PLESSY, *BROWN*, AND *GRUTTER*: A PLAY IN THREE ACTS

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Fifty-eight years separate the 1896 decision in *Plessy v. Ferguson*[1] from *Brown v. Board of Education*.[2] Forty-nine years separate the 1954 opinion in *Brown I* from *Grutter v. Bollinger*.[3] *Brown*, it turns out, lies almost exactly between *Plessy* and *Grutter*. This is not an accident. It symbolizes an important fact, which is the subject of this essay.

People often think of *Brown* as a great transformation in the law, or even a revolution. In fact, *Brown* is actually a halfway point between an older conception about how the Constitution secures equal citizenship and a newer one. Citizenship is a very large topic, and in this essay I will focus on only one aspect, the question of constitutional citizenship. I am interested in how the United States Constitution imagines what rights and privileges all citizens enjoy by virtue of being citizens. To put it another way, if all citizens are equal before the law, in what respects does the Constitution demand that they be equal or be made equal, and in what respects can they (or must they) remain unequal even though they are all equally citizens?[4]

Brown sits midway between two conceptions of constitutional citizenship. The first conception arose with the ratification of the Fourteenth Amendment. It attempted to rationalize the new status of blacks in American society. The first sentence of the Fourteenth Amendment bestowed citizenship on the black population that had been born in the United States and had been enslaved for hundreds of years. The key question was what this grant of citizenship meant. The first conception of constitutional citizenship divided the rights of citizens

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[1] 163 U.S. 537 (1896).

[2] 347 U.S. 483 (1954).

[3] 539 U.S. 306 (2003).

[4] Thus, in this essay I shall not be concerned with the large and important set of questions about how the government should treat those persons within its jurisdiction who are not citizens, or with the constitutional powers of Congress to bestow or refuse to bestow citizenship. I am interested, rather, in what a person gets (and does not get) once it is acknowledged that he or she is a citizen.

into three parts—civil, political and social—and held that equal citizenship meant equality of civil rights. Hence I call it the tripartite theory of citizenship. The tripartite theory was never a fully coherent theory; rather it was a set of categories, a language for talking and thinking about citizenship. Over time, its details and its applications were debated, elaborated, and modified. Eventually the whole theory fell apart.

The second conception arises with the New Deal and the Second World War, but the details are only worked out in the late 1960s and early 1970s, in the Civil Rights Revolution and the reaction to that revolution that begins with the 1968 election. This is the model of constitutional citizenship we are living with now, and the one that constitutional law professors teach their students, whether or not they understand it in precisely those terms. It is the model of scrutiny rules, and it views the rights of citizenship as a series of protections from state power that are, in turn, divided into fundamental rights and suspect classifications. Like the tripartite model, this model has never been a fully coherent theory, but rather a language for talking and thinking about constitutional citizenship. It too has been debated, elaborated and modified over time, and it is interesting to speculate about whether, after some fifty or so years of intellectual dominance, it too is slowly coming apart at the seams.

Brown v. Board of Education is decided after World War II, when the old model has dissolved, but before a new model of constitutional citizenship had fully emerged to replace it. That is one reason—although certainly not the only one—why *Brown* says so little about its theoretical justifications for jettisoning *Plessy*. Quite apart from the need to maintain unanimity, the details of the new theory simply had not been worked out. That required the efforts in succeeding decades by lawyers, judges, politicians, legal scholars, and members of social movements. Later on, people attributed elements of the theory of citizenship that developed in the 1960s and 1970s to *Brown*. In hindsight, *Brown* has come to represent this second theory of citizenship, even though that theory was not yet articulated in 1954 and would not be fully articulated for several decades.

Hence the three cases, *Plessy*, *Brown*, and *Grutter*, represent the three acts of a play, a constitutional drama about the transformation of one idea of constitutional citizenship into another. *Plessy*, the first act, is decided in the full flower of the tripartite theory, indeed, just as that theory is beginning to unravel, although nobody realizes it yet. *Brown*, the second act, occurs after it has passed away, but nothing has clearly emerged to replace it. And the third act, *Grutter*, occurs at the height of the second conception, which has become so complicated and confusing that it too, may be headed for a long period of decline, producing yet

another conception of constitutional citizenship whose contours we can only begin to imagine.

The historical theme of this essay is the rise and fall of different conceptions of constitutional citizenship and constitutional equality. The jurisprudential theme is that constitutional principles are political compromises. That may seem paradoxical, because we normally oppose principle to compromise; people who compromise betray principle, and people who stick to their principles do not compromise. Yet adopting certain constitutional principles, and not others, is sometimes a method of compromise; it is a way of explaining and justifying political compromise in what appears to be a principled fashion. The story of *Plessy*, *Brown*, and *Grutter* is a perfect example of how principles of equal citizenship were adopted at particular moments in the country's history to effect particular compromises that would be palatable to the most powerful groups in society, in this case, white Americans.

Here is the basic idea: all equality law is also the law of inequality. The law marks a liminal point. It declares what constitutes unequal treatment as a matter of law. At the same time, it also states what is not unequal treatment, or, put slightly differently, what forms and claims of inequality the law will not recognize as presenting real or remediable problems of inequality. The law only sees some forms of inequality and not others because that is how law is made. First, law is simply imperfect. Second, and more important, law is a compromise of contending forces and interests in society. Legal doctrines that enforce ideas of equality enforce the nature of that compromise and restate it in principled terms. Thus, what law enforces is not equality, but equality in the eyes of the law.

Law does not stand outside the forms of social stratification that exist in any society. Rather, to some extent, it also supports them and legitimates them. That does not mean that law cannot do enormous good in reforming discredited social practices. The point is rather that even (and especially) when law participates in social change, law is complicit in the new forms of social stratification that replace older, discredited forms. As law recognizes and outlaws some forms of inequality, it fails to recognize or legitimates others. My colleague Reva Siegel has given a name to this process; she calls it "preservation-through-transformation."[5] For example, the antebellum system of

[5] *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 83 (2000); Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of* Hopwood v. Texas, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29 (Robert Post & Michael Rogin eds., 1998); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*]; Reva B. Siegel, *"The Rule of Love": Wife-Beating as*

chattel slavery was overthrown and replaced by a new system that, by the late nineteenth century, had produced the system of de jure segregation known as Jim Crow. This transformation surely promoted equality, but it also left behind a "remainder"—not simply the dregs of older discredited forms but also new forms of social stratification that law rationalizes and protects. Legal transformations, and the political compromises they generate, often leave behind such a remainder, as powerful groups press for legal norms and principles that suit their evolving identities and interests.

Characterizing law's role in maintaining inequality while guaranteeing new forms of equality is always controversial. At the height of the Jim Crow regime, some people believed that Jim Crow preserved inequality to which the law turned a blind eye, others thought that the system of segregation was unjust but that there was little that could be done about it for practical reasons, and still others believed that Jim Crow was fully consistent with equality and that to eliminate it would interfere with people's rights and liberties. Our own era is not so different from theirs: whether social stratification exists, whether it is unjust, and whether law is helping to maintain it are controversial questions.

Viewed from this perspective, the law only protects equality to a certain degree, while simultaneously maintaining and fostering other features of inequality in new forms and guises. From the law's standpoint, however, that remainder of inequality is wholly consistent with legal equality. From the law's standpoint, all citizens are equal before the law.

Just as the law of equality is also the law of inequality, the law of equal citizenship is also law of unequal citizenship (or non-citizenship). Conceptions of citizenship mark what all citizens enjoy by virtue of being citizens. But they also simultaneously mark out what forms of inequality may exist between citizens, and what forms of social hierarchy or stratification may exist wholly consistent with all citizens being equal before the law.[6] Conceptions of citizenship mark what counts as equality, what counts as inequality, and what is not even recognized as raising a question of equality or inequality. Doctrinal forms arise to articulate, explain, and justify this conception of equal citizenship. At the same time, these doctrinal forms articulate, explain, and justify what is not contained in the conception of equal citizenship, and thus, what remainder of inequality the law does not recognize as *legal* inequality, and what forms of inequality may persist even as all citizens are judged equal before the law.

Prerogative and Privacy, 105 YALE L.J. 2117, 2175-88 (1996).

[6] At the same time, they also mark the forms of inequality and social stratification that may exist between citizens and non-citizens.

We can see the three acts of our play in this light: What we are interested in is how people theorized the notion of what it meant to be equal before the law, and how certain conceptions of citizenship, articulated through constitutional doctrine, emerged in order to simultaneously extend equality and withhold it. The tripartite model is a method of promoting and withholding equality, of recognizing inequality and failing to recognize it. But so too, is our current model of scrutiny rules. And so too, one suspects, will be whatever replaces that model in the future. This perspective is not at all inconsistent with an idea of progress in human affairs. After all, few today believe that the current model of equality law is not an improvement on Jim Crow, just as few today believe that, however vicious the system of Jim Crow segregation was, it was not a distinct improvement over the evils of chattel slavery. Just as we can see Jim Crow as both an improvement over a previous form of social life and the creation of a new form of social structuration supported and fortified through law, we can come to understand how our own model of equality—the model of scrutiny rules—is not the final achievement of true equality, but rather has accompanied new forms of social structure that now help maintain new forms of social hierarchy.[7]

ACT I: *PLESSY* AND THE TRIPARTITE MODEL

Along with astounding practical difficulties, the Civil War also left behind an enormous theoretical problem. The Thirteenth Amendment abolished slavery, making all members of the American political community free. But did this make all of them citizens, and if they were citizens, what rights did they have by virtue of being citizens?

The Fourteenth Amendment tried to provide an answer. Its first sentence, the Citizenship Clause, stated that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[8] Blacks, whom the *Dred Scott* decision had held were not and could never be citizens,[9] were established as full citizens and members of the American political community.[10] Out of the debates over the

[7] *See* Siegel, *Why Equal Protection No Longer Protects*, *supra* note 5, at 1113 ("If we reconstruct the grounds on which our predecessors justified subordinating practices of the past, we may be in a better position to evaluate contested practices in the present.").

[8] U.S. CONST. amend. XIV, § 1.

[9] Dred Scott v. Sandford, 60 U.S. 393, 406-11 (1856).

[10] Nevertheless, the Fourteenth Amendment left some persons out of the political community. *See* Elk v. Wilkins, 112 U.S. 94 (1884) (holding that Native Americans born in the United States are not automatically citizens). Congress did not pass legislation naturalizing all "Indians born within the territorial limits of the United States" until 1924. *See* 8 U.S.C. § 140(a)(s) (2000).

