist's controversial confirmation and the pro-segregation memo, see RICHARD KLUGER, *SIMPLE JUSTICE* 605-09 (1975).

100. 321 U.S. 649 (1944).

101. 345 U.S. 461 (1953).

102. *Id.* at 469.

103. 364 U.S. 339, 341 (1960).

104. 377 U.S. 533, 555 (1964).

105. *Id.*

106. *Id.* at 559.

107. *Id.*

108. 509 U.S. 630, 659 (1993).

in a majority-minority district—a majority black district.¹⁰⁹ What was the constitutional harm alleged in *Shaw*? That the new district was so strange-looking, so ill-shaped, that, on its face, it had no explanation save as an effort to separate voters on the basis of race.¹¹⁰ Of course, when Hasidic Jews made the same claim fifteen years earlier in *United Jewish Organizations v. Carey*,¹¹¹ the Court told them they had not asserted an equal protection claim.¹¹²

Shaw is another example of the Court's deceptive comparison of cases out of context. The only point that *Gomillion* and *Shaw* shared was a reference to race in drawing a district line, a reference probably made every time a district is drawn in the United States. The motives for using race and the consequences following its use were completely different. Under *Shaw*, any separation of voters by race is invidious, despite the motives or results.¹¹³ This interpretation, of course, makes an inquiry into motives redundant and unnecessary, implicitly rewriting the Court's holdings in cases such as *Washington v. Davis*¹¹⁴ and *Arlington Heights v. MDHC*¹¹⁵ where the Court said that to prove discrimination, plaintiffs had to show evidence of purposeful, invidious conduct by the government. Is it possible that the current Court majority applies one standard for minority plaintiffs, but a different standard for white complainants? It is difficult to reconcile *Shaw* and its progeny otherwise.

Since *Shaw*, majority-minority districts in Florida, North Carolina, Georgia, Louisiana, and Texas have all been invalidated under this modern racial gerrymander theory.¹¹⁶ A *Shaw*-plaintiff presents an equal protection claim if he establishes that race was the predominant factor motivating the legislature's decision to place a significant number of voters in or outside a particular district.¹¹⁷ Obviously, in any case where a legislature intentionally creates a majority-minority district, the *Shaw/Miller* standard will be met. So, in my mind, majority-minority districts are presumptively unconstitutional for at least five current justices. This result turns voting rights history against minority groups seeking to elect the candidate of their choice. It makes it much easier for white plaintiffs to challenge majority-minority districts. As

109. *Id.* at 637.

110. *Id.*

111. 430 U.S. 144, 162-68 (1977).

112. *Id.*

113. *Shaw*, 509 U.S. at 657.

114. 426 U.S. 229 (1976).

115. 429 U.S. 252 (1997).

116. The Court's recent decisions since *Shaw v. Reno* have effectively taken the Court out of its role of protecting minority voting rights. *See, e.g.*, *Hunt v. Shaw*, 116 S. Ct. 1894 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995).

117. *See Miller*, 515 U.S. at 915-16.

bad, it opens the door to a direct constitutional challenge to the role of the Department of Justice (DOJ) in voting cases. The Court has told the DOJ it cannot force states to maximize the number of majority-minority districts.¹¹⁸ The next step is a rereading of the Voting Rights Act itself, already suggested by Justice Thomas.¹¹⁹

PART FOUR

Caste in the Twenty-First Century

Thus far, I have shown that current equality theory does not allow government to eliminate caste. Antidiscrimination theory only allows government to redress its own past discrimination; absent specific evidence that the government was the bad actor, complainants cannot obtain relief from federal courts. Stark statistical disparities in educational access, employment opportunity, political representation, or elsewhere are insufficient to prove invidious discrimination. As a result, widespread discrimination goes unchecked and the law remains a shield for discriminators who act on their prejudices against others.

Current equality theory views discrimination as isolated bad acts by a few bad actors. Discrimination is aberrant not systemic; infrequent not universal. Likewise, current equality doctrine extends various forms of privilege into the future by confirming its invisibility and unassailability. These views turn caste against its victims, pretending it has been remedied and treating all persons as if there are similarly situated in caste.

Current antidiscrimination theory freezes American caste, ignoring its causes and effects and extending it intergenerationally. Historically subordinated individuals largely remain dependent. In most situations, historic societal discrimination is an insufficient basis to justify judicial intervention or remediation. Absent particularized discrimination and ample evidence of government misconduct, discrimination claims fail.¹²⁰ The Supreme Court has applied an ineffective theory and abdicated its duty to all Americans.

My critique has several parts. First, under our constitutional system, all government branches have a duty to uphold the Constitution, including ensuring that no person or group be relegated to second class citizenship.¹²¹ Thus, I would not confine anticaste efforts to legislation or legislators. Indeed,

118. *See id.* at 921-22.

119. *See* Johnson v. DeGrandy, 512 U.S. 997 (1994); Holder v. Hall, 512 U.S. 874 (1994).

120. *Croson*, 488 U.S. at 469; *Adarand*, 515 U.S. at 521-37.