Reconstruction Amendments came a language for understanding what citizenship was and what it entailed. This set of assumptions I call the tripartite theory of citizenship.

The tripartite theory divided rights (and equality) into three different categories: civil, political, and social.[11] What fell into each category was always somewhat contested,[12] but for the most part civil equality meant equal rights to make contracts, own, lease, and convey property, sue and be sued, and, according to some formulas, the rights of freedom of speech and free exercise of religion. All adult members of the political community possessed civil equality; this is what black males obtained when they became free. Unmarried adult women also possessed civil equality with men, although in practice women lost almost all of their civil rights upon marriage because of the coverture rules, which were premised on the legal fiction that a wife surrendered her rights to her husband.

Civil equality, which meant equal civil rights, was distinguished from political equality, which meant equal political rights. Political rights included the right to vote, serve on juries, and hold office. Not all citizens had these rights, so people could be civilly equal but not politically equal. Black men and unmarried women were civilly equal to white men but not politically equal. The distinction between civil and political equality was important to the framers of the Fourteenth Amendment because many of them did not want blacks to have the right to vote, to say nothing of women. That is why a separate Fifteenth Amendment, guaranteeing black suffrage, was thought necessary.

The idea of social equality was more amorphous. Essentially it concerned whether persons were considered social equals in civil society. Social equals are those with equal social status. Social equality and social inequality were not the business of the state; rather social equality and social inequality were natural features of human interaction produced through the preferences and behavior of private individuals, and normally the state should not interfere with these decisions. However, "social equality" had another, more racially charged meaning.

Moreover, making blacks birthright citizens distinguished them from Chinese immigrant laborers, who were not only denied the ability to become citizens but who were also excluded in the 1880s. *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600 (1943). In 1898 the Supreme Court finally held that children of Chinese immigrants born in the United States were birthright citizens. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[11] AKHIL REED AMAR, THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION 216-18, 258-61, 271-74 (1998); EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 103-06 (1990); HAROLD M. HYMAN & WILLIAM W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 276-78, 394-402 (1982).

[12] RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 154-56 (1999) ("The many political and legal actors who spoke and wrote about rights using these terms did not always employ the categories in the same way.").

It was also a code word for miscegenation and racial intermarriage.[13] The idea (or rather the fear) was that the relative status of blacks and whites as a group would be altered by a preponderance of mixed race children, or if blacks and whites regarded themselves as members of the same family. Thus, states could continue to prohibit interracial sex or interracial marriage consistent with the Fourteenth Amendment.

The two ideas underlying social equality are in tension with each other: The first idea assumes that social equality is the product of natural affinities and private social interactions. The state should not interfere with these interactions because they are private and an important aspect of individual liberty, and it would be futile for the state to do so in any event.[14] No matter what the state does, most white people will continue to regard themselves as the social superiors of black people.[15] The second idea assumes, to the contrary, that the state may (and perhaps should) intervene to prevent the mixing of the races, particularly where sex and the formation of families is concerned. Even if some blacks and whites want to form intimate relations through private agreement, the state may stop them from doing so. In order to preserve social inequality it is necessary to know who is white and who is black, and miscegenation threatens to blur those distinctions. Individual decisions—the exercise of individual liberty—will affect the status of other members of the social group without their consent. Hence the state's intervention is not only not seen as futile, it is viewed as necessary to preserve racial identity and racial status. Not surprisingly, after the Civil War many states passed laws and created categories determining racial status and indicating the degree of black ancestry sufficient to make a person black by law. In *Plessy* itself, the Supreme Court noted that states had different rules, under which the

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[13] *See* Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 877, 891 (1995).

[14] *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896), where the Court explained:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher* "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

Id. (citations omitted).

[15] *Id.* Thus, Justice Brown argued, "if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature," and ordered segregation of railway carriages, this would not "relegate the white race to an inferior position" because "the white race . . . would not acquiesce in this assumption." *Id.*

same person might be judged black in one state and white in another, but asserted that these were matters of state law that had raised no constitutional problems.[16] The Court did not think that defining race by law made any difference to the equality of blacks before the law.

The major reason for the tripartite theory was that most of the framers of the Fourteenth Amendment did not want to give blacks full equality. In particular, they did not want to give blacks the right to vote. Most of them also did not consider blacks to be full social equals with whites, and so they believed that states should still be able to restrict interracial marriage and perhaps even segregate some public facilities.

The key idea of the tripartite theory was that blacks and whites were civilly equal. They had equal rights to make contracts, own, sell, convey, and lease property, sue and be sued, express themselves, and practice their religion. To the framers of the Fourteenth Amendment this meant that blacks and whites were equal before the law. Today this formulation seems strange to us. How can blacks and whites be equal before the law if segregation is constitutional and if blacks have no constitutional right to vote? But the idea made perfect sense to many of the framers and ratifiers of the Fourteenth Amendment, because they assumed that voting and social equality were not necessary elements of citizenship. Some citizens, such as children, could not vote, and it was no business of the law to require that those who were socially unequal by nature be regarded as socially equal.

In short, the basic assumption of most of the framers and ratifiers of the Fourteenth Amendment was that all citizens were equal before the law even if they were not political or social equals. Equality before the law simply meant civil equality, nothing more. Furthermore, some citizens did not enjoy full civil rights because of their status (minors) or because they willingly surrendered those rights (married women, whose rights were merged into those of their husbands under the coverture rules).

The tripartite model of citizenship is an ideological and practical compromise. It reflects the contending forces in American society, the political compromises necessary to ratify the Fourteenth Amendment,

[16] Justice Brown explained:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others that the predominance of white blood must only be in the proportion of three-fourths. But these are question[s] to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

Id. at 552 (citations omitted).

and the play of forces in the years that followed which took the theory in a trajectory that could not have been fully foreseen. The tripartite model acknowledges that blacks are free and equal citizens, but it defines equal citizenship so that blacks and women do not have the right to vote. Black men gained the franchise in 1870, women in 1920, in each case through constitutional amendment.

The concept of "equality before the law" simultaneously constructs and produces forms of equality and inequality. It is a particularly good example of how the law of equality is also the law of inequality. It is obvious to us today that the principles of the tripartite theory are a compromise that prevents blacks and women from enjoying full equal citizenship. We see how these principles were a compromise because we approach equality from a different historical vantage point. But we need to imagine how our own conception of equality is also a set of compromises characteristic of our own era. Viewing our own practices as a model akin to the tripartite model helps us see our own practices of equality from the perspective of another era. The point of this historicist idea is that we should try to see our own theory of citizenship in this light. Its principles are actually an ideological compromise that arises out of political compromise.

The tripartite model of citizenship not only produced different results from present day constitutional doctrine. It also reasoned about citizenship in importantly different ways. A good example is the case of *Minor v. Happersett*,[17] decided in 1874. Virginia Minor, a key figure in the phase of the suffrage movement called the New Departure, argued that the Fourteenth Amendment already gave women the right to vote.[18]

Today we would judge whether women had an equal right to something in terms of the familiar categories of suspect classifications and fundamental rights. Of course, the text of the Nineteenth Amendment solves the problem of voting immediately, but my point is that under today's doctrinal assumptions the Amendment seems to be superfluous—presumably courts would guarantee women equal rights to vote even if the text of the Nineteenth Amendment were absent. That is because classifications based on sex are suspect or quasi-suspect, and require "an exceedingly persuasive justification;"[19] the right to vote is

[17] 88 U.S. (21 Wall.) 162 (1874).

[18] On the New Departure, see Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456 (2001); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 180-83 (2000); Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, *in* ELLEN CAROL DUBOIS, WOMAN SUFFRAGE AND WOMEN'S RIGHTS 98-106 (1998); Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1364-75 (1995).

[19] United States v. Virginia, 518 U.S. 515, 524 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

either a fundamental right or a fundamental interest, and access to the ballot may not be subject to invidious distinctions.[20] So today we would say that denying women the right to vote involves a suspect classification that also burdens a fundamental interest. Thus, the law is doubly suspect.

But of course, the Nineteenth Amendment was *not* superfluous in 1920, and indeed it is quite possible that had women not won the vote in 1920, the Supreme Court would not have created sex equality doctrines some fifty years later that make the Amendment appear superfluous today. Woman suffrage required a constitutional amendment because people operated under very different assumptions about what it meant to be a full and equal citizen than we do today.[21]

Thus, in 1874, when the Supreme Court decided *Minor v. Happersett*, it asked very different questions than a court would ask today, even though both courts would be construing the very same amendment. The Court began by arguing at some length that women are citizens, and had always been understood to be, even before the Fourteenth Amendment.[22] Therefore women are equal before the law. The Court's next question, however, was whether voting is a necessary attribute of citizenship, that is, whether voting rights involve civil, political, or social equality.[23] The answer was clear: voting, like jury service, is not one of the privileges or immunities of citizens, the basic components of civil equality.[24] If voting was one of the privileges and immunities protected by the Fourteenth Amendment, the Court asked, what was the point of ratifying the Fifteenth Amendment?[25] Children are citizens, and they cannot vote; conversely, as the Court itself pointed out, in some states, non-citizens were given the right to vote if they expressed an intention to become citizens later on.[26]

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20 Harper v. Va. Bd. of Elections, 383 U.S. 663, 667-68 (1966).

21 On the theories of citizenship prevalent prior to the ratification of the Nineteenth Amendment, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979-87 (2002).

22 *Minor*, 88 U.S. at 167-70.

23 *Id.* at 170 ("The direct question is, therefore, presented whether all citizens are necessarily voters.").

24 *Id.* at 171 ("It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted."). The Court's argument in *Minor* proceeded by assuming that all citizens were entitled to the privileges and immunities of citizenship—an alternative formulation for the idea of civil equality—and then asked whether, whatever those privileges and immunities might have been before the Fourteenth Amendment, voting was added to them by that amendment. It also pointed to section two of the Fourteenth Amendment, which stated that states would be penalized in their representation in the House of Representatives and in the Electoral College if they denied the right to vote to "to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States . . . ." *Id.* at 174.

25 *Id.* at 175.

26 *Id.* at 177.

The Court did not waste much effort deciding *Minor v. Happersett*, and in fact the State of Missouri, the defendant in the case, did not even bother to send opposing counsel. *Minor* is an easy case under the tripartite theory. It is also an easy case—with exactly the opposite result—under our current model of constitutional citizenship, even without any help from the Nineteenth Amendment. That is proof enough of how radically different the two models are in their basic assumptions.

I have called the tripartite theory of citizenship a theory, but it was never very well-worked out. It is probably better to say that it was a common language and a shared set of concepts for talking and thinking about questions of citizenship and equality.[27] Not everyone agreed about its concepts or their contours, and over time, the ideas in the theory developed and changed.

For example, by the time *Plessy* was decided in 1896, the boundary between political and civil equality had proved increasingly difficult to manage, even though, of course, in most states women still lacked the right to vote. In 1880, in *Strauder v. West Virginia*,[28] the Supreme Court struck down a law banning blacks from serving on juries under the Fourteenth Amendment, while saying nothing about the Fifteenth Amendment, even though, as Justice Field pointed out, jury service was an attribute of political, not civil equality.[29] In 1896, the same year as *Plessy*, in *Gibson v. Mississippi*,[30] the Court stated that "the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race. All citizens are equal before the law."[31] A similar idea appears in *Plessy* itself:

> The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished

[27] Siegel, *Why Equal Protection No Longer Protects*, *supra* note 5, at 1120 (noting that "distinctions among civil, political, and social rights functioned more as a framework for debate than a conceptual scheme of any legal precision"); PRIMUS, *supra* note 12, at 154-57, 169-71.

[28] 100 U.S. 303 (1880).

[29] *Id.* at 312 (Field, J., dissenting) (dissenting "on the grounds stated in [his] opinion in *Ex parte Virginia*"); *Ex Parte* Virginia, 100 U.S. 339, 367 (1880) (Field, J., dissenting) ("The equality of the protection secured [by the Fourteenth Amendment] extends only to civil rights as distinguished from those which are political, or arise from the form of the government and its mode of administration."). However, perhaps *Strauder* protected not the political rights of the excluded members of the jury, but the defendant Strauder's right to be tried only by a jury of his peers (or a jury fairly selected from a cross-section of the community). The latter right would be an attribute of civil, and not political equality. *See* AMAR, *supra* note 11, at 272.

[30] 162 U.S. 565 (1896).

[31] *Id.* at 591.

> from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[32]

The tripartite theory has become a two pronged theory. Civil and political equality were guaranteed, but social equality was still different, because a person's social status among his or her fellow citizens is formed by private interactions in a private sphere of association.

What *Plessy* turns on, then, is the meaning of social equality, and whether segregation of the races in railway cars is a matter of civil equality, in which case it is unconstitutional, or social equality, in which case it is perfectly fine as long as it is "reasonable, and . . . enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[33] Justice Brown, writing for the majority, says segregation of railway carriages is a question of social equality and therefore not unconstitutional under the Fourteenth Amendment.[34] Justice Harlan, in dissent, insists that segregation is a denial of civil equality.[35] Indeed, his argument is that integration of the races in public facilities has nothing whatsoever to do with the social equality of whites and blacks, an argument which sounds more than a little disturbing from today's standpoint:

> [S]ocial equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.[36]

In other words, it doesn't matter how much you integrate the institutions of American political and civil society. Blacks and whites are not social equals and they are not going to be.

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[32] Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

[33] *Id.* at 550.

[34] *Id.* at 551-52 ("If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.").

[35] *Id.* at 562 (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.").

[36] *Id.* at 561 (Harlan, J., dissenting). Harlan then attempts to clinch the argument by comparing blacks to Chinese. The Chinese, he explains, are "a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country." *Id.* Since "a Chinaman can ride in the same passenger coach with white citizens of the United States," the Louisiana statute treats blacks worse than people who are not and cannot be citizens. *Id.* On Harlan's views about the Chinese, see Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

Although Justices Brown and Harlan come out differently in *Plessy*, they are not fundamentally in disagreement. Rather, they are fighting over the meaning of the same category—social equality. Both assume that the Fourteenth Amendment does not make blacks and whites social equals. Indeed, immediately before launching into his famous invocation of a colorblind Constitution, Harlan notes:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.[37]

Colorblind government is fully consistent, Harlan thinks, with the social inequality of the races, even the dominance of the white race "for all time." The question is whether segregation of railway carriages merely accommodates social inequality, as Brown and the majority believe, or whether it infringes on civil equality, as Harlan contends.

Behind this disagreement is a larger agreement about the nature of social equality: The key idea is that social equality and inequality are produced in the realm of private choice, by whom people choose to associate with, befriend, avoid, and snub. Social hierarchies and status differences are not the product of the law; rather they emerge from networks of private choices that, in turn, reflect what Brown calls "natural affinities" and "physical differences."[38] Both private contacts within markets and private social encounters reflect these affinities and preferences. Social engineering that attempts to alter these affinities and preferences is futile and will only make people unhappy, but reasonable restrictions designed to soothe social tensions and diffuse social conflicts are not social engineering. Rather, they facilitate the private sphere.

Brown's assumptions about the private sphere are hardly unique to the race cases. They are part of more general assumptions about the relationship between public power and private choice in late nineteenth century. These are the key assumptions of the substantive due process jurisprudence of the *Lochner* era, which begins only a year after *Plessy*, in *Allgeyer v. Louisiana*.[39] *Lochner*-era jurisprudence is based on the inherent limits of the police power that underlie the social contract. The state must not invade private spheres of interaction, which it exists in part to protect. When the state acts to protect or promote the morals, health, safety, and welfare of its citizens within reasonable limits, it facilitates the realm of private choice. When it goes further than this, it invades the private sphere and acts unconstitutionally.

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[37] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[38] *Id.* at 551.

[39] 165 U.S. 578 (1897).

Lochner-era jurisprudence is deeply connected to the basic assumptions of the tripartite theory of citizenship. Indeed, the two strands of thought flow from the same source. When the state acts within its police power, it does not offend, but rather protects and secures, the civil rights and the civil equality of all of its citizens. Conversely, when the state acts unreasonably, for example, when it engages in "class legislation" that favors one social group over another, it denies civil rights and hence abridges civil equality—for example, by abridging the right to choose one's profession, or the right to contract.

Therefore, it is entirely unsurprising that Justice Brown justifies Louisiana's segregation of railway carriages by invoking the state's police power. The Fourteenth Amendment, he explains, "enforce[s] the absolute equality of the two races before the law," that is, their civil equality. At the same time, it left open differences in social status—"in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[40] Laws that smooth racial tensions and prevent social offense are not class legislation but rather attempts to facilitate a well functioning private sphere of social and economic interaction. Thus, *Brown*, argues, "[l]aws permitting, and even requiring, . . . separation [of the races], in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." "The most common instance of this" exercise of the state's police power, *Brown* explains, "is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[41]

Brown's thesis proved too much. The police power argument provided an ideological justification for an entire system of state regulation defining racial identity and requiring separation of everything from public water fountains to funeral parlors. What Brown saw as merely a method of facilitating private choice was in fact directing it and restricting it in countless ways. Even if blacks and whites wanted to use the same facilities, the states forbade it.[42]

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[40] *Plessy*, 163 U.S. at 544.

[41] *Id.*

[42] It is no accident that preserving social inequality required so much state regulation. David Bernstein and Illya Somin point out that because white racial superiority is a public good among whites, maintaining it takes considerable government intervention. Thus, Jim Crow laws solved collective action problems among racist whites (some of whom might defect in order to achieve individual gains). These laws also shifted the costs of maintaining segregation from individual

The brute reality of vast systems of Jim Crow legislation which were put in place for the most part after *Plessy*, combined with denials of black political rights, put the two different notions of social rights I described earlier on a collision course. If social equality and inequality are produced by purely private decisions about association and contracting, then states wrongly intrude in the private sphere when they require separation of the races as much as when they require integration. On the other hand, if the differential social status of whites and blacks as groups will inevitably be undermined by individual decisions to mingle, contract, or marry, then states have not only the right, but perhaps also the duty, to protect the integrity of the private sphere of association from free riders by keeping the races apart in certain situations.[43] In particular, this conflict between different conceptions of social inequality meant that *Lochner* and *Plessy* were in conflict with each other, a conflict which is most apparent in *Buchanan v. Warley*.[44] In *Buchanan* the Supreme Court struck down a local ordinance that kept blacks from buying houses in predominantly white neighborhoods on the grounds that the law hampered individuals' freedom of contract. The Court said:

> Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms. . . The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color. . . . The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.[45]

Note that both *Plessy* and *Buchanan* can be seen alternatively as cases involving civil rights or social rights. The Court thought that *Plessy* involved merely social rights—because blacks could still ride on

whites onto the legal system, and simultaneously minimized the costs of maintaining a system of white supremacy. David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 602 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

[43] *Id.* at 603-05.

[44] 245 U.S. 60 (1917); *see also* Berea Coll. v. Kentucky, 211 U.S. 45 (1908). In *Berea College*, the Supreme Court upheld a Kentucky law that prohibited corporations from maintaining racially integrated schools.

[45] *Buchanan*, 245 U.S. at 78-79, 81 (citations omitted).

railway carriages—while *Buchanan* involved civil rights because the right to purchase a particular piece of property was completely extinguished. Yet one could argue the reverse: Harlan thought separation of the races in *Plessy* violated black civil rights. One could also argue that *Buchanan* was really about social rights rather than a ban on the right to purchase property, because blacks could still purchase properties in other neighborhoods.[46] Moreover, as in *Plessy* and in the earlier case of *Pace v. Alabama*,[47] the limitation was formally equal—whites and blacks were equally forbidden from selling to one another.

Of course, no theory of constitutional citizenship is purely a matter of logic. It is always in conversation with politics. And although its contours are shaped by political compromises, its concepts also offer people ways of critiquing existing political and legal arrangements. That is as true of the tripartite model as it is of our present day model of scrutiny rules.

ACT II: *BROWN V. BOARD OF EDUCATION* AND THE RISE OF THE MODEL OF SCRUTINY RULES

The intellectual edifice of the tripartite theory and the police power theory falls apart during the first part of the twentieth century. It might look as if the police power theory goes first, during the constitutional struggles over the New Deal, but in fact they both collapse together. The reasons have less to do with the internal logic of doctrine than with how concepts and categories interact with social and political changes.

By the time *Brown* is decided, the Supreme Court has also abandoned the other key feature of the theory of citizenship that we get from Reconstruction: the notion of inherent limits on the police power in order to preserve a private sphere of individual liberty. The Jacksonian focus on class legislation has also disappeared, at least with respect to economic regulation, although it will soon reemerge in a new form as an prohibition against caste or invidious discrimination.