121. U.S. CONST. art. VI.

if caste is violative of the Constitution, the Supreme Court has a paramount duty to interpret the Constitution to compel government to eliminate it.¹²²

This is not another attempt at discovering the original intent of the drafters, but rather a gentle reminder that some proponents of the Fourteenth Amendment intended to eliminate black caste. But that goal is too narrow and my chief criticism of Charles Sumner and others. Government not only has yet a duty to dismantle black caste; it also must dismantle other forms of caste that are the consequence of state-sanctioned discrimination. Black men will not be free of caste until all women are. Women will not be free of caste until gay men and lesbians are. Gays and lesbians will not be free of caste until Native Americans, Mexican Americans, and Asian Americans are. Nonwhites will not be free of caste until religious minorities are. Religious minorities will not be free of caste until persons with disabilities are. Only affirmative anticaste policies can eliminate the marked disparities in American life caused by legalized prejudice.

Second, we should never forget that it is a Constitution we are expounding. The Court has read the Equal Protection Clause in its narrowest sense. But there is nothing that precludes the Court from reading the Clause broadly, as an anticaste provision. I have shown earlier that Charles Sumner wanted nothing less than to eradicate black caste. Such a meaning of the clause is majestic. It gives the clause a meaning worth expounding and the only one that moves the government towards establishing equal opportunity.

Third, since American caste has resulted from animus towards race, gender, poverty, religion, sexual orientation, age, disability, among other arbitrary classifications, the anticaste principle should apply to all such classifications and their textured, complex intersections. The equality guarantee should be coherent and determinate across axes of discrimination. There is but one Equal Protection Clause; its prohibitions on government should not shift with sliding scales of judicial scrutiny based on the Court's view that some discrimination is more pernicious than other forms. All invidious discrimination should be unconstitutional absent a compelling justification and proof that noninvidious means are unavailable to achieve the government's compelling interest.¹²³ Only after we construct a coherent anticaste equality theory can we counter the analytical missteps contained in recent cases like *Podberesky v. Kirwan*,¹²⁴ *Hopwood v. Texas*,¹²⁵ and *Taxman v. Piscataway*.¹²⁶

122. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). It is emphatically the province and duty of the judicial department to say what the law is. *Id.*

123. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

124. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 U.S. 2001 (1995).

125. 861 F. Supp. 551 (W.D. Tex. 1994), 78 F.3d 932 (5th Cir. 1996).

126. 91 F.3d 1547 (3d Cir. 1996).

In *Podberesky*, the court was asked to resolve the constitutionality of the University of Maryland's Banneker Program, a scholarship program exclusively for African American students. Daniel Podberesky, a Hispanic student who met the academic requirements for Banneker, challenged the exclusive program as a violation of the Fourteenth Amendment's Equal Protection Clause. The court held that the Banneker Program could not withstand the required strict scrutiny analysis applicable to all racial classifications.¹²⁷

The court's analysis is quite dissatisfying. First, the court never articulates Maryland's invidious purpose for enacting the Banneker Program. Instead, the court implies that any reference to race violates the Constitution. This reasoning is the logical extension of cases like *Shaw* where the Court lowered the proof standards for an equal protection claim, at least for white plaintiffs.

Second, the court's opinion rests on anachronistic thinking. For example, the court accepts the idea that racial classifications are more pernicious than others on the basis of gender, sexual orientation, religion, or disability. But why? Animus against women, homosexuals, Jews, or persons with disabilities is all pernicious. Why must the court declare a hierarchy among castes? I should think that the court would apply one test against invidious discrimination by government. The Court, through Justice O'Connor, has required such a consistent rule for all race cases,¹²⁸ but it needs to adopt one rule for all invidious classifications.

Third, where there is no evidence of invidious motive, why would the court second guess the legislative judgment? The *Podberesky* court insists that strict scrutiny is essential because "absent searching judicial inquiry into the justification for such race-based measures, there is no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."¹²⁹

Curiously, Justice O'Connor's identical formulation in *Croson* has polar effects. On the one hand, it confirms that, at least in theory, some remedial policies are animated by permissible aims. If that is what O'Connor really meant, she has a significant challenge to explain why eliminating caste is impermissible.

On the other, only those policies that result from theories of racial inferiority or racial politics are unconstitutional. And given the court's opinion in *Podberesky*, it must have concluded the Banneker Program was the result of racial politics. But that conclusion seems wrong factually because there is a critical difference between *Croson* and *Podberesky*. In *Croson*, O'Connor

127. *Podberesky*, 38 F.3d at 153.

128. See *Adarand*, 515 U.S. at 200.

129. *Podberesky*, 38 F.3d at 153 (citing *City of Richmond v. Croson*, 488 U.S. 469 (1989)).

condemned the Richmond set-aside program as the result of racial politics because it extended to so many minority groups, including some that had no history in Virginia.¹³⁰ But, the University of Maryland followed O'Connor's admonition, extending its remedial program to a group that undeniably has a significant legacy of discrimination in Maryland and at the University, the same place that told Thurgood Marshall, solely because of his race, he was unfit to attend the Maryland Law School. Despite this care, Maryland's program was invalidated, leaving the University to guess what it might have done differently. Soon the time will come for Justice O'Connor to explain why she rejects an anticaste principle.