In place of the *Lochner*-era notions of limited police power, the Supreme Court developed doctrines that legitimated and justified the regulatory and welfare state. Indeed, this is the whole point of the New Deal. The New Deal is a new social contract with a new concept of citizenship. This is the "deal" in the New Deal: give the federal government more power to regulate private transactions, and, in turn,

46 *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 699-700 (1992).

47 106 U.S. 583, 585 (1883) (upholding provisions of the state code that punished interracial cohabitation more severely than cohabitation between persons of the same race on the grounds that "[t]he punishment of each offending person, whether white or black, is the same").

the government will take care of its citizens, providing public goods, security, and investments in human capital, including education.

But this New Deal had an ominous flip side. The more power the government assumes, the more ways it has to regulate and control the citizenry, and hence the greater the threat to liberty. Hence at the very moment when the Supreme Court legitimates the regulatory state, it also begins to create a new set of doctrines that will replace the *Lochner*-era emphasis on inherent limits of federal regulatory power and state police power. The replacements that eventually emerge are the doctrines of suspect classifications and fundamental rights.

We already see the glimmerings of this idea in the famous *Carolene Products* footnote.[48] In the midst of expounding the highly deferential standard that will become the rational basis test, the Court suggests that it may abandon the traditional presumption of constitutionality where the Bill of Rights is affected, where the democratic process is adulterated, or whether "discrete and insular minorities" are harmed.[49] The idea is extended further in the concept of "preferred liberties" in the 1940s.[50] In addition, from the early twentieth century to the mid 1960s, the Supreme Court incorporates most of the Bill of Rights into the Fourteenth Amendment and applies them to state governments, treating these guarantees as fundamental liberties of all citizens.[51] In this way, the Supreme Court preserves certain elements of the libertarian jurisprudence in the 1920s and 1930s and redescribes and redeploys them so that they mesh with the obligations of government in the regulatory and welfare state.[52]

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[48] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[49] *Id.* Thus, the theory of judicial scrutiny in this second system of citizenship comes with a corresponding idea about democracy. The political process is responsive to the will of the people, as it should be in a democracy, but sometimes the system misfires or has predictable pathologies. Therefore courts need to protect discrete and insular minorities from being abused by the political process, and they need to protect everyone's fundamental rights. In all other cases, the system should rely on democratic mobilization and the play of interest groups to protect people's interests. This conception of democracy is the successor to the combination of the police power theory and the tripartite theory.

[50] *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."); *see also* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994). The First Amendment was the obvious candidate for a preferred liberty that would receive heightened judicial scrutiny because of its connections to democratic self-government. *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 327-42 (1996) (tracing the history of the preferred liberty idea in the 1930s and 1940s).

[51] *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (listing incorporated clauses); Powell v. Alabama, 287 U.S. 45, 67 (1932) (stating that the Fourteenth Amendment incorporates "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.").

[52] *Cf.* BRUCE A. ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 150-56 (1991) (arguing that *Griswold v. Connecticut* synthesizes earlier commitments to liberty from the Founding Period with the New Deal).

By the 1960s and 1970s, we have a full blown system of fundamental rights (the successor of the idea of preferred freedoms) and forbidden classifications.[53] Both fundamental rights and rights against forbidden classifications are enforced by scrutiny rules.

I distinguish scrutiny rules from conduct rules. Conduct rules state that a government agent may do this or may not do that. For example, the requirement that a bill must be presented to the President for his signature before it becomes law is a conduct rule. So too is the rule of *New York Times v. Sullivan Co.*[54] that states may not allow libel suits against public officials unless the plaintiff demonstrates actual malice.[55] Many elements of constitutional doctrine are conduct rules. But a far larger number of rules, and particularly the rules that concern civil rights and civil liberties, employ scrutiny rules. Scrutiny rules allow government to do things if it gives a sufficiently good reason. Thus scrutiny rules are a special form of balancing, with different weights attached depending on the nature of the interest at stake. When the level of scrutiny is either very relaxed or very strict, the scrutiny rule begins to resemble a conduct rule. However, there are enough examples of statutes struck down under rational basis, or upheld under strict scrutiny, to suggest that there still is balancing going on, even though the actual features of the balancing are often disguised in the various formulas that courts use to scrutinize government action. It might be better to say that rational basis and strict scrutiny are scrutiny rules with particular weights that limit judicial discretion in different ways.

One might trace the origins of scrutiny rules back to *McCulloch v. Maryland*'s famous language about review of federal power for pretext.[56] But the real birth of scrutiny rules occurs in the *Lochner* period, and these doctrines were created to put into effect the theories of limited government in vogue at the time. When faced with challenges under the Fifth and Fourteenth Amendments, courts asked whether economic and social regulation had a fair relation to a legitimate purpose for regulation consistent with the theory of the police power, or

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[53] There is, however, a shift in emphasis between these two conceptions. The idea that the First Amendment is a "preferred liberty" originated from the notion that First Amendment liberties are inextricably linked to democracy and self-government. White, *supra* note 50, at 329-30. The rights that the Supreme Court later declared to be "fundamental" do not always have this connection to democratic theory.

[54] 376 U.S. 254 (1964).

[55] *Id.* at 279-83.

[56] In *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819), Chief Justice Marshall argued that:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id.

whether, as in *Lochner* itself, the challenged regulation was "a labor law, pure and simple"[57] and therefore an illegitimate attempt at taking from *A* and giving to *B*.[58] The language of scrutiny is employed in dicta in *Korematsu*,[59] appears in a few First Amendment cases, and then finally becomes the standard method of thinking about constitutional equality in *McLaughlin v. Florida*[60] and *Loving v. Virginia*.[61] Ironically, but perhaps appropriately, *Brown v. Board of Education* does not use the language of scrutiny. It is a case about harm to black schoolchildren, although today many people, I suspect, instinctively identify it with the doctrinal proposition that racial classifications are strongly disfavored and will be viewed by courts with the most searching scrutiny.

We can summarize the two different models of constitutional citizenship in the following chart:

57 Lochner v. New York, 198 U.S. 45, 57 (1905).

58 *See id.* at 64 ("It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.").

59 Korematsu v. United States, 323 U.S. 214, 216 (1944).

60 McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

61 Loving v. Virginia, 388 U.S. 1, 11 (1967).

Table 1 Two Models of Constitutional Citizenship

	Concept of Social Contract	Judicial Scrutiny	Citizenship Rights Defined By	Equality Before the Law Means
Tripartite Theory of Citizenship	Protection of sphere of private association with limited police power to promote health, safety, and welfare; even more limited federal regulatory power	Prevents improper redistribution, strikes down oppressive regulation that goes beyond inherent boundaries of police power, or enumerated federal powers	Distinction between civil, political, and social equality	Civil equality
Model of Scrutiny Rules	New Deal: General power to regulate health, safety and welfare to promote the public interest, including redistributive goals and use of regulatory state to reshape market forces; robust federal regulatory power. In return government must create wide variety of public goods to allow citizens to flourish and to secure equal citizenship.	Strikes down laws and executive actions that make forbidden classifications and/or infringe on fundamental rights	Creation/recognition of suspect classifications and fundamental rights	Not being subject to suspect classifications and/or denials of fundamental rights

The decisions in *Brown* and the companion case of *Bolling v. Sharpe*[62] are doctrinally awkward. That is not entirely surprising, because consistency with previous doctrine does not seem to have been decisive for the Justices. For that matter, neither does the history of the Fifth and Fourteenth Amendments. Instead, Chief Justice Warren bases his *Brown* decision on the special importance of education in American society, and the harm that segregation by law causes black schoolchildren. *Bolling* offers the same argument based on the Due Process Clause of the Fifth Amendment.

Neither *Brown* nor *Bolling* fit well into the tripartite theory. It is hard to say whether education is a question of political, civil, or social equality. That is not surprising, because the very idea of a pervasive welfare state that provides basic elements of opportunity for its citizens is not on the minds of framers of Fourteenth Amendment. Rather, *Brown* is at the start of creating a new way of organizing concepts of citizenship, one that will eventually use concepts like scrutiny rules, classifications, and fundamental rights. Of course, *Brown* does not tell us anything about this theory, because it has not been developed yet. Instead, the very paucity of *Brown*'s arguments, and the massive resistance that followed *Brown*, spur lawyers, judges, and legal scholars to come up with novel and sophisticated theories about why *Brown* was correct.[63] This sort of theorizing is particularly vital after the Civil Rights revolution, which transforms *Brown* into a hallowed icon. Recognizing that *Brown* is here to stay, both liberals and conservatives attempt to claim the mantle of *Brown* for themselves, and give accounts of *Brown* that are consistent with their constitutional ideals.

As noted earlier, by the time *Brown* is decided, the tripartite scheme inherited from Reconstruction no longer makes sense. It no longer makes sense because the notion that the State has nothing to do with social equality, but merely facilitates a private sphere of interaction that produces social status, no longer makes sense. It was quite obvious to the Supreme Court that Jim Crow was hardly a laissez-faire operation. Instead state and local governments inserted themselves into the regulation of almost every facet of everyday life, including schools, hospitals, cafeterias, recreational facilities, transportation, public accommodations, bathrooms, and water fountains, even funeral parlors. All of this was done to maintain and signify the superior status of whites over blacks. Far from a byproduct of purely private decisionmaking, the maintenance of social inequality was a state-run project.[64]

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[62] 347 U.S. 497 (1954) (holding segregation of the District of Columbia public schools unconstitutional under the Fifth Amendment's Due Process Clause).

[63] The story is told in Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1497-1500 (2004).

[64] *See* Bernstein & Somin, *supra* note 42, at 602-09.

Not only were southern states heavily invested in maintaining white supremacy, but the understanding of what governments did and could do had also changed, both in the North and the South. Quite apart from white supremacy, all forms of social equality were affected by what governments did. The notion that government was not responsible for the inequality produced by private decisionmaking made considerably less sense following the New Deal, when the government had pledged to take care of its citizens through affirmative programs in return for a grant of increased regulatory power. Warren makes this point succinctly in *Brown* itself:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[65]

Education, which is a good delivered by the state, is now essential for citizenship. Good citizenship requires more than the mere facilitation of private exchange: it demands that the state provide (or subsidize the production of) important public goods. Education symbolizes this function of government, that of collecting taxes and redistributing benefits to the citizenry through providing valuable services. In just a few words Warren offers a new vision of citizenship grounded in the welfare state and a justification of the welfare state as central to good citizenship.[66]

In some ways it is appropriate that the language of scrutiny makes no appearance in *Brown*, and that Warren's most succinct discussion is about government's role in providing education necessary for equal citizenship. That is because *Brown* is not just a case about racial classifications. It is also a case about systemic oppression of one group by another in American society and a case about the distribution of an important public good necessary to citizenship.

So *Brown* might have three different interpretations. First, it might stand for a principle forbidding government to make classifications

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[65] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[66] *See* ACKERMAN, *supra* note 52, at 149 (arguing that in Warren's *Brown* opinion, the public school "'serves as a compelling symbol of the modern republic's activist commitment to the general welfare.'") (citations omitted).

based on race. Second, it might stand for a principle forbidding government from subordinating one social group to another. Third, it might stand for the principle of fair distribution of the public goods that are necessary to citizenship in an increasingly complicated world. Call the first the anticlassification principle, the second the antisubordination principle, and the third the fair distribution of public goods principle.

In the fifty years following *Brown*, all three themes appear in interpretations of the case, and, to some extent, in the constitutional doctrine itself; but the anticlassification theme becomes the dominant one. The reason is not internal to the logic of Warren's opinion, but rather to the political and legal struggles that followed it. Remember my earlier point: principles are compromises—they reflect the vector sum of the powerful (and less powerful) forces in society. The anticlassification principle proved far more palatable to the white majority than the antisubordination principle or the welfare state principle. First, the anticlassification principle appears to offer a simple rule of neutrality. It does not require any inquiry into whether particular groups in society are subordinated, or, if so, how bad the subordination has been. It blames no one in particular, but simply asserts that henceforth governments will not make racial distinctions. Second, the anticlassification principle, because it is stated in neutral terms, is symmetrical, and thus might be used to benefit whites as well as blacks. It could become, and did become, a moral and legal argument against forms of race conscious affirmative action that disadvantage members of the white majority and require the transfer of resources and opportunities from whites to blacks. In like fashion, the anticlassification theme was more palatable to the white majority than the welfare state principle. First, it requires almost no distribution from those with more resources to the poor, a group strongly identified in the public mind with racial minorities, other than to require that resources not be allocated directly on the basis of race. Second, it requires much less detailed judicial supervision of public resources and the way that the public spends its money. The anticlassification principle does not, at least on its face, challenge the methods that states and municipalities use to fund their programs or the ways in which state and local governments distribute the benefits of their welfare state activities among various groups in society.

In sum, because the anticlassification interpretation of *Brown* becomes dominant, courts and legislatures do not have to pay so much attention to social structure and forms of stratification on the one hand, and the duty to provide fair distribution and basic public goods in order to guarantee equal citizenship on the other. Understanding *Brown* as a case about forbidden classifications is the sort of interpretation that white majorities can most easily live with.

Because this interpretation of *Brown* is less threatening or destabilizing than other possible interpretations, it becomes part of a construction of new constitutional doctrines that reshape the contours of citizenship and that, in turn, construct a new way of justifying and rationalizing various social inequalities. In this sense, the theory of scrutiny rules that emerges following *Brown* has something in common with the tripartite theory that it replaced. The tripartite theory eliminated an earlier legal regime of inequality—chattel slavery—and helped justify new forms of social hierarchy and stratification that emerged out of the crucible of the Civil War. The tripartite theory justified and rationalized certain forms of social inequality by distinguishing between different elements of equality, and by rejecting social equality as a goal of the Fourteenth Amendment. The method of scrutiny rules that emerges after *Brown* helped abolish an earlier form of social hierarchy—Jim Crow—and helped justify new forms of social hierarchy and stratification that emerged out of the civil rights revolution. It justified and rationalized new forms of social inequality by constructing doctrines and interpreting precedents like *Brown* in ways that hindered serious engagement with forms of social hierarchy and social structure that emerged from the 1960s.[67] It too, helped preserve a remainder of social inequality.

ACT III *GRUTTER* AND THE END OF THE SECOND RECONSTRUCTION

A. *Implementing Rules*

The model of scrutiny rules arises from political forces extending over several decades, including social movements on both the left and the right, the civil rights movement and the reaction to that movement that begins with the 1968 election and the realignment of political parties that followed. The model of scrutiny rules declares unconstitutional a set of delegitimated state practices of race discrimination, but it does not abolish all forms of racial inequality or social stratification. Rather, the model of scrutiny rules is developed alongside the new forms of racial and social stratification produced in the post-civil rights era.

In the years between *Brown v. Board of Education* and *Grutter v. Bollinger*, courts construct a new doctrinal framework for articulating claims about equal citizenship. People fight over this framework as it is being constructed, so that what emerges is by no means inevitable. What ultimately results is a series of doctrines and principles that enacts

[67] *See infra* text accompanying notes 73-86.

a constitutional compromise, reflecting the vector sum of the political forces at play. This compromise, articulated in constitutional doctrine, secures a limited vision of equality while making the law of equality palatable to the white majority in the United States

Loving v. Virginia,[68] which struck down Virginia's prohibition on interracial marriage, is an important moment in construction of the new doctrinal regime. Interracial marriage was a central symbol of social equality, an equality not guaranteed by the framers of the Fourteenth Amendment. By holding that Virginia could not prevent whites and blacks from becoming members of the same family through marriage, the Court jettisoned the last elements of the tripartite scheme, seemingly abolishing all distinctions between civil, political, and social equality and substituting a new conception of racial equality.

Loving contains both anticlassification and antisubordination language.[69] Today, however, the case is mostly cited for two propositions: first, that racial classifications are suspect and subject to strict scrutiny, and second, that the Constitution protects a fundamental right to marry.[70] Thus, all of the key elements of the new model of constitutional citizenship appear in *Loving*: the recognition of suspect classifications and fundamental rights, and the application of strict scrutiny.

The model of scrutiny rules could have taken any number of different directions. By 1967, when the Supreme Court decides *Loving*, it is already experimenting with constitutional protections within the welfare state to protect the poor, altering the boundaries between public and private discrimination through the doctrines of state action, expanding criminal procedure protections and invigorating constitutional guarantees for freedom of speech. There is no reason internal to the model itself why the model of scrutiny rules might not have developed in a much more progressive direction than it actually did. Instead, political forces produced by and reacting to the Second Reconstruction led to political decisions and judicial appointments that interpreted and implemented the model in more conservative ways. Therefore, we must distinguish the particular substantive results that a model of citizenship produces from its characteristic forms of reasoning. In hindsight it may appear that the former necessarily flowed from the latter, but that is because certain people gained power and certain paths were not taken.

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68 388 U.S. 1 (1967).

69 *Id.* at 11 ("[R]acial classifications, especially suspect in criminal statutes, [must] be subjected to the 'most rigid scrutiny' . . . the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 12 (2003).

70 *Loving*, 388 U.S. at 11-12.

It is instructive to compare the model of scrutiny rules with the history of the tripartite model. Following the collapse of slavery, southern states attempted to reinstitute chattel slavery by another name through the Black Codes. The Fourteenth Amendment outlawed this practice and promised equal citizenship. The most radical members of the Republican Party wanted to do far more, but eventually settled for the compromise of the tripartite scheme. That compromise was further compromised with the end of Reconstruction, the withdrawal of federal troops following the Compromise of 1876, and the gradual acceptance of increasing white dominance over black populations in the South leading to the *Civil Rights Cases*,[71] *Plessy v. Ferguson*, and black disenfranchisement[72] in the decades that followed.

Decades later, the Cold War and the civil rights movement led Congress and the courts to dismantle the system of *de jure* segregation that emerged after *Plessy*. Some wanted to do far more than this, but eventually political reaction to the civil rights movement and the upheavals of the 1960s led to a series of political compromises in the 1970s and 1980s as the Second Reconstruction came to an end—the very period in which the contours of the model of scrutiny rules were fixed and the details filled in.[73] These compromises produced the model as we know it today, but they were not the only possible instantiation. The model of scrutiny rules had far more degrees of freedom than the tripartite theory. The tripartite theory was launched with a constitutional amendment that, to a very large degree, embodied the idea of civil equality in its text. The model of scrutiny rules, by contrast, had no clear starting point. It developed over time, its compromises were worked out over many decades, and its concepts were repeatedly adapted to new situations and new political forces.

The model of scrutiny rules has four key features: First, there are suspect (and later quasi-suspect) classifications which are presumptively forbidden to the government. Second, there are fundamental rights with which the government is presumptively forbidden to interfere. Third, forbidden classifications and abridgements of fundamental rights both receive heightened (and usually strict) scrutiny, which makes them presumptively unconstitutional, although that presumption may not be fatal in a small number of cases. Fourth, any challenged government action that does not involve a suspect classification or an abridgment of a fundamental right is subject to the test of rational basis, which means that it is presumptively constitutional. In other words, government action that falls outside the realm of suspect classification or abridgment

71 109 U.S. 3 (1883).

72 Giles v. Harris, 189 U.S. 475 (1903) (refusing to intervene in Alabama's system of black voter disenfranchisement).

73 Balkin & Siegel, *supra* note 69, at 29.

of fundamental rights is assumed to be the democratically fair outcome of struggles within the political process. Courts must respect the outcome of such struggles, even if they reinforce or maintain social stratification, because respecting the work of the political process is respect for democracy itself.

The political compromises in this system of constitutional citizenship arise in deciding what classifications are suspect and what rights are fundamental, and, conversely, what sorts of political decisions are immunized from judicial scrutiny and are relegated to the realm of everyday political struggle. Courts have articulated these compromises in many different ways.

For example, although race and sex classifications are inherently suspect, courts can declare that certain government practices are not classifications on the basis of race or sex. Examples include pregnancy discrimination, which the Supreme Court has held is not sex discrimination, and racial suspect descriptions,[74] which some courts have held are not classifications on the basis of race.[75] In school desegregation litigation, the distinction between *de jure* and *de facto* discrimination insulates certain forms of school segregation from judicial remedy because they cannot be traced to forbidden governmental classifications on the basis of race. The Supreme Court's 1974 decision in *Milliken v. Bradley*[76] absolves wealthier and mostly white suburban school districts from having to share resources with poorer and mostly minority inner city school districts. What constitutes classification on the basis of race or sex can change over time as old practices once thought legitimate are later delegitimated through social movement activism and political protest.