In *Hopwood*, the federal appellate court went even further than the court in *Podberesky*. At issue was the use of racial preferences at the University of Texas School of Law favoring African Americans and Mexican Americans in admission to the prestigious law school in Austin, the same school that was once so threatened by the admission of Heman Sweatt that the legislature created a separate school just for him in lieu of desegregation.¹³¹ The court held that the Fourteenth Amendment prohibits the school from considering race in admissions unless the law school can present a compelling justification and prove that its policy is narrowly tailored to achieve the compelling state interest.¹³²

More importantly, the court did not stop by applying strict scrutiny. Instead, the court took the enormous step of rejecting the common understanding of *Bakke*, deciding that it had been implicitly overruled by more recent Supreme Court decisions.¹³³ The court reversed *Bakke* by concluding that achieving a diverse student body was not a compelling interest under the Fourteenth Amendment.¹³⁴

But, every first-year law student learns that lower federal courts cannot overrule the Supreme Court. Only the Supreme Court can overrule *Bakke* and until then all federal judges are duty bound to follow existing precedent. Thus, not only did the *Hopwood* court apply the same flawed reasoning as the *Podberesky* court, in its zeal to protect innocent whites, it usurped constitutional power assigned only to the highest court.¹³⁵

130. *Croson*, 488 U.S. at 493.

131. *Sweatt v. Painter*, 339 U.S. 629 (1950).

132. 78 F.3d 932, 934-35, 940.

133. *Id.* at 941-45.

134. *Id.* at 944.

135. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 237 (1997). "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Finally, in *Taxman*, the court was asked to determine whether the Piscataway Board of Education violated Title VII when it made race a factor in selecting which of two equally qualified employees to lay off. The court held that Title VII is violated when an employer makes an employment decision based on an employee's race. Applying the Supreme Court's *Weber* test, the court said that Title VII's prohibition against race discrimination is not violated by affirmative actions plans which have purposes that mirror those of Title VII and by plans that do not unnecessarily trammel the interests of nonminority employees. The court struck down the Piscataway plan under both prongs of *Weber*.¹³⁶

Taxman is perhaps most notable because civil rights activists, fearing a potentially devastating Supreme Court ruling agreeing with the antidiversity theory of *Hopwood*, structured a settlement to buy off Sharon Taxman.¹³⁷

Podberesky, *Hopwood*, and *Taxman* were decided under a misguided, equality theory, one that fixes caste and extends privilege for America's longstanding affirmative action babies. No one really believes that Maryland adopted the Banneker Program to subjugate Hispanics. Instead, Maryland was trying to reduce educational caste among African Americans. And one cannot resist the assumption that had Maryland included Hispanics and other minority groups, the same court would have held the scholarship program invalid because of racial politics. Strict scrutiny simply should not apply unless the government acts invidiously to promote individual or group caste.

Under an anticaste equality theory, the court need only ascertain if the relevant policy was enacted to advance individual or group caste. Did Maryland adopt the Banneker Program because of animus towards Hispanics? Did Texas adopt its admissions preferences to subordinate whites or Asians? Did Piscataway lay off Taxman because of its impact on whites? Even if an incidental effect of a government policy is discriminatory, that usually is insufficient to prove invidious discrimination. At least that is what the Court has told minority plaintiffs.¹³⁸

In addition to permitting government to dismantle caste, another virtue of an anticaste equality theory is the elimination of the arbitrariness and unpredictability of three-tiered judicial scrutiny that obfuscates current equality analyses. It is easily argued that when one looks for substance underlying rational basis, intermediate, or strict scrutiny analysis, it is accurate to assert, "there is no there there." This anticaste theory presents a cabining principle for all discrimination cases.

Finally, an anticaste interpretive theory promotes the essential purpose of the Equal Protection Clause: similar treatment for similarly situated persons.

136. *Taxman*, 91 F.3d at 1550.

137. *Id.*

138. *Washington v. Davis*, 426 U.S. 229 (1976).

In this case, all persons mired in caste, for whatever morally irrelevant reason, can be assisted up from caste. Lifting people from the bottom of the well in no way thrusts others into caste nor invidiously discriminates against any person or group.

CONCLUSION

One could divide American history into two distinct periods, a prodiscrimination period (1492-1964), and an antidiscrimination period (1964-present). During the first, millions of people were assigned second class status because they were the inferior color, the inferior sex, the inferior religion, the inferior class, or inferior in some other way. Now five centuries later, American castes are hardened, appearing intractable and normative.

The second period has made illegal some of the discrimination. Yet, the latest era has not had as its chief aim eliminating cumulative caste. Instead, the antidiscrimination era compels government largely to close its eyes to the past and the present effects of past discrimination.

Our next great historical period must permit government to ameliorate American caste that has accumulated over centuries of discrimination and despair. When government acts to dismantle caste, by aiding those mired in or marginalized by caste, it cannot violate anyone's constitutional interests. It is only when government maintains a person's caste that it runs afoul of the Constitution's equality guarantee.