Courts can also create rules of proof and burden shifting. For example, in *McCleskey v. Kemp*,[77] the Supreme Court held that statistical proof that defendants who murdered white victims were far more likely to receive the death penalty than those who murdered black victims did not demonstrate invidious discrimination on the part of juries or prosecutors. In *Washington v. Davis*[78] and *Personnel Administrator v. Feeney*,[79] the Supreme Court held that government policies that have a predictably disparate impact that disadvantages women and minorities are constitutional unless one can prove that the government decisionmaker intended to harm the group in question. Thus, even if government practices help maintain racial stratification or

74 Geduldig v. Aiello, 417 U.S. 484 (1974).

75 Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 1999), *reh'g denied*, 235 F.3d 769 (2d Cir. 2000).

76 418 U.S. 717 (1974) (imposing strict limits on interdistrict desegregation plans).

77 481 U.S. 279 (1987).

78 426 U.S. 229 (1976).

79 442 U.S. 256 (1979).

the lower social status of women, these practices are insulated from constitutional attack unless one can prove they were deliberately put in place to harm women or racial minorities. In addition, practices that maintain or reinforce economic stratification are also insulated from equal protection scrutiny because poverty is not a suspect classification, and government practices that distribute educational opportunities unequally, and thus help maintain social stratification, are insulated from constitutional scrutiny because education is not a fundamental right. At the same time, if governments attempt to use race conscious affirmative action to dismantle racial stratification, their actions are presumptively unconstitutional because they are subject to strict scrutiny.[80]

Similar compromises occur in the area of fundamental rights. Following the 1968 election, the Supreme Court also closed the door on the use of fundamental rights doctrine to constitutionalize the welfare state.[81] The New Deal revolution established that the government's welfare state activities are in most cases constitutionally permissible, but the government is under no obligation to employ its welfare state power to secure equal opportunity or even minimum amounts of government services that might be necessary for minimum levels of opportunity.[82] Abortion law is another good example of how political compromises shape the implementation of guarantees of fundamental rights. Although the Supreme Court currently guarantees the formal right to abortion, it allows states to disfavor abortion and impose regulations that predictably discourage it.[83] States may refuse to fund abortions for poor women and may prohibit state facilities from performing abortions, even if this makes abortions practically impossible to get in certain parts of the country.[84]

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[80] *See* Siegel, *Why Equal Protection No Longer Protects*, *supra* note 5, at 1141-42.

[81] Ross v. Moffitt, 417 U.S. 600, 610 (1974) (declining to extend right to counsel to indigents seeking discretionary review in the state Supreme Court); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22-25 (1973) (reaffirming the rule of *Dandridge v. Williams*, 397 U.S. 471 (1970), that poverty is not a suspect classification); United States v. Kras, 409 U.S. 434, 449-50 (1973) (holding that the Due Process Clause did not require waiver of a fifty dollar filing fee in bankruptcy cases); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (rejecting claim that the "need for decent shelter" rose to the level of a fundamental interest protected by the Fourteenth Amendment); Wyman v. James, 400 U.S. 309, 318-24 (1971) (holding that a state did not violate the Fourth Amendment when it conditioned continuation of welfare benefits on unannounced "home visits" by welfare case workers, because the visitations were "not forced or compelled"); *cf.* Mathews v. Eldridge, 424 U.S. 319, 332-49 (1976) (holding that a recipient of disability benefits under the Social Security Act was not entitled to a hearing prior to termination, and announcing a balancing test for procedural due process cases).

[82] *See* cases cited *supra* note 81.

[83] Casey v. Planned Parenthood of Southeastern Pa., 505 U.S. 833, 878 (1992).

[84] Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

In short, the model of scrutiny rules requires not only a set of decisions about what constitutes a suspect classification or a fundamental right, but also a series of implementing rules that determine when a suspect classification has occurred or fundamental right has been abridged.[85] Many different implementing rules are possible within the model, and these implementing rules are where most of the work of political compromise occurs, legitimating some practices that contribute to social stratification and delegitimating others.[86]

Not surprisingly, then, our contemporary model of constitutional citizenship, like the tripartite model it replaced, legalizes and supports certain forms of social stratification, including stratification by race and sex. To the extent that the tripartite model recognized the existence of social stratification, it assumed that some social stratification was inevitable because blacks and whites were not and could not be social equals. Likewise, the modern system also views some social inequality—to the extent that it recognizes it—as the inevitable if occasionally unfortunate outcome of markets, individual private preferences, and judicial respect for legislation passed by democratically elected representatives of the people.

The tripartite system abolished an earlier form of racial stratification—chattel slavery—while simultaneously helping legitimate new forms of racial stratification through the distinction between civil and social equality, and through turning a blind eye to denials of political equality that become more frequent in the years following *Plessy*. In like fashion, the system of scrutiny rules outlawed an earlier form of racial stratification—*de jure* segregation—that had been delegitimated in American politics. At the same time, the system of scrutiny rules legitimated new forms of racial and social stratification that developed and evolved even as the old forms were receding into history. Battles over constitutional rights produced compromises in legal rules and in constitutional doctrine that determined which developing practices of social stratification would be recognized and prohibited by the model of constitutional citizenship and which practices would either not be recognized as existing or would be immunized and legitimated.

The key ideas of suspect classification, fundamental rights and heightened judicial scrutiny—and their associated implementation rules—produce our contemporary version of what the triparite theory referred to as equality before the law. These ideas serve as our era's gatekeepers for recognizing (or failing to recognize) problems of equality, and for determining what is a problem of constitutional equality in the eyes of the law and what is not. Through these doctrines

85 Balkin & Siegel, *supra* note 69, at 13-24.
86 *Id.* at 24-28.

judges and lawyers have created our age's own liminal theory of equality, a theory of equality that majorities can live with.

B. *Grutter v. Bollinger*

Like *Brown v. Board of Education* and *Bolling v. Sharpe*, *Grutter v. Bollinger* is doctrinally awkward. While *Brown* does not offer a well worked-out theory of constitutional citizenship, *Grutter* does not fit easily into a well developed edifice of equality law that mostly conservative courts had created over the course of three decades. Instead, as I shall explain in a moment, Justice O'Connor's opinion in *Grutter* tends to paper over rather serious doctrinal difficulties. There are two ways of understanding this phenomenon. First, *Grutter* might simply be a mid-course correction—it reflects an ongoing political compromise over affirmative action in education that has gotten worked out in constitutional decisionmaking, however doctrinally ungainly it may appear to skeptics. The Supreme Court tends to follow national majorities in the long run, whether or not this produces decisions that will appeal to the purist. The second possibility is that *Grutter*'s doctrinal awkwardness signals that the model of scrutiny rules has become increasingly unwieldy, and it is in the process of breaking down, to be replaced in succeeding decades by a new and as yet undetermined model of constitutional citizenship. My guess is that both explanations have a grain of truth in them.

Plessy, *Brown*, and *Grutter* all reflect two basic facts about Supreme Court decisionmaking. The first is that Supreme Court decisions tend to match the views of national majorities—and particularly the views of national elites. The second is that the Supreme Court tends to protect minorities just about as much as majorities want them to.[87] *Plessy* adopted the scientific racism of northern elites, while *Brown* reflected the foreign policy imperatives of the Cold War.[88] *Grutter* reflects support for educational affirmative action by a wide number of elite institutions in business, the military, and the academy itself. It is surely no accident that Justice O'Connor's majority opinion prominently cites amicus briefs from military officers and from various Fortune 500 companies who argued that "the skills needed in today's

[87] For more discussion of these two lessons about Supreme Court decisionmaking, see Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1538-46, 1550-57 (2004).

[88] KLARMAN, *supra* note 42, at 22-23 (noting that *Plessy* was largely consistent with Northern white opinion, or at least did not greatly offend Northern sensibilities, and that the decision produced little comment in the Northern press); MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 80-81 (2000) (tracing the history of the Cold War imperative for black civil rights and desegregation).

increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" and that "a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security.'"[89] When large corporations inform the Court that affirmative action is necessary for competitiveness in global capitalism, and when members of the military insist that affirmative action is necessary for national security, it is clear that race conscious affirmative action in education is no radical nostrum of the left but is thoroughly and utterly mainstream.

In *Grutter*, as in *Brown*, the Court emphasizes the link between citizenship and education. Indeed, it quotes *Brown* for the proposition that "education . . . is the very foundation of good citizenship."[90] But it makes this connection in two different ways. First, the Court argues that affirmative action is necessary for *individuals* to secure equal opportunity: "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."[91] This opportunity, the Court argues, is necessary for national unity: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[92]

O'Connor's rhetoric is partly in tension with the Court's previous insistence that the Equal Protection Clause protects individuals, not groups.[93] Although she asserts that race conscious affirmative action is consistent with, and perhaps even required by, respect for individuals and individual opportunity, the Court had previously argued that racial classifications, by their very nature, are group based categorizations that deny the dignity of individuals.[94]

O'Connor's second claim about education and citizenship makes the tension with the Court's previous decisions even more explicit. Diversity in education, O'Connor, explains, is necessary because it

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89 Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (quoting Brief for 3M et al. as Amici Curiae at 5, Grutter v. Bollinger, 539 U.S. 306 (2003); Brief for General Motors Corp. as Amicus Curiae at 3-4, Grutter v. Bollinger, 539 U.S. 306 (2003); Brief for Julius W. Becton, Jr. et al. as Amici Curiae at 27, Grutter v. Bollinger, 539 U.S. 306 (2003)).

90 *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

91 *Id.*

92 *Id.* at 332.

93 *Id.* at 326 ("[T]he Fourteenth Amendment 'protect[s] *persons*, not *groups*.'") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

94 *Adarand*, 515 U.S. at 227 ("[A]ll governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.").

helps secure legitimacy: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." "All members of our heterogeneous society," O'Connor asserts, "must have confidence in the openness and integrity of the educational institutions that provide this training."[95] In other words, if elite educational institutions are not producing their fair share of future leaders, people will lose confidence in the fairness of the educational system.

Thus, "[a]ccess to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[96] Legitimacy comes from the appearance (if not the reality) that positions of leadership are open to different groups in society. That means that key demographic groups—including blacks, Latinos, and Native Americans—must have a share of opportunities in elite institutions so that these institutions, in turn, can produce members of these groups who share in the future leadership of the country. But this argument about leadership is not about protecting individual rights; it is about distributing opportunities among various social groups. The Court's theory, outlined in earlier cases, that equal protection has nothing to do with securing equal representation for groups and everything to do with protecting individuals from being viewed as members of groups, has been strained to the breaking point.

O'Connor's argument in *Grutter* makes legitimacy a key justification for diversity. This legitimacy is of two types. One is sociological legitimacy—whether people believe that the system is sufficiently fair and just that they can support it. The other form of legitimacy is moral legitimacy: whether the system actually is fair and just. O'Connor does not tell us which kind of legitimacy she means; although she emphasizes that opportunities for leadership must be "visibly open," which suggests that her concern is sociological legitimacy, she may mean far more than merely keeping up appearances. What is important for our purposes is that what other people think about the justice of the American educational system clearly matters for the Court, just as what other nations thought about Jim Crow during the Cold War was an important factor in the Court's decision in *Brown*. Foreign policy elites viewed America's treatment of African-Americans as an embarrassment that should be ended. The decision in *Brown* helped remedy a deficit in the country's legitimacy.

95 *Grutter*, 539 U.S. at 332.
96 *Id.* at 332-33.

In 2003, establishment elites argued that American legitimacy, both domestically and around the world, required the appearance, if not the reality, that positions of leadership were open to everyone in society, regardless of race or ethnicity. And so the Court responds by allowing educational institutions to engage in race-conscious affirmative action, for fear that without it, few black, Latino, or Native American faces would appear in the classrooms of elite institutions.[97]

Yet in order to achieve its desired result, the Court has to cut back on the implementing rules and doctrinal requirements it created in cases like *Bakke*,[98] *Wygant*,[99] *Croson*,[100] and *Adarand*.[101] Together these decisions created a matrix of rules that strongly discouraged race-conscious affirmative action and made it difficult for these programs to survive judicial scrutiny. By greatly restricting the ways that majorities could remedy past discrimination, these decisions helped rationalize an evolving system of social stratification that developed alongside the model of scrutiny rules.

The matrix of implementation rules created during the 1970s and 1980s have had four major elements: First, classifications based on race are subject to strict scrutiny whether they are "benign" race conscious affirmative action or invidious discrimination against racial minorities.[102] All such classifications must be narrowly tailored to achieve a compelling governmental interest and there must be no racially neutral alternatives.[103] Second, remedying the effects of past societal discrimination, providing distributive justice among various disadvantaged groups in the present,[104] and providing role models for disadvantaged groups[105] are not compelling state interests that can

97 In dissent, Justice Thomas argues that racial preferences are merely "aesthetic" and that if Michigan wants them it can simply change its admissions policy and cease to be an elite institution. *Id.* at 355 n.3, 356-62 (Thomas, J., dissenting). This is merely the flip side of O'Connor's argument about legitimacy. In order for the American system of education to have legitimacy in the eyes of the populace, it is important that Michigan continue to be an elite institution that prepares future leaders *and* that it be visibly open to blacks and Latinos. For if it ceased to be the sort of elite institution that opened doors to future leadership positions because it wanted to admit more blacks and Latinos, it would contribute far less to the appearance as well as the reality of legitimacy.

98 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

99 Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 273-74 (1986).

100 Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

101 Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

102 *Wygant*, 476 U.S. at 279-80; *id.* at 285-86 (O'Connor, J., concurring in part and concurring in judgment); *Bakke*, 438 U.S. at 298-99.

103 *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 493-94; *Wygant*, 476 U.S. at 274, *Bakke*; 438 U.S. at 299.

104 *Bakke*, 438 U.S. at 306-07.

105 *Wygant*, 476 U.S. at 275-76. Nevertheless, the governmental unit "can use its spending powers to remedy private discrimination" that results from its procurement policies, "if it identifies that discrimination with the particularity required by the Fourteenth Amendment." *Croson*, 488 U.S. at 492 (announcing "passive participant" rule).

justify race-conscious affirmative action. Third, remedying previous discrimination by the specific governmental unit that seeks to engage in race-conscious affirmative action is a compelling state interest but there must be significant proof of past discrimination by the governmental unit that seeks to implement an affirmative action program.[106] Fourth, achieving a diverse student body is a compelling state interest that can justify race conscious-affirmative action.[107]

These precedents had "discourse shaping" or "discourse forcing" effects. If state governments wanted to practice race-conscious affirmative action, they had to speak in certain ways. They could not say that they were remedying past societal discrimination against minorities, nor could they say that they were remedying their own past discrimination unless they had proof that they had discriminated against each and every minority they wished to assist. That meant, for example, that the University of Michigan would have had to demonstrate that it had discriminated against Latinos or Native Americans if it wished to provide either a preference in its affirmative action policy. Thus, the rules in place forced university administrators to speak the language of diversity.[108] Hence, they packed all of their different aims into the language of educational diversity, and as a result, the word "diversity" came to conflate several different ideas.

There are at least four different types of diversity. Ideological diversity seeks to ensure a mix of students with different beliefs (including but not limited to beliefs about politics and religion). Experiential diversity seeks to ensure a mix of students who have had different backgrounds and experiences (applicants who are poor or rich, have gone parachuting, have worked in relief agencies in the Third World, are former soldiers, battled childhood traumas or diseases, and so on). Diversity of talents seeks to ensure a mix of students with different talents and abilities (athletes, cello players, actors, and so on). Finally, demographic diversity seeks to ensure a mix of students from different ethnic, social and religious groups.

These forms of diversity may often overlap, but they may also point in quite different directions. For example, admitting a conservative pro-life white male who plays the flute may add to ideological diversity and diversity of talents, but it may not necessarily promote demographic diversity. Admitting an additional African-American student may promote demographic or experiential diversity, but it may not promote either demographic or experiential diversity as much as adding a student from Malaysia or Kazakhstan.

106 *Wygant*, 476 U.S. at 274-76.
107 *Bakke*, 438 U.S. at 311-15.
108 *See* Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000).

Michigan's critical mass policy clearly makes the most sense if the goal is demographic or experiential diversity, far less sense if the goal is ideological diversity, and it is orthogonal to the goal of securing a diversity of talents. Justice Powell's original conception of diversity in *Bakke* deliberately conflated all of these forms of diversity. He based his argument on universities' academic freedom, arguing that "universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,'"[109] an argument that sounds in ideological diversity. But Powell also argued that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[110] This seems to be about experiential diversity. "Ethnic diversity," by which Powell presumably meant demographic diversity, contributed to these goals, as long as it "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[111] In this way, Powell allowed universities to admit members of previously disadvantaged groups without having to state directly that they were remedying past societal discrimination or attempting to "reduc[e] the historic deficit of traditionally disfavored minorities" in colleges and university programs,[112] which Powell himself characterized as an unlawful interest in racial balancing.[113] Although Powell insisted that remedying societal discrimination and achieving distributive justice among disadvantaged groups were not legitimate purposes for affirmative action, his mangling of the different concepts of diversity allowed these goals to be pursued surreptitiously.

Justice O'Connor continued and extended Powell's conflation of the different types of diversity in *Grutter*. In this way, she undermined the logic of previous decisions like *Wygant*, *Croson*, and *Adarand*. These decisions had created implementing rules that sought to prevent governments from using race conscious affirmative action to remedy past societal discrimination or to redistribute opportunities or resources between whites and disadvantaged minority groups.

Grutter undermined two other features of the Court's implementing rules—that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,"[114] and that all racial

109 *Bakke*, 438 U.S. at 313.

110 *Id*. (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

111 *Id.* at 314.

112 *Id.* at 306.

113 *Id.* at 307; *accord*, Grutter v. Bollinger, 539 U.S. 306, 322-25, 328-31 (2003).

114 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion)). O'Connor calls this the principle of "consistency."

classifications, whether characterized as benign or invidious, are subject to strict scrutiny.[115]

In *Grutter*, Justice O'Connor defers to "[t]he Law School's educational judgment that . . . diversity is essential to its educational mission" because of "complex educational judgments in an area that lies primarily within the expertise of the university."[116] "'[G]ood faith' on the part of a university," she explains, "is 'presumed' absent 'a showing to the contrary.'"[117]

The fact that the Court engages in this sort of deference is a tell-tale sign that it is not applying a scrutiny as strict as it claims. When courts apply strict scrutiny, they do not usually defer to the judgments of government decisionmakers, especially when the government decisionmakers have deliberately made racial classifications. It is difficult to believe that the Court would give Michigan the same degree of deference if the university announced that educational considerations made it necessary to increase enrollments of white students. The most likely reason why the Court gives university officials the benefit of the doubt is that it believes that Michigan's decisionmaking process is designed to be benign rather than invidious. It applies a different degree of scrutiny to policies admittedly designed to assist minorities than to policies deliberately designed to subordinate them. Both of these positions, of course, are inconsistent with the Court's opinions in *Adarand* and *Croson*, not to mention language in the *Grutter* opinion itself.[118]

Finally, *Grutter* undermines the other requirement of strict scrutiny: that racial classifications must be narrowly tailored to achieve their ends. Michigan argued that it needed a "critical mass" of minorities to achieve its goal of diversity. The critical mass was necessary to ensure that minority students "do not feel isolated or like spokespersons for their race."[119] A critical mass also undermines "racial stereotypes . . . because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."[120] But the theory behind the critical mass does not explain

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115 *Id.* at 227. O'Connor calls this the principle of "skepticism." *Id.* at 223.

116 *Grutter*, 539 U.S. at 328.

117 *Id.* at 330 (quoting *Bakke*, 438 U.S. at 318-19).

118 *Adarand*, 515 U.S. at 223-24, *Croson*, 488 U.S. at 494, *Wygant*, 476 U.S. at 279-280; *id.* at 285-86 (O'Connor, J., concurring in part and concurring in judgment).

119 *Grutter*, 539 U.S. at 319.

120 *Id.* at 320.

> [T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

Id. at 333 (alteration in original) (citations omitted).

why Michigan consistently chose different percentages of blacks, Latinos, and Native Americans for its entering class. Between 1995 and 2000, for example, the number of African Americans admitted was more than five times the number of Native Americans, and almost twice the number of Latinos.[121] If the point of the critical mass policy is to keep students from feeling isolated or feeling like they must be spokespersons for their group, it is not clear why it takes five times as many black admittees for black students to feel comfortable about themselves than it does for Native American students to feel comfortable about themselves, or why it takes twice as many black admittees to rebut the assumption that all blacks think in lockstep than it does to rebut similar stereotypes about Latinos.[122]

However, if Michigan's goal were to give major demographic groups in American society a fair share of opportunities at elite institutions, the Law School's admissions decisions would make some sense. Michigan might wish to ensure that blacks, Latinos, and Native Americans were represented in the entering class in rough proportion to the number of applications received. On the other hand, because Asian Americans will likely be fairly well-represented in the entering class, there is no need to give them any admissions preference. But if so, then it seems likely that Michigan's program is designed to achieve goals of distributive justice and to help dismantle the effects of previous societal discrimination and existing racial stratification. That is to say, Michigan's purposes are consistent with the antisubordination principle, but not with the matrix of implementing rules that the Court devised in *Wygant*, *Croson*, and *Adarand* to restrict the purposes and scope of affirmative action. By artfully conflating different meanings of the concept of diversity, and by diplomatically overlooking the relationship between the theory of critical mass and Michigan's actual admission practices, O'Connor papers over the cracks in the edifice she and her fellow Justices had constructed over the course of three decades.[123]

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121 *Id.* at 384 (Rehnquist, C.J., dissenting).

122 *Id.* at 381 (Rehnquist, C.J., dissenting).

123 Sanford Levinson has pointed out to me that Justice O'Connor's famous remark that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today," *Grutter*, 539 U.S. at 342, also shows the incoherence of her argument and of her use of the concept of diversity. The twenty-five year remark undermines the claim that the compelling interest in *Grutter* is merely ideological or experiential diversity and implies that the real purpose of affirmative action is promoting distributive justice among groups and other antisubordination concerns. If the point of educational affirmative action is achieving, year after year, a healthy mixture of individuals with different experiences and ideas, a university will always have to be attentive to the mix of students who apply. Thus the need to assure a critical mass of minorities who will help provide an appropriate mix of diverse experiences, beliefs, and perspectives should, in principle, be never ending. On the other hand, if the point of educational affirmative action is to dismantle previous forms of social stratification and place social groups on a more or less level playing field in the future, it makes more sense to think that at some point admission preferences should cease. One might reasonably believe that

In order reach the result the majority wishes to reach, it must stretch existing doctrinal categories. It must work around doctrinal structures that were put in place partly to hinder race conscious attempts at remedying racial stratification.

There are at least four different ways of looking at O'Connor's accomplishment in *Grutter*. The first is that her opinion is simply intellectually dishonest. The second is that it is an act of supreme statesmanship, in which O'Connor balances what appeared to be irreconcilable conceptions of equality and produces a political compromise that most of the public can live with. The third is that the compromise is hardly remarkable or statesmanlike; it reflects the Supreme Court's continuous adjustment of its doctrines to the imagined center of public opinion. *Grutter* is nothing more than a quotidian accommodation of slightly altered political realties within the model of scrutiny rules, a model which remains essentially intact. The fourth possibility, however, is that the awkwardness of *Grutter*'s doctrinal compromise reflects something far larger: it suggests that the system of implementing rules that supported the model of scrutiny rules has been stretched to the breaking point, and that the model has outlived its usefulness.

To reach the result it wants, the Court obfuscates and fudges existing doctrinal categories. It holds that state universities may make individualized determinations that take race into account in admissions, if race is only one factor and if the university is willing to pay for the extra cost of individualized determinations. Of course, these individualized determinations are precisely the sort that also tend to hide the decisionmaking process from view and obscure the role that race plays in the decisionmaking process. To achieve this result the Court must wriggle around the implementing rules—symmetry, strict scrutiny, and stringent proof requirements—whose primary purpose was to rationalize a particular legal social system of equality and inequality that arose with the Second Reconstruction.

Grutter suggests that the present system of constitutional citizenship, which rationalizes equal citizenship through scrutiny rules, has become increasingly complicated and unwieldy. *Grutter*, to be sure, is only one case. However, there is some additional evidence that the system's seams are starting to unravel, as the Court moves toward fairly ad hoc balancing in a number of different areas.[124] Not only has strict scrutiny become less than strict in *Grutter*, but the rational basis test has

at some point these preferences, plus social mobility and inevitable social change, will have mitigated the most important sources of social inequality among groups.

[124] I do not claim that this is a particularly new phenomenon. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987) (arguing that balancing has become "widespread, if not dominant, over the last four decades").

become stricter to protect groups like the mentally retarded,[125] the children of illegal immigrants,[126] and homosexuals.[127] The Court introduced a medium level of scrutiny in its sex equality cases in the 1970s,[128] and then began applying it in novel ways in the First Amendment area in the 1990s.[129] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[130] a key fundamental rights decision, the Court simply replaced the strict scrutiny standard of earlier cases with the more amorphous test of "undue burden."[131] In its recent decision in *Lawrence v. Texas*,[132] which held that same-sex sodomy laws violated the right of privacy, Justice Kennedy's opinion refused to state directly that the Court was protecting a fundamental right subject to strict scrutiny, preferring instead to speak of the "liberty" protected by the Fourteenth Amendment.[133]

External causes may be an important reason why the doctrinal structure is coming apart. Three factors in particular are worth mentioning. First, the Supreme Court has been grappling with different kinds of issues and facing claims from different kinds of social movements than it did in the 1950s and 1960s. Abortion, homosexuality, and structural media regulation may present problems that are not easily addressed through doctrinal models designed to protect political dissent and racial equality. Second, if we are indeed on the cusp of significant social change—for example, in the recognition of rights for homosexuals—we might be in a period of transition like the years before and after *Brown*,[134] in which the doctrine is fairly ad hoc and does not make too much sense.[135] It is important to remember that the full articulation of the model of scrutiny rules came only after much of the work of the Second Reconstruction was already accomplished. Indeed, the doctrinal structure created in the 1970s and 1980s served as much to cabin and limit the Second Reconstruction as to vindicate it. Third, and perhaps most intriguing, because we live in an era of globalization, the next several decades promise a wide variety of constitutional questions about the rights of immigrants and non-citizens.

125 Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

126 Plyler v. Doe, 457 U.S. 202 (1982).

127 Romer v. Evans, 517 U.S. 620 (1996).

128 Craig v. Boren, 429 U.S. 190 (1976).

129 Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997); Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (applying intermediate scrutiny to "must carry" provisions of Cable Television Consumer Protection and Competition Act of 1992 on the grounds that they were content neutral).

130 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

131 *Id.* at 874-76.

132 539 U.S. 538 (2003).

133 *Id.* at 562, 564, 567-78.

134 I am indebted to Reva Siegel for this point.

135 I fully realize that I have begged the question whether the Supreme Court's doctrine ever has made very much sense.

These questions will severely test constitutional doctrines that are based on a model of the equal rights of citizens. The very idea of equal constitutional citizenship, the question I have been addressing in this essay, may make considerably less sense on *Brown*'s one hundredth anniversary.

Is the system of scrutiny rules really on its way out? The tripartite theory of citizenship went through significant changes following the ratification of the Fourteenth Amendment and collapsed within seventy years. It is hard to assess a similar time frame for the model of scrutiny rules because it was not inaugurated at a single point in time. It has been roughly seventy years since the New Deal, fifty years since *Brown v. Board of Education*, and forty years since *Loving v. Virginia*. *Grutter* could signal the beginning of the end, or it could mean nothing, just a blip on the screen. It is simply too early to tell, and as with many momentous transformations, we may be able to tell only some time after the change has already taken place. Of one thing, however, we can be sure: the way we conceptualize the basic rights of citizens today will not be the way we do it fifty years hence.

CONCLUSION

Brown is an icon, a symbol, but what is it a symbol of? I would say that it symbolizes the decay and dissolution of an older way of thinking about what it meant to be an equal citizen, equal before the law, and the beginning of a new conceptualization of equal citizenship that matured in the 1970s and 1980s.

Like the tripartite theory that it replaced, this new way of imagining equality before the law did not in fact make people equal, or even equal before the law. Rather, the new theory of imagining citizenship was simultaneously a way of providing new guarantees of equality that the older system had not recognized, while preserving newly developing forms of economic and social inequality, either by claiming that such inequalities were beyond the scope of constitutional law, or by not even recognizing them as being instances of economic and social stratification.

Public education provides an excellent example. As we have seen, Chief Justice Warren's opinion in *Brown* spoke urgently and eloquently about the importance of equal educational opportunity to equal citizenship. But the new model of citizenship that developed fifty years after *Brown* did not produce anything like equal educational opportunity. True, pupils are no longer deliberately assigned to schools on the basis of their race. *De jure* segregation in public schools is largely a thing of the past. Yet the United States, has for some time

been in a process of resegregation by other means. Largely white suburban and exurban school districts ring central city school districts that are predominantly black and Latino. In many of these central city districts public schools provide very little educational opportunity to their students, much less opportunities equal to those in the largely white suburbs. We have rid the world of Jim Crow, but in its place we have produced a new world of inequality. And we have created an elaborate system of doctrines in order to rationalize and justify it as being entirely consistent with everyone being equal before the law. Not to put to fine a point on it, but that is not so different from what the tripartite theory achieved one hundred and forty years ago. It rid the world of a great evil—chattel slavery—and promised that, henceforth, everyone, regardless of color, would be equal before the law. But that promise, however great an advance on the legal regime that preceded it, rang hollow in many ways.

Both law and the theories of citizenship that law articulates and puts into practice are Janus-faced. They are liminal. They define the guarantees of equal citizenship while defining what is not a question of equal citizenship. To understand this, we must think of the law like a bronze statue formed from pouring molten metal into a mold. Instead of studying the surface of the statue, we should study the mold used to cast it. To understand what law does, we should examine what it does not do, what law leaves unsaid, unoccupied, unrecognized, and untouched. Because the law of equality is also the law of inequality, if we want to understand how inequality is reproduced in the United States, we must consider how the law of equality assists in this reproduction, just as if we want to understand the system of censorship in the United States, we must look to what is recognized and unrecognized by the law of freedom of speech.

This is not a denial of progress; it is a description of it. Progress in law comes from replacing one set of liminal categories of thought with a new set, which promise finally to deliver real equality but which in fact never do. There is always a remainder.

Brown represents the moment at which the old forms have cracked and new ones are yet to be prepared. *Brown* is like a child, full of future hopes and future possibilities. Some of those hopes are realized, others are dashed. We watch the law of equality grow, and as it grows, it grows compromised. Then we wonder whether all of the haggard lines we now discover in its face were somehow immanent in the rosy cheeks of the infant. But it is not so. It takes hard intellectual work to create doctrines and principles that reflect compromises between competing social forces, that dismantle an old regime of inequality and help establish a new one, and that produce a simultaneous law of equality and inequality that majorities can live with